No. ________

In The
Supreme Court of the United States

CONTINENTAL MOTORS, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

KRIS ELLIOT HIGLEY AND
MOLLY LAUREN HIGLEY,

Real Parties in Interest.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

STEPHEN R. GINGER
CONTINENTAL MOTORS, INC.
2039 Broad Street
Mobile, Alabama 36615
Tel.: (251) 436-8397
Email: sginger@continentalmotors.aero

WILL S. SKINNER
Counsel of Record
DEFOREST KOSCELNIK YOKITIS SKINNER & BERARDINELLI
21600 Oxnard Street, Suite 1760
Woodland Hills, California 91367
Tel.: (818) 710-7708
Email: skinner@deforestlawfirm.com

Counsel for Petitioner Continental Motors, Inc.

QUESTION PRESENTED FOR REVIEW

Whether the District Court may effectively write Rule 4(m) out of the Federal Rules of Civil Procedure by granting an extension of time to effect service of process after the initial trial date has passed, and without any showing that plaintiffs ever attempted to comply with Rule 4(m).

PARTIES TO THE PROCEEDINGS BELOW

1. Petitioner Continental Motors, Inc.
2. Respondent United States District Court, Central District of California.
3. Kris Elliot Higley and Molly Lauren Higley, Real Parties in Interest.

CORPORATE DISCLOSURE

Continental Motors, Inc., is 100% owned by Technify Motors (USA) Inc., which is a wholly owned subsidiary of AVIC International Holding Company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. NATURE OF THE CASE	3
B. PROCEEDINGS BELOW	3
REASONS FOR GRANTING THE PETITION	6
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE DECISIONS OF THE CIRCUIT AND DISTRICT COURTS	7
II. THIS CASE RAISES SUBSTANTIAL AND IMPORTANT ISSUES INVOLVING THE CORRECT INTERPRETATION OF AN ACT OF CONGRESS	10
A. The District Court's Order Is Clearly Erroneous As A Matter Of Law Because Plaintiffs Made No Attempt Whatsoever To Comply With Rule 4(m)	11

TABLE OF CONTENTS – Continued

Page

B. The District Court's Order Is Clearly Erroneous As A Matter Of Law Because Continental Asserted Rule 4(m) As An Affirmative Defense In Its Answer And Then Defended Itself In The Case 19

CONCLUSION 30

APPENDIX

Ninth Circuit Opinion ....App. 1

District Court Opinion ....App. 2

TABLE OF AUTHORITIES

Page

CASES

Ayers v. Jacobs & Crumplar, 99 F.3d 565 (3d Cir. 1996) 21

Benny v. Pipes, 799 F.2d 489 (9th Cir. 1986), *cert. denied,* 484 U.S. 870, 108 S. Ct. 198, 98 L.Ed.2d 149 (1987) 11

Brandon v. Kennewick School Dist. No. 1, 133 F.3d 925 (9th Cir. 1997) 11, 13, 17

Brandon H. v. Kennewick School Dist. No. 17, 133 F.3d 925 (9th Cir. 1998) 13

Briere v. Chertoff, Civ. No. 06-56740, 2008 WL 833087 (9th Cir. March 26, 2008) 14

Burns & Russell Co. of Baltimore v. Oldcastle, Inc., 166 F. Supp. 2d 432 (D. Md. 2001) 8

Castro-Diaz v. Kovalovsky, Civ. A. No. 11-00181, 2012 WL 3135397 (E.D. Pa. August 1, 2012) 12

Cambridge Holdings Grp., Inc. v. Federal Ins. Co., 489 F.3d 1356 (D.C. Cir. 2007) 11

Combs v. Nick Garin Trucking, 825 F.2d 437 (D.C. Cir. 1987) 11

Conway v. Am. Red Cross, Civ. No. 10-1859 SJF ARL, 2010 WL 4722279 (E.D.N.Y. November 15, 2010) 25

Creed v. Hill, 2012 WL 3685992 (E.D. Va. August 24, 2012) 8

TABLE OF AUTHORITIES – Continued

Page

Crispin-Taveras v. Municipality of Carolina, 647 F.3d 1 (1st Cir. 2011) 9

Direct Mail Specialists, Inc. v. ECLAT Computerized Technologies, 840 F.2d 685 (9th Cir. 1988) 11

Efaw v. Williams, 473 F.3d 1038 (9th Cir. 2007) ...*passim*

Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995) 9

Fahey v. O'Melveny & Myers, 200 F.2d 420 (9th Cir. 1952), *cert. denied*, 345 U.S. 952, 73 S. Ct. 863, 97 L.Ed. 1374 (1953) 21

Giacomo-Tano v. Levine, Civ. No. 98-2060, 1999 WL 976481 (4th Cir. October 27, 1999) 8

Glaser v. City of Bell Gardens, Civ. No. 93-55473, 1994 WL 327737 (9th Cir. July 7, 1994) 14

Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002) 10

Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476 (3d Cir. 1993) 11

Guerrero v. Baca, Civ. No. 03-57203, 2005 WL 3060587 (9th Cir. November 8, 2005) 13, 17

Hearst v. West, Civ. No. 00-56178, 2002 WL 460131 (9th Cir. February 15, 2002) 15

Henderson v. United States, 517 U.S. 654, 116 S. Ct. 1638, 134 L.Ed.2d 880 (1996) 8, 9

TABLE OF AUTHORITIES – Continued

Page

Hicks v. U.S. Post Office, Civ. No. 94-56276, 1996 WL 204557 (9th Cir. April 22, 1996) 14

Hill v. Stun Tech, Inc., Civ. No. 03-16387, 2004 WL 1832869 (9th Cir. August 16, 2004)................15

Holland v. Florida, ___ U.S. ___, 130 S. Ct. 2549, 177 L.Ed.2d 130 (2010)..25

Holmes v. Dept. of the Treasury, Civ. No. 97-56703, 1998 WL 540019 (9th Cir. August 24, 1998) 15, 18

Horenkamp v. Van Winkle and Co., Inc., 402 F.3d 1129 (11th Cir. 2005)..9

King v. Taylor, 694 F.3d 650 (6th Cir. 2012)................9

Kurka v. Iowa County, Iowa, 628 F.3d 953 (8th Cir. 2010) 9

Lemoge v. United States, 587 F.3d 1188 (9th Cir. 2009) 13, 22

Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962) 25

Mann v. American Airlines, 324 F.3d 1088 (9th Cir. 2003) 18

Mann v. Castiel, 681 F.3d 368 (D.C. Cir. 2012) 9, 11

Mateo v. M/S KISO, 805 F. Supp. 792 (N.D. Cal. 1992) 14, 15

McDonald v. United States, 898 F.2d 466 (5th Cir. 1990) 16

Mendez v. Elliott, 45 F.3d 75 (4th Cir. 1995) 8, 9

TABLE OF AUTHORITIES – Continued

Page

Metcalf v. City of Minneapolis, Civ. No. 11-3023 ADM/LIB, 2012 WL 2357573 (D. Minn. June 20, 2012) 25

Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 66 S. Ct. 242, 90 L.Ed. 185 (1946) 10

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322, 143 L.Ed.2d 448 (1999) 10

Nealey v. Transportacion Maritima Mexicana, 662 F.2d 1275 (9th Cir. 1980) 16

Newby v. Enron Corp., Civ. No. 06-20658, 2008 WL 2605118 (9th Cir. July 2, 2008) 15, 16, 17, 18

Norlock v. City of Garland, 768 F.2d 654 (5th Cir. 1985) 16

Okla. Radio Assocs. v. FDIC, 969 F.2d 940 (10th Cir. 1992) 10

Omega U.S. Ins., Inc. v. Penn. Nat. Mut. Cas. Ins. Co., Civ. No. ELH-11-2297, 2012 WL 115422 (D. Md. January 13, 2012) 8

Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 108 S. Ct. 404, 98 L.Ed.2d 415 (1987) 10

Panaras v. Liquid Carbonic Industries Corp., 94 F.3d 338 (7th Cir. 1996) 9

Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298 (3d Cir. 1995) 9, 12, 24

Phillips v. The Electoral College, 2002 WL 1190922 (9th Cir. 2002) 14

TABLE OF AUTHORITIES – Continued

Page

Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd., 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) 13, 22, 23, 25

Redding v. Essex Crane Rental Corp. of Ala., 752 F.2d 1077 (5th Cir. 1985) 16

Scruggs v. Spartanburg Reg'l Med. Ctr., 198 F.3d 237, 1999 WL 957698 (4th Cir. October 19, 1999) 9

In re Sheehan, 253 F.3d 507 (9th Cir. 2001) 9, 12

Simmons v. M.S. Evans, Civ. No. 07-16714, 2011 WL 2669968 (9th Cir. July 8, 2011) 14

Thompson v. Brown, 91 F.3d 20 (5th Cir. 1996) 9

Townsel v. County of Contra Costa, 820 F.2d 319 (9th Cir. 1987) 14, 17

Traina v. United States, 911 F.2d 1155 (5th Cir. 1990) 17

Troxell v. Fedders of N. Am., Inc., 160 F.3d 381 (7th Cir. 1998) 20

Trueman v. Johnson, 2011 WL 6721327 (D. Ariz. December 21, 2011) 13, 22

Tuke v. U.S., 76 F.3d 155 (7th Cir. 1996) 24

U.S. v. Rodrigue, 645 F. Supp. 2d 1310 (C.I.T. 2009) 24

U.S. v. Ziegler Bolt & Parts Co., 883 F. Supp. 740 (C.I.T. 1995), *aff'd*, 111 F.3d 878 (Fed. Cir. 1997) 28, 30

TABLE OF AUTHORITIES – Continued

Page

Universal Engineering and Construction, Inc. v. Travelers Casualty & Surety Co. of America, 2011 WL 6019928 (D. Md. November 30, 2011) 8, 9

Vasquez v. North County Transit Dist., 292 F.3d 1049 (9th Cir. 2002) 12

Vilter Mfg. Co. v. Rolaff, 110 F.2d 491 (8th Cir. 1940) 21

Walker v. Sumner, 14 F.3d 1415 (9th Cir. 1994)........12

Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985) 17

West Coast Theater Corp. v. Portland, 897 F.2d 1519 (9th Cir. 1990) 16

Wheat v. Airport Authority of Washoe County, 166 F.3d 1219 (9th Cir. 1999) 16

Willis v. Tarasen, Civ. No. 04-4110 JMR (FLN), 2005 WL 1705839 (D. Minn. July 11, 2005)..........21

Zapata v. City of New York, 502 F.3d 192 (2d Cir. 2007) 9

RULES

Federal Rule of Civil Procedure 4(c)(1)....................11

Federal Rule of Civil Procedure 4(m) ....*passim*

Federal Rule of Civil Procedure 12(b)....................21

TABLE OF AUTHORITIES – Continued

Page

TREATISES

4A Wright & Miller, Fed. Prac. & Proc. § 1083 (1987) 12

4B Wright & Miller, Fed. Prac. & Proc.: Civil 3d § 1137 (3d ed. 2002) 7

PETITION FOR WRIT OF CERTIORARI

Petitioner Continental Motors, Inc., respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 17, 2012.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported. *See* App. 1.

The opinion of the United States District Court for the Central District of California is not reported. *See* App. 2-12.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on December 17, 2012. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this petition is Rule 4(m) of the Federal Rules of Civil Procedure. Rule 4(m) provides:

> **Time Limit for Service.** If a defendant is not served within 120 days after the complaint was filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or 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 4(j)(1).

STATEMENT OF THE CASE

Plaintiffs Kris and Molly Higley sued Continental Motors, Inc. (f/k/a Teledyne Continental Motors, Inc., and hereinafter referred to as "Continental") in Los Angeles Superior Court for personal injuries they suffered during an aircraft accident at Eros Airport in Namibia, Africa on May 9, 2008. Approximately three weeks before the date set for trial, Continental filed a motion to dismiss the lawsuit based on plaintiffs' failure to timely serve Continental with summons and complaint as required by Rule 4(m) of the Federal Rules of Civil Procedure. The District Court denied Continental's motion, and Continental immediately

sought mandamus review in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit denied Continental's petition for writ of mandamus.

A. Nature of the Case

Kris and Molly Higley were passengers on a charter flight from Eros Airport to the Mokuti Lodge in the Etosha National Forest in Namibia, Africa on May 8, 2008. The aircraft was a Cessna 206 model aircraft operated by Scenic Air, and was equipped with a single piston engine manufactured by Continental. Shortly after takeoff, the aircraft crashed in a railway scrap yard near the airport. Both Mr. and Mrs. Higley sustained injuries in the crash.

B. Proceedings Below

This action for personal injuries was commenced on April 26, 2010 in Los Angeles Superior Court, and was removed to the United States District Court, Central District of California on May 4, 2010. In an Order dated June 5, 2012, the District Court scheduled the case for trial on August 28, 2012. Approximately three weeks before trial, Continental filed a motion to dismiss the action for failure to timely serve Continental with summons and complaint pursuant to Rule 4(m) of the Federal Rules of Civil Procedure. In response to Continental's motion, the District Court vacated the trial date and set a new

trial date for October 30, 2012.[1] In an Order dated September 18, 2012, issued 20 days after the initial trial date, the District Court denied Continental's motion to dismiss and granted plaintiffs leave to serve Continental with summons and complaint, some two years and five months after the commencement of the action. In its Order, the District Court disregarded the explicit provisions of Rule 4(m), and instead, based its decision to grant plaintiffs leave to serve at such a late date in the litigation on its "discretion." In the District Court's view, it had broad discretion to grant plaintiffs relief from the 120-day limitation period for service set forth in Rule 4(m), even though plaintiffs had made no showing of any attempt to comply with Rule 4(m) during the entire two years and five months that the action had been pending. NINTH CIRCUIT APPX. EX. 11, p. 100. The District Court granted plaintiffs an extension, even though the only argument plaintiffs made in opposition to the motion was that Continental had "waived" the defense by filing an Answer to plaintiffs' Complaint, and then proceeding with its defense of the action. This argument is manifestly incorrect, contrary to the rules of pleading in the Federal Rules of Civil Procedure, and should have been summarily rejected by the District Court.

[1] The October 30, 2012 trial date was subsequently continued by the District Court to January 22, 2013.

The District Court's Order is unprecedented. It is noteworthy that, in the District Court's Order, there is a complete absence of any facts showing that plaintiffs ever attempted to comply with Rule 4(m) *until after* Continental filed its Motion to Dismiss.[2] It is as though plaintiffs, on their own, determined that compliance with Rule 4(m) was simply not required, and that Rule 4(m) is not an important provision in the Federal Rules of Civil Procedure. Incredibly, the District Court agreed with them. The District Court's Order, relying on the factors set forth in *Efaw v. Williams,* 473 F.3d 1038 (9th Cir. 2007), turned Rule 4(m) on its head by allowing relief under Rule 4(m) without any showing whatsoever that plaintiffs attempted to comply with the rule. The Order also

---

[2] The Order states "[o]n the same day that Defendant informed Plaintiffs of the service defect, Plaintiffs' counsel sought to cure the defect by requesting Defendant to waive service." App. 5. The Order ignores the fact that plaintiffs' "effort" to cure the defect by sending a letter to defendant's counsel was itself procedurally improper and did not comply with Rule 4(d) as Continental stated in its Reply Brief as follows:

> "Moreover, for multiple reasons, counsel's recent letter did not cure Plaintiffs' failure to serve Continental. For example, the letter was not an effective waiver request because it did not conform to Rule 4(d)(1)'s specific requirements which are clearly laid out (*e.g.*, it did not enclose copies of a waiver form or use 'text prescribed in Form 5 [to describe] consequences of waving and not waiving service', was sent to Continental's counsel, not Continental in Mobile, Alabama or as provided for in Rule 4(d)(1)(A)(ii), etc.)." NINTH CIRCUIT APPX. EX. 13, p. 132 (see line 6).

punished Continental for defending itself in the litigation and then filing a motion to dismiss, as it was clearly entitled to do under Rule 4(m). The Order effectively writes Rule 4(m) out of the Federal Rules of Civil Procedure by requiring no showing of attempted compliance in order to obtain relief. Based on the District Court's reasoning, it is difficult to fathom a case where the *Efaw* factors would ever weigh in favor of a defendant that asserted Rule 4(m) as an affirmative defense and then defended itself in the case. If the *Efaw* factors apply to such a case (where a Rule 4(m) affirmative defense is raised in the answer, plaintiffs have notice of the defect in service, and plaintiffs ignore the clear warning that there is a defect in service), then asserting a Rule 4(m) affirmative defense would be pointless. The Order is erroneous as a matter of law.

Continental immediately filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals. The Ninth Circuit denied Continental's petition for writ of mandamus on December 17, 2012.

REASONS FOR GRANTING THE PETITION

The jurisprudence involving the interpretation of Rule 4(m) in the lower courts is in disarray. Not only are there direct conflicts between the Fourth Circuit and the eleven other circuits, there are conflicts within the Fourth Circuit itself on how to interpret the

rule. As stated by a leading commentator on federal procedure,

> the federal courts are divided over whether district judges have discretion to extend the time period for service when the plaintiff has not shown good cause for failing to complete service within the 120-day period. Although a significant number of federal courts have interpreted Rule 4(m) in light of the Advisory Committee Note and allowed the enlargement of time without a showing of good cause, other courts (including one court of appeals) have held that district courts may grant an extension of the time period only upon a showing of good cause.

4B Wright & Miller, Fed. Prac. & Proc.: Civil 3d § 1137, pp. 365-368 (3d ed. 2002).

Certiorari should be granted to resolve these conflicts, to set forth a uniform interpretation of Rule 4(m), and to define the scope of the discretion granted in Rule 4(m).

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE DECISIONS OF THE CIRCUIT AND DISTRICT COURTS

In 1993, former Rule 4(j), which established a 120-day period in which to effectuate service, and mandated dismissal unless plaintiff could show "good cause" why such service was not accomplished within that period, was renumbered Rule 4(m). 4B Wright &

Miller, Fed. Prac. & Proc.: Civil 3d § 1137, pp. 340-341. After Rule 4(m) was enacted, the Fourth Circuit decided *Mendez v. Elliott*, 45 F.3d 75 (4th Cir. 1995), in which it ruled that extensions of the 120-day time period could only be granted upon a showing of good cause. *Id.* at 78. The following year, this Court decided *Henderson v. United States*, 517 U.S. 654 (1996), in which it stated in dicta that "courts have been accorded discretion to enlarge the 120-day period 'even if there is no good cause shown.'" *Id.* at 662-663 (opinion by Ginsburg, J.) (quoting Fed. R. Civ. Proc. 4(m) Advisory Committee Notes 1993 Amendment). Since *Henderson* was decided, the district courts in the Fourth Circuit have reached conflicting decisions on whether Rule 4(m) vests a court with discretion to grant an extension in the absence of good cause. *See, e.g.,* cases collected in *Creed v. Hill*, 2012 WL 3685992 at *5 (E.D. Va. August 24, 2012) and *Omega U.S. Ins., Inc. v. Penn. Nat. Mut. Cas. Ins. Co.*, 2012 WL 115422 at *5 (D. Md. January 13, 2012) and *Universal Engineering and Construction, Inc. v. Travelers Casualty & Surety Co. of America*, 2011 WL 6019928 at *1 n.2 (D. Md. November 30, 2011). *See also Burns & Russell Co. of Baltimore v. Oldcastle, Inc.*, 166 F. Supp. 2d 432, 439 n.7 (D. Md. 2001) (Fourth Circuit's "continued demand that plaintiffs demonstrate 'good cause' has been widely criticized; nevertheless, district courts in this Circuit are bound by *Mendez*."). "The Fourth Circuit has not addressed *Henderson* in published opinions, but in unpublished opinions it has followed it. *E.g., Giacomo-Tano v. Levine*, Civ. No. 98-2060, 1999 WL 976481 at *2 (4th Cir. October 27,

1999) ('Even if a plaintiff does not establish good cause, the district court may in its discretion grant an extension of time for service.') . . . However, in 1999, the Fourth Circuit adhered to *Mendez*, despite its conflict with *Henderson*. *Scruggs v. Spartanburg Reg'l Med. Ctr.*, 198 F.3d 237, 1999 WL 957698 at *2 n.2 (4th Cir. October 19, 1999 (unpublished)." *Universal Engineering*, 2011 WL 6019928 at *1.

Despite the confusion among the district courts in the Fourth Circuit, the rest of the circuits, including the Ninth Circuit, have held that under Rule 4(m), a district court has discretion to extend the 120-day time period even in the absence of a showing of good cause. *Crispin-Taveras v. Municipality of Carolina*, 647 F.3d 1, 7 (1st Cir. 2011); *Zapata v. City of New York*, 502 F.3d 192, 194-195 (2d Cir. 2007); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995); *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996); *King v. Taylor*, 694 F.3d 650, 656 n.1 (6th Cir. 2012); *Panaras v. Liquid Carbonic Industries Corp.*, 94 F.3d 338, 340 (7th Cir. 1996); *Kurka v. Iowa County, Iowa*, 628 F.3d 953, 958 (8th Cir. 2010); *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001); *Espinoza v. United States*, 52 F.3d 838, 840-841 (10th Cir. 1995); *Horenkamp v. Van Winkle and Co., Inc.*, 402 F.3d 1129, 1131-1132 (11th Cir. 2005); *Mann v. Castiel*, 681 F.3d 368, 375-376 (D.C. Cir. 2012). However, no court has ever held – as the District Court did here – that the 120-day time period may be extended when plaintiffs failed to make any showing that they attempted to comply with Rule 4(m).

The Court should grant certiorari to resolve the conflict in the circuits as to the proper interpretation of Rule 4(m), and, as discussed below, to define the scope of the discretion granted in Rule 4(m).

II. THIS CASE RAISES SUBSTANTIAL AND IMPORTANT ISSUES INVOLVING THE CORRECT INTERPRETATION OF AN ACT OF CONGRESS

As recently observed by the District of Columbia Court of Appeals,

> Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350, 119 S. Ct. 1322, 143 L.Ed.2d 448 (1999). Under the federal rules enacted by Congress, federal courts lack the power to assert personal jurisdiction over a defendant "unless the procedural requirements of effective service of process are satisfied." *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 514 (D.C. Cir. 2002); *see Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L.Ed.2d 415 (1987); *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-445, 66 S. Ct. 242, 90 L.Ed. 185 (1946). Service is therefore not only a means of "notifying a defendant of the commencement of an action against him," but "a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Okla. Radio Assocs. v. FDIC*, 969 F.2d

> 940, 943 (10th Cir. 1992). Consequently, courts have "uniformly held . . . a judgment is void where the requirements for effective service have not been satisfied." *Combs v. Nick Garin Trucking*, 825 F.2d 437, 442 & n.42 (D.C. Cir. 1987); *cf. Cambridge Holdings Grp., Inc. v. Federal Ins. Co.*, 489 F.3d 1356, 1360 (D.C. Cir. 2007).

Mann v. Castiel, 681 F.3d 368, 372 (D.C. Cir. 2012). *See also Direct Mail Specialists, Inc. v. ECLAT Computerized Technologies*, 840 F.2d 685, 688 (9th Cir. 1988).

A. The District Court's Order Is Clearly Erroneous As A Matter Of Law Because Plaintiffs Made No Attempt Whatsoever To Comply With Rule 4(m)

Without substantial compliance with Rule 4, "neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction." *Direct Mail Specialists*, 840 F.2d at 688, *quoting Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), *cert. denied,* 484 U.S. 870, 108 S. Ct. 198, 98 L.Ed.2d 149 (1987). The burden is on plaintiffs to show that they have complied with the service requirements of Rule 4. Fed. R. Civ. Proc. 4(c)(1); *Brandon v. Kennewick School Dist. No. 17*, 133 F.3d 925, 1998 WL 10552 at *1 (9th Cir. 1997) ("[i]t is well-established that it is the plaintiff, and not the defendant, who is charge [sic] under the Federal Rules with ensuring that service is properly executed."); *see also Grand*

Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993), *citing* 4A Wright & Miller, Fed. Prac. & Proc. § 1083 (1987); *Castro-Diaz v. Kovalovsky*, Civ. A. No. 11-00181, 2012 WL 3135397 at *3 (E.D. Pa. August 1, 2012).

Rule 4 provides, in pertinent part, that

> [i]f a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or 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.

Fed. R. Civ. Proc. 4(m); *Vasquez v. North County Transit Dist.*, 292 F.3d 1049, 1054 n.3 (9th Cir. 2002) (dismissing complaint without prejudice for failing to effect proper service after removal).

According to the cases, Fed. R. Civ. Proc. 4(m) contains both a mandatory and a discretionary component. If a plaintiff shows good cause for failure to serve within the 120-day time period, the district court must extend the time period for service. *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001). However, if the plaintiff fails to show good cause, the district court has "the discretion to dismiss without prejudice or extend the time period." *Id.* (*citing Petrucelli v. Bohringer & Ratzinger*, *GMBH*, 46 F.3d 1298, 1305 (3d Cir. 1995); *see also Walker v. Sumner*, 14 F.3d

1415, 1422 (9th Cir. 1994); *Brandon H. Kennewick School Dist. No. 17*, 1998 WL 10552 at *1, 133 F.3d 925 (9Th Cir. 1998), 1998 WL 10552 at *1 (same)); *Lemoge v. United States*, 587 F.3d 1188, 1198 (9th Cir. 2009); *Trueman v. Johnson*; 2011 WL 6721327, at *5 (D. Ariz. December 21, 2011).[3]

While the district court's discretion to dismiss or grant an extension is broad, *Guerrero v. Baca*, Civ. No. 03-57203, 2005 WL 3060587 at *1 (9th Cir. November

---

[3] "A court's discretion under Rule 4(m) is not 'limitless[,]' however. *Id.* It must be predicated upon a finding of excusable neglect. *See Lemoge*, 587 F.3d at 1197 (citation omitted) (emphasis added) ('[I]f good cause is not established, the district court may extend time for service upon a showing of excusable neglect.'). 'To determine whether a party's failure to meet a deadline constitutes 'excusable neglect,' courts must apply a four-factor equitable test[ ]' based upon *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993); and *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997). *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010) (citations omitted). *Pioneer* involved excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b), and *Briones* involved a Rule 60(b) motion for relief from judgment. The Ninth Circuit applies the *Pioneer/Briones* factors in a variety of contexts, though, including in deciding whether excusable neglect has been shown under Rule 4(m). *See Lemoge*, 587 F.3d at 1198."

Here, plaintiffs made no showing whatsoever but rather only argued that Continental had "waived" the Rule 4(m) defense by filing an Answer to plaintiffs' Complaint, and then proceeding with its defense of the action. NINTH CIRCUIT APPX. EX. 11, p. 100.

8, 2005), "no court has ruled that the discretion is limitless." *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (holding trial court abused its discretion by granting extension of time to serve after lengthy delay). Accordingly, where no attempt to comply with Rule 4 is shown, and there is a lengthy delay (both present in this case), it is an abuse of discretion to grant an extension under Rule 4(m).

The cases addressing good cause for an extension under Rule 4(m) are unanimous that ignorance of the federal rules or inadvertent error does not constitute good cause. *See, e.g., Briere v. Chertoff*, Civ. No. 06-56740, 2008 WL 833087 at *1 (9th Cir. March 26, 2008); *Hicks v. U.S. Post Office*, Civ. No. 94-56276, 1996 WL 204557 at *1 (9th Cir. April 22, 1996); *Glaser v. City of Bell Gardens*, Civ. No. 93-55473, 1994 WL 327737 at *1 (9th Cir. July 7, 1994); *Townsel v. County of Contra Costa*, 820 F.2d 319, 320 (9th Cir. 1987). **Good cause generally means "that service had been attempted but not completed**, that plaintiff was confused about the requirements of service, or that plaintiff was prevented from serving defendants by factors beyond his control." *Mateo v. M/S KISO*, 805 F. Supp. 792, 795 (N.D. Cal. 1992) (emphasis added). Where there is no good cause for an extension, discretionary dismissal is appropriate where there has been a complete failure to comply with Rule 4, *Simmons v. M.S. Evans*, Civ. No. 07-16714, 2011 WL 2669968 at *1 (9th Cir. July 8, 2011); *Phillips v. The Electoral College*, 2002 WL 1190922 at *1 (9th Cir. 2002), or where no "justifiable excuse" to

serve has been shown. *Hearst v. West*, Civ. No. 00-56178, 2002 WL 460131 at *3 (9th Cir. February 15, 2002).

In *Newby v. Enron Corp.*, Civ. No. 06-20658, 2008 WL 2605118 at *1 (9th Cir. July 2, 2008), the Ninth Circuit held that a delay of over two years warranted dismissal. In *Holmes v. Dept. of the Treasury*, Civ. No. 97-56703, 1998 WL 540019 at *1 (9th Cir. August 24, 1998), a lengthy delay in service of almost two years was found to be adequate justification for dismissal. "Given the lengthy record of this case, and the almost two year delay of service, the district court did not abuse its discretion by dismissing the action." *Id*. In *Hill v. Stun Tech, Inc.*, Civ. No. 03-16387, 2004 WL 1832869 at *1 (9th Cir. August 16, 2004), the Ninth Circuit held that "[b]ecause Hill did not serve process on defendants for over ten months after filing his complaint, the district court did not abuse its discretion by dismissing Hill's action under Rule 4(m)"; and in *Mateo, supra*, the district court dismissed plaintiff's action for failure to timely serve under Rule 4 because plaintiffs did not attempt service until nine months after the complaint was filed. *Mateo*, 805 F. Supp. at 795.

Where no attempt has been made to comply with the time limits set forth in Rule 4(m), courts have routinely exercised their discretion to dismiss even though the statute of limitations would bar the

refiling of plaintiff's claim.[4] In *Newby*, for example, the Ninth Circuit had no difficulty dismissing an action for failure to comply with Rule 4(m) even though a dismissal without prejudice had the effect of barring plaintiff's action:

> In addition, we have rejected the argument that dismissal is unwarranted when the statute of limitations period has run. *Redding v. Essex Crane Rental Corp. of Ala.*, 752 F.2d 1077, 1078 (5th Cir. 1985). "It is not our function to create exceptions to the rule for cases in which dismissal without prejudice may work prejudice in fact. . . ." *Norlock v. City of Garland*, 768 F.2d 654, 658 (5th Cir. 1985); *see also McDonald v. United States*, 898 F.2d 466, 468 (5th Cir. 1990) ("[D]ismissal is not unwarranted simply because

---

[4] Dismissal for failure to comply with Rule 4 is appropriate even if such dismissal appears to punish an innocent client for the lawyer's mistakes. As held by the Ninth Circuit in *Wheat v. Airport Authority of Washoe County*, 166 F.3d 1219 (9th Cir. 1999),

> "[a] plaintiff cannot avoid dismissal by arguing that he or she is an innocent party who will be made to suffer for the errors of his or her attorney. The established principle is that the faults and defaults of the attorney may be imputed to, and their consequences visited upon, his or her client. *West Coast Theater Corp. v. Portland*, 897 F.2d 1519, 1523 (9th Cir. 1990) (citation omitted). In cases such as this where the 'litigants are bound by the conduct of their attorneys,' the client's remedy is one of malpractice. *See Nealey v. Transportacion Maritima Mexicana*, 662 F.2d 1275, 1282 n.13 (9th Cir. 1980)."

> the limitations period has run."); *Traina v. United States*, 911 F.2d 1155, 1157 (5th Cir. 1990) ("It is well settled that inability to refile a suit does not bar dismissal. . . .").

2008 WL 2605118 at *3 (footnote omitted.).[5] *See also Guerrero*, 2005 WL 3060587 at *1 ("we cannot conclude that the district court abused its discretion even though the effect of the dismissal was to bar Guerrero's claim."); *Townsel*, 820 F.2d at 320-321 ("Townsel also argues that the district court abused its discretion in dismissing the action because the statute of limitations has run and the dismissal for untimely service was therefore effectively with prejudice. We considered and rejected this argument in *Wei*, and we reach the same conclusion here.").[6]

In the instant case, the District Court's Order completely ignores the established principles which inform a court's decision whether to dismiss or grant an extension under Rule 4(m). There is no mention that plaintiff has the burden "under the Federal Rules with ensuring that service is properly executed." *Brandon*, 133 F.3d 925, 1998 WL 10552 at *1.

---

[5] In the lengthy footnote omitted from the passage quoted above, the Ninth Circuit explained that "[c]hanges reflected in Rule 4(m), however, did not affect any provisions relating to good cause or prejudice, and these cases, therefore, continue to apply in Rule 4(m) dismissals." 2008 WL 2605118 at *3, n.2. Accordingly, the cases cited by the *Newby* court for the proposition that expiration of the statute of limitations does not bar a Rule 4(m) dismissal are still viable precedent.

[6] *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

There is no mention that the delay in effecting service was extremely lengthy, over two years since the filing of the complaint. *Holmes*, 156 F.3d 1237, 1998 WL 540019 at *1. There is no mention of plaintiffs' failure to show any attempt to comply with the rule, not even an excuse based on ignorance of the rule or confusion. There is no mention of the principle that, in cases of lengthy delay, expiration of the statute of limitations is no bar to dismissal. *Newby*, 2008 WL 2605118 at *1. In the District Court's interpretation of Rule 4(m), no showing of attempted compliance is required at all.[7] A plaintiff can ignore the requirements of Rule 4(m) for as long as he or she pleases even after being put on notice by a defendant asserting Rule 4(m) as an affirmative defense, until the defendant or the court itself draws attention to the fact that no service has been effected on defendant. In the instant case, it was only after Continental filed its Motion to Dismiss that plaintiffs' counsel decided to finally take

[7] The Order cites to *Mann v. American Airlines*, 324 F.3d 1088 (9th Cir. 2003) to support its exercise of discretion. However, *Mann* is distinguishable from this case because not only did the defendant in that case **not assert Rule 4(m) affirmative defense**, the pro per plaintiff failed to serve the summons during the 120-day period and then, in responses to an OSC, retained counsel and then filed a motion for extension of time to serve the complaint. *Id.* at 1089. Here, Continental asserted Rule 4(m) in its answer putting plaintiffs on notice of the defect in service which they failed to correct, plaintiffs have always been represented by counsel and never made any request whatsoever to the Court for extension of the 120-day period of time until after Continental filed its motion to dismiss.

some action. When that occurs, no explanation for the lengthy delay is required, according to the District Court's Order. Under the District Court's analysis, it is irrelevant because the power to grant extensions is virtually limitless.

Continental submits that a proper interpretation of Rule 4(m) requires the court to first determine whether service was properly effected within the 120-day period prescribed by Rule 4(m). If no service was effected within the 120-day time period, a showing of good cause must be made for an extension, otherwise the case *must* be dismissed. If good cause cannot be shown, the District Court still has "discretion" to grant an extension. However, the court can only exercise its "discretion" under Rule 4(m) if there has been *some attempt* to satisfy the Rule (*i.e.*, to effect service). Where, as here, no attempt whatsoever was made to comply with Rule 4(m) for almost two and a half years, there is no discretion to extend the time for service. Otherwise, Rule 4(m) would be rendered meaningless.

B. The District Court's Order Is Clearly Erroneous As A Matter Of Law Because Continental Asserted Rule 4(m) As An Affirmative Defense In Its Answer And Then Defended Itself In The Case

The District Court's reliance on the factors set forth by the Ninth Circuit in *Efaw v. Williams*, 473

F.3d 1038 (9th Cir. 2007)[8] to exercise its discretion to extend the time for service was improper and effectively writes Rule 4(m) out of the Federal Rules of Civil Procedure in a case such as this – where a defendant properly asserts a Rule 4(m) affirmative defense in its answer and then defends itself in the case.

The burden is on plaintiffs to show that they have complied with the service requirements of Rule 4. NINTH CIRCUIT APPX. EX. 5, pp. 60-61. The focus of a court's inquiry under Rule 4(m) is whether

---

[8] The *Efaw* factors appear to be based on *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d 381, 383 (7th Cir. 1998) which was a case where the plaintiff **did not** serve the complaint until after the 120-day period for service of process expired and the defendant **did not** assert a Rule 4(m) affirmative defense but rather filed a motion to dismiss. In exercising its "discretion" the District Court does not mention or analyze the "excusable neglect" that plaintiffs established to justify their failure to comply with Rule 4. This is not surprising because when plaintiffs filed their opposition to Continental's Motion to Dismiss on August 20, 2012, plaintiffs' opposition contained no facts showing (*i.e.*, establishing excusable neglect) that they had ever attempted to serve Continental during the two plus years that their action had been pending, or had ever requested an extension of time to serve Continental. NINTH CIRCUIT APPX. EX. 11, p. 100. The statement by District Court in its Order that " . . . the failure [to comply with Rule 4] was an oversight, likely brought on by the Parties' vigorous litigation virtually immediately upon removal of this action to this Court" (App. 11) is not supported by any showing from plaintiffs, does not establish "excusable neglect" and effectively punishes Continental for asserting Rule 4(m) as an affirmative defense and then defending itself in the litigation. App. 11.

the rule was ignored, or whether there was some good faith attempt to satisfy its requirements. A defendant's actions in defending a lawsuit are irrelevant to this inquiry, because the Federal Rules of Civil Procedure allow a party to preserve a Rule 12(b)(5) defense by either filing a pre-answer motion or raising the defense in its answer. Fed. R. Civ. P. 12(b).

Once a party has preserved a defense by either of those alternative methods, the party does not then waive the defense by defending on the merits of the case (*i.e.*, by fulfilling its obligations under the Federal Rules). *Fahey v. O'Melveny & Myers*, 200 F.2d 420, 451-452 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953); *see also, e.g., Ayers v. Jacobs & Crumplar*, 99 F.3d 565, 568 (3d Cir. 1996) (holding that defendant's attendance at conferences and participation in discovery did not waive preserved defense); *Vilter Mfg. Co. v. Rolaff*, 110 F.2d 491, 495 (8th Cir. 1940) (holding that defendant did not waive preserved defense by defending case on merits at trial); *Willis v. Tarasen*, Civ. No. 04-4110 JMR (FLN), 2005 WL 1705839 at *3 (D. Minn. July 11, 2005) (holding that insufficient service defense preserved in answer was not waived by defendant's participation in Rule 16 pretrial conference).

These cases all support the proposition that Continental did not waive the defense by fulfilling its obligations under the Federal Rules; had Continental not defended itself, a default judgment would have been entered against it. The District Court's Order, however, directly contradicts these authorities by

holding that, because Continental proceeded with its defense of this lawsuit, it cannot now assert the defense of insufficient process.

The District Court's reliance on the *Efaw* factors (*e.g.*, statute of limitations bar, prejudice to defendant, actual notice of a lawsuit, and eventual service) to exercise its "discretion" to extend the time for service was clearly erroneous as a matter of law because those factors cannot logically apply to a case such as this where a defendant asserted a Rule 4(m) affirmative defense in its answer – thereby putting plaintiff on notice that plaintiff must act to cure the jurisdictional defect.[9] Although the Order states that "after

[9] A court's discretion under Rule 4(m) is not limitless and must be predicated upon a finding of excusable neglect. *Lemoge v. United States*, 587 F.3d at 1197 (9th Cir. 2009); *Trueman v. Johnson*, 2011 WL 6721327, *5 (D. Ariz. December 21, 2011)

> ("'To determine whether a party's failure to meet a deadline constitutes 'excusable neglect,' courts must apply a four-factor equitable test[ ]' based upon *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993); and *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997). *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010) (citations omitted). *Pioneer* involved excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b), and *Briones* involved a Rule 60(b) motion for relief from judgment. The Ninth Circuit applies the *Pioneer/Briones* factors in a variety of contexts, though, including in deciding whether excusable neglect has been shown under Rule 4(m).").

As indicated *supra* in footnote 8, the District Court illogically and incorrectly applied the *Efaw* factors to this case to justify its

(Continued on following page)

carefully weighing the *Efaw* factors, we find and conclude that the circumstances of this case favor an extension of time for Plaintiffs to effect service," the Order fails to analyze or acknowledge that the factual circumstances of *Efaw* were clearly distinguishable from the present case.[10] Specifically, the defendant had not raised a Rule 4(m) affirmative defense in *Efaw*. Thus, the *Efaw* factors are inapplicable to a case, such as this, where Rule 4(m) was asserted at the outset as an affirmative defense. The District Court's Order is clearly erroneous as a matter of law.

In *Efaw*, the Ninth Circuit stated that "[i]n making extension decisions under Rule 4(m) a district court may consider factors 'like a statute of limitations bar, prejudice to defendant, actual notice of a lawsuit, and eventual service.'" 473 F.3d at 1041. If these factors apply to a case such as this – where a defendant timely asserts a Rule 4(m) affirmative defense, defends itself in the litigation and then files

---

exercise of discretion instead of considering or applying the *Pioneer/Briones* factors.

[10] The District Court's Order states that "Defendant argues that it would be prejudiced by an extension of time to serve because it would defeat its affirmative defense of failure of service. Neither the Federal Rules or [sic] any case law interpreting them prevent the exercise of our discretion to extend time for service once the defense of failure of service has been asserted in an Answer. *Indeed, Efaw makes no mention of such purported limitation*." (emphasis added). App. 9-10. The Ninth Circuit decision in *Efaw* makes no mention of this limitation because, unlike in this case, **the defendant had not raised a Rule 4(m) affirmative defense in *Efaw***.

a motion to dismiss – then a Rule 4(m) affirmative defense would be rendered meaningless, as would the long line of cases stating that the Rule 4(m) defense is preserved if asserted as an affirmative defense.

First, the Order states that prejudice to plaintiffs is significant because dismissal would bar plaintiffs from re-filing this action due to the running of the statue of limitations. However, the running of the statute of limitation in this action is due **entirely** to the fact that plaintiffs (or their counsel) chose to file this action just before the statutory limitation period expired, and they then ignored their obligation to effect timely service – even after Continental raised that jurisdictional defect as an affirmative defense in its answer. Instead of treating the "120 days with the respect reserved for a time bomb," plaintiffs (and their counsel) simply ignored Rule 4(m) altogether. *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1307 (3d Cir. 1995).

Where (as here) a plaintiff files its complaint at the last possible moment, the plaintiff has "'assumed the risk' of entirely forfeiting its cause of action if it fail[s] to effect proper service of process within 120 days." *U.S. v. Rodrigue*, 645 F. Supp. 2d 1310, 1331 (C.I.T. 2009). "Faced with that reality," the plaintiff should "demonstrate uber-diligence in attempting timely service." *Id.*; *see also Tuke v. U.S.*, 76 F.3d 155, at 156 (7th Cir. 1996) (Easterbrook, J.) (warning that "attorney who files suit when the statute of limitations is about to expire must take special care to achieve timely service of process, because a slip-up is

fatal"); *Metcalf v. City of Minneapolis*, Civ. No. 11-3023 ADM/LIB, 2012 WL 2357573 (D. Minn. June 20, 2012) (*citing Holland v. Florida*, 130 S. Ct. 2549, 2571 (2010) and *Link v. Wabash R. Co*., 370 U.S. 626, 633-634 n.10 (1962) (denying motion to extend service period; "keeping suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant"); *Conway v. Am. Red Cross*, Civ. No. 10-1859 SJF ARL, 2010 WL 4722279 at *5 (E.D.N.Y. November 15, 2010) (holding discretionary extension not warranted where plaintiff failed to even attempt service despite being put on notice of issue by proposed motion to dismiss for improper service).

Here, plaintiffs filed their action on April 26, 2010 – less than two weeks prior to the May 9, 2010 expiration of the two-year statute of limitations. Plaintiffs had notice of the defect (clearly asserted in Continental's Answer filed on June 4, 2010) and could have cured it without running afoul of the statute of limitations bar if plaintiffs had simply served Continental during the original 120-day period which ran on August 26, 2010 – more than two months after Continental filed its Answer and provided clear notice to plaintiffs of the Rule 4(m) defect.[11] Any prejudice to

[11] *Compare Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 398, 113 S. Ct. 1489, 1500, 123 L.Ed.2d 74 (1993) (concluding that the unusual form of notice employed required a

(Continued on following page)

plaintiffs because of the statue of limitations bar is due to their (or their counsel's) failure to heed the clear warning Continental raised in its answer by way of its twenty-third affirmative defense. Continental should not be punished for that failure. If this *Efaw* factor applies to a case such as this one – where plaintiffs waited until shortly before the statute of limitations expired to file the lawsuit and then failed to effect service despite being put on notice by a specific affirmative defense raised in the answer – then it is difficult to imagine a set of circumstances where a defendant, such as Continental, could ever overcome this "prejudice to plaintiff" *Efaw* factor. If that were the law, a Rule 4(m) affirmative defense would be meaningless.

Second, the Order states that "[t]o establish prejudice, Defendant must show what it would have done differently had Plaintiff timely effected service." App. 8. The Order cites, *inter alia*, to *Efaw* to support this prejudice standard but fails to recognize that this case is factually distinct from *Efaw* in that the defendant in *Efaw* did not assert Rule 4(m) affirmative defense because she was not even aware of the lawsuit. In a case such as this one, where a defendant asserts Rule 4(m) as an affirmative defense in its answer, applying this factor to allow the Court to exercise its discretion to extend the time for service would

---

finding that the neglect of respondents' counsel was, under all the circumstances, excusable).

be illogical. If applicable to this type of case, this factor would require a defendant (such as Continental) who answers the complaint and asserts Rule 4(m) as a defense to do nothing to defend itself in the lawsuit in order to be in a position to argue later on (when a motion to dismiss is filed – assuming a default was not taken first) that, if the plaintiff had served the defendant, then defendant would have conducted certain discovery, taken depositions or done something to defend itself in the case. This makes no sense since the case law is clear that once Rule 4(m) has been preserved in an answer, defendant does not waive that defense by defending itself in the litigation. The prejudice standard espoused by the Order would essentially require a defendant to do nothing (and risk default judgment) in order to be able to show prejudice.

Third, the Order states "it is clear from the record that Defendant had actual notice of the suit, given that it joined the Notice of Removal on May 4, 2012, less than ten days after the Complaint was filed on April 26, 2010." App. 10. What the Order does not state at this point of the analysis is that on June 4, 2010, Continental filed its Answer and asserted Rule 4(m) as an affirmative defense. The District Court did not explain how this *Efaw* factor (notice of the lawsuit) could possibly apply in a situation where, as here, the defendant has asserted Rule 4(m) as an affirmative defense in its answer. The application of this *Efaw* factor is perplexing.

Fourth, the Order states that "the eventual service factor is not applicable in this situation because at this time, Plaintiffs could not effect service without our order." App. 10. This statement is also perplexing because **any** attempt to serve after the original 120-day service period would require a court order extending that period. In any event, the Order then continues stating "[h]owever, to the extent this factor considers Plaintiffs' efforts at curing the defect **once they became aware of it**, we find that Plaintiffs have made a **good faith effort by immediately requesting a waiver** from Defendant, attempting to obtain a summons form the clerk, and filing the Ex Parte Application shortly thereafter." *Id*. (emphasis added). The Order completely ignores the fact that, because Continental raised the Rule 4(m) defense in its Answer, **"Plaintiff[s] had early notice and ample opportunity to cure any defects in service of process" – but they did not do so.** *U.S. v. Ziegler Bolt & Parts Co*., 883 F. Supp. 740, 752 (C.I.T. 1995), *aff'd*, 111 F.3d 878 (Fed. Cir. 1997) (emphasis added). Therefore, "Plaintiff[s] can hardly be heard to complain at this juncture that defendant did not give further notice of its defenses. To find otherwise and permit plaintiffs to ignore affirmative defenses raised in the answer in such a cavalier manner would seem to undermine an important purpose of the rules – fair notice." *Id*. As aptly stated in *U.S. v. Ziegler Bolt Parts Co.*,

[s]ome courts appear willing to foist upon defendants who challenge service the obligation, not found in the rules, to seek discovery immediately to ascertain whether service was proper and if service was not proper, to move to dismiss at the earliest opportunity. This Court rejects the adoption of court-imposed obligations unauthorized by the rules that may effectively force defendants to waive their legitimate affirmative defenses, such as the statute of limitations, which have been properly asserted in their answers. Defendants should not be obligated beyond that which is required by the rules to further educate inattentive plaintiffs that service of process is defective. Furthermore, there is no standard authorized by the rules for courts to properly measure such obligations. This Court believes the better practice and the one consistent with procedural fairness is to abide by the Court's rules and require only that the defendant raise its defense in a timely manner. . . . The plaintiff is then on notice and is in the best position to challenge the defenses raised. Plaintiff chose to ignore the defenses raised in the answer at its own peril. Apparently, plaintiff failed to take notice of the affirmative defenses, given plaintiff's characterization of the defenses as a "part of a laundry list" of possible defenses that the defendant may or may not pursue.

Once defendant raised its defenses, thereby preserving them under the rules, defendant had the right to strategically and tactically decide the most

> **advantageous time to assert them. For example, the defendant might have perceived it advantageous to raise the defenses at the time of trial or by timely motion.** In any event, once the defenses were raised in the answer, plaintiff had early notice and ample opportunity to cure any defects in service of process. Plaintiff can hardly be heard to complain at this juncture that defendant did not give further notice of its defenses. To find otherwise and permit plaintiffs to ignore affirmative defenses raised in the answer in such a cavalier manner would seem to undermine an important purpose of the rules-fair notice.

883 F. Supp. 751-752 (emphasis added).

The District Court's Order is clearly erroneous as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN R. GINGER
CONTINENTAL MOTORS, INC.
2039 Broad Street
Mobile, Alabama 36615
Tel.: (251) 436-8397
Email: sginger@
continentalmotors.aero

WILL S. SKINNER
Counsel of Record
DEFOREST KOSCELNIK YOKITIS
SKINNER & BERARDINELLI
21600 Oxnard Street, Suite 1760
Woodland Hills, California 91367
Tel.: (818) 710-7708
Email: skinner@
deforestlawfirm.com

Counsel for Petitioner
Continental Motors, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CONTINENTAL MOTORS, INC. CONTINENTAL MOTORS, INC., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES, Respondent, KRIS ELLIOT HIGLEY; et al., Real Parties in Interest.	No. 12-73073 D.C. No. 2:10-cv-03345-GHK-FMO Central District of California, Los Angeles ORDER (Filed Dec. 17, 2012)

Before: GOODWIN, LEAVY, and M. SMITH, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

DENIED.

ec/MOATT

E-Filed

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 10-3345-GHK (FMOx)
Date	September 18, 2012
Title	*Kris Elliot Higley, et al. v. Cessna Aircraft Company, et al.*

Presiding: The Honorable

GEORGE H. KING, U. S. DISTRICT JUDGE

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order re:** (1) Motion to Dismiss Pursuant to Fed. R. Civ. P. 4(m) (Dkt. No. 161); (2) Plaintiffs' Ex Parte Application for an Order to Extend the Time for Service on Defendant CMI (Dkt. No. 177).

This matter is before us on (1) Defendant Continental Motors, Inc.'s ("Defendant" or "CMI") Motion to Dismiss Pursuant to Fed. R. Civ. P. 4(m) ("Motion");

(2) Plaintiffs Kris Elliot Higley and Molly Lauren Higley's ("Plaintiffs") Ex Parte Application for an Order to Extend the Time for Service on Defendant CMI ("Ex Parte Application"). We have considered the arguments in support of and in opposition to these matters and deem them appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Background

On August 9, 2012, just nineteen days before the originally scheduled trial date on August 28, 2012, Defendant filed the instant Motion based on Plaintiffs' failure to effect service on it. Defendant's counsel alleges that in assessing defenses for trial and preparing the proposed Pre-Trial Conference Order, he determined that Defendant had never been served.

This action commenced more than two years ago on April 26, 2010, when Plaintiffs filed their Complaint against Cessna Aircraft Company ("Cessna"), Teledyne Continental Motors, Inc. ("TCMI"), and Teledyne Technologies, Inc. ("TTI") in state court. On May 4, 2010, Cessna filed a Notice of Removal in which TCMI and TTI joined. (Dkt. No. 3). On June 4, 2010, TCMI and TTI, represented by the same counsel, filed their Answers that included the Affirmative Defense of lack of service. After we denied Plaintiffs' Motion to Remand on July 21, 2010, the Parties proceeded to participate in a Rule 26(f) Planning Meeting, and we

issued a Scheduling Order on August 6, 2010, setting a fact discovery completion date of July 29, 2011 and an expert discovery completion date of November 30, 2011. Additionally, the Parties, on their own initiative, stipulated to certain specific procedures regarding depositions in foreign countries in anticipation of the need for such depositions. (Dkt. No. 23).

On September 16, 2010, the Parties stipulated to dismiss Cessna, (Dkt. No. 25), and after TTI sold TCMI to another company in December 2010, the Parties stipulated to dismiss TTI and to change the name of TCMI to CMI on June 23, 2011. (Dkt. No. 39).

As the only Defendant remaining in the case, CMI has vigorously defended the action, including engaging in extensive motion practice and discovery, participating in two mediations and two settlement conferences, and appearing in a telephonic status conference with the court. Specifically, with respect to discovery, Defendant has participated in fourteen depositions that took place in four cities across the country and in Africa. (Johnson Decl. ¶ 2p). With respect to motion practice, Defendant has filed at least three discovery motions (Dkt. Nos. 60, 74, and 81), a motion to bifurcate trial (Dkt. No. 89), and multiple motions in limine (Dkt. Nos. 102-106, 135, 164). As recently as July 23, 2012, Defendant filed its Opposition to Plaintiff's Motion for Order for Extension of Time Allotted for Trial. (Dkt. No. 149). Up until the filing of the of the instant Motion, Defendant fully

litigated the action notwithstanding the failure of formal service.

On the same day that Defendant informed Plaintiffs of the service defect, Plaintiffs' counsel sought to cure the defect by requesting Defendant to waive service. (Johnson Decl. ¶ 4). After failing to receive a response from Defendant's counsel, Plaintiffs attempted to obtain a summons from the court but was informed that they could not do so without our order. (*Id.* ¶ 5). On August 31, 2012, a day after the Parties failed to reach a settlement in a second settlement conference, Plaintiffs filed the Ex Parte Application for an order to extend their time for service.

II. Discussion

Under Rule 4(m):

> If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or 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.

In other words, "Rule 4(m), as amended in 1993, *requires* a district court to grant an extension of time when the plaintiff shows good cause for the delay. Additionally, the rule *permits* the district court to grant an extension even in the absence of good cause."

Efaw v. Williams, 473 F.3d 1038, 10401 [sic] (9th Cir. 2007); *see also Henderson v. United States*, 517 U.S. 654, 661 (1996) (recognizing that "the 120-day provision operates not as an outer limit subject to reduction, but as an irreducible allowance").

While not limitless, our discretion to extend time for service under Rule 4(m) is broad. *Efaw*, 473 F.3d at 1041. In exercising our discretion, we consider factors such as "a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service." *Id.* In *Efaw*, the Ninth Circuit found that where a plaintiff failed to effect service on the defendant for seven years without any reasonable explanation, there was no evidence that the defendant knew about the filing of the complaint, and the delay prejudiced the Defendant because the memories of all witnesses had faded during the seven years and the key eyewitness to the underlying incident had died without being deposed, the district court abused its discretion in extending the time for service.[1] *Id.*

[1] In footnote one of Defendant's Opposition to Plaintiffs' Ex Parte Application, Defendant relies on *Mendez v. Elliot*, 45 F.3d 75, 79 (4th Cir. 1995) for the proposition that there is no discretion under Rule 4(m) to extend the time for service once a plaintiff has failed to show good cause for an extension. Given that *Mendez* predates the Supreme Court's decision in *Henderson* and that its abrogation is well-recognized even within the Fourth Circuit, *see*, *e.g.*, *Perri-Clair v. Ace P'ship of Charleston SC*, 2011 WL 765671, at *1 (D.S.C. Feb. 23, 2011); *Hammad v. Tate Access Floors, Inc.*, 31 F. Supp. 2d 524, 527-28 (D. Md. 1999), Defendant's reliance on *Mendez* is troubling, especially when the Ninth

(Continued on following page)

Here, after carefully weighing the *Efaw* factors, we find and conclude that the circumstances of this case favor an extension of time for Plaintiffs to effect service. First, the prejudice to Plaintiffs from a dismissal of the complaint is significant. Dismissal would bar Plaintiffs from re-filing this action because the statute of limitation has lapsed. Plaintiffs would be denied their day in court despite having having [sic] spent more than two years actively litigating the case up to the eve of trial. Dismissal at this point without the possibility of re-filing the action would impose extreme prejudice on Plaintiffs.

Defendant argues that Plaintiffs would not be prejudiced by the dismissal because they have a better chance at prevailing in a legal malpractice action against their counsel upon dismissal than at prevailing in this action. This argument is nonsensical. "In a typical professional negligence case against a litigation attorney, a determination of the merits of the underlying lawsuit must be made in order to adjudicate the elements of causation and damages." *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 934 (Ct.

Circuit has expressly recognized our discretion under Rule 4(m). To the extent that Defendant also relies on *Tenenbaum v. PNC Bank Nat'l Assoc.*, 2011 WL 2038550, at *6 (D. Md. May 24, 2011) to define our discretion under Rule 4(m), *Tenenbaum* is not persuasive, much less binding, authority. The district court there largely applied *Mendez's* good-cause standard despite recognizing that it "stand[s] on shaky footing." *Id.* at *4-5. Moreover, it provided no analysis of the type of equitable factors that we must consider in exercising our discretion. *Id.* at *6.

App. 2011). Thus, if, as Defendant asserts, Plaintiffs are not likely to succeed in this action, then they would not be able to establish causation and damages in the malpractice action. In any event, this Motion provides an improper vehicle for us to pre-judge the merits of Plaintiffs' case.

Second, unlike the great prejudice to Plaintiffs, the prejudice to Defendant is minimal. Defendant argues that it would face prejudice from being required to "try this case at considerable expense." (Reply 8). But "prejudice requires greater harm than simply that relief [for Plaintiff] would delay resolution of the case." *See Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009); *see also TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) ("[M]erely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment."). To establish prejudice, Defendant must show what it would have done differently had Plaintiff timely effected service. *See Lemoge*, 587 F.3d at 1196; *Efaw*, 473 F.3d at 1041. In *Efaw*, the defendant suffered great prejudice from the plaintiff's seven-year delay in effecting service because had the defendant been timely served, she would have deposed the relevant witnesses, including the key eyewitness who had died during the seven-year period. Here, Defendant makes no argument, nor can it, that it would have proceeded any differently during the last two years if it had been served. Defendant even admits that it "was ready to try this case within the

time prescribed by the court on August 28." (Opp'n Ex Parte App. 10).

Defendant also argues that it would face prejudice from having to appeal this Motion if it eventually suffers an adverse judgment. While this purported prejudice is fairly traceable to Plaintiffs' failure to effect timely service – that is, Defendant would otherwise not have to file this Motion if Plaintiffs had timely served Defendant – the cost associated with such an appeal is minimal relative to the prejudice Plaintiffs would face from dismissal. Moreover, while it is certainly within Defendant's rights to appeal, it is ultimately Defendant's choice whether to expend the resources to appeal this ruling, especially given Defendant's marginal arguments in support of its position.

Defendant further argues that it would be prejudiced by any additional delay from the extension of time for service. There is no such prejudice because we are requiring Plaintiff to effect service within the current scheduling dates. Moreover, counsel appears to speak out of both sides of his mouth by also requesting a certification for interlocutory appeal which would guarantee the additional delay that Defendant decries.

Finally, Defendant argues that it would be prejudiced by an extension of time to serve because it would defeat its affirmative defense of failure of service. Neither the Federal Rules or any case law interpreting them prevent the exercise of our discretion to

extend time for service once the defense of failure of service has been asserted in an Answer. Indeed, *Efaw* makes no mention of such purported limitation. We reject this argument.

Third, it is clear from the record that Defendant had actual notice of the suit, given that it joined the Notice of Removal on May 4, 2010, less than ten days after the Complaint was filed on April 26, 2010.

Fourth, the eventual service factor is not applicable in this situation because at this time, Plaintiffs could not effect service without our order. However, to the extent that this factor considers Plaintiffs' efforts at curing the defect once they became aware of it, we find that Plaintiffs have made a good faith effort by immediately requesting a waiver from Defendant, attempting to obtain a summons from the clerk, and filing the Ex Parte Application shortly thereafter.

Defendant argues that we only have discretion to extend time for service when there has been some attempt to comply with Rule 4(m). No authority supports this rigid interpretation. In fact, it is contradicted by a case cited by Defendant. In *Mann v. American Airlines*, 324 F.3d 1088, 1089-91 (9th Cir. 2003), the Ninth Circuit held that the district court properly exercised its discretion to extend time for service when it granted the plaintiff's motion for an extension of time to serve after the 120-day period. Thus, at the time the trial court reviewed the motion, the plaintiff had otherwise made no attempt to serve the defendant. *See id.* Instead, the plaintiff took

timely steps to cure the defect after it had been put on notice by the trial court's Order to Show Cause, much like what the Plaintiffs did in this case after Defendant notified them of the defect.

Moreover, *Efaw* makes clear that eventual service, or even attempts at effecting service, is merely one of many factors we could consider in determining whether to extend time for service. Here, we consider Plaintiffs' lack of attempt to serve Defendant before this Motion in light of the circumstances of this case. We find no evidence that Plaintiffs' failure was due to any bad faith or attempt to gain any tactical advantage. Instead, the failure was an oversight, likely brought on by the Parties' vigorous litigation virtually immediately upon removal of this action to this Court.

Thus, we find that the totality of circumstances of this case favors an extension of time to serve. Accordingly, we exercise our discretion under Rule 4(m) to extend Plaintiffs' time to effect service.

III. Conclusion

Based on the foregoing, Defendant's Motion is **DENIED**. Its request that we certify this denial for interlocutory appeal is likewise **DENIED**. Our order denying Defendant's Motion and granting Plaintiffs' Ex Parte Application does not "involve a controlling question of law *as to which there is substantial ground for difference of opinion*. . . ." 28 U.S.C. § 1292(b) (emphasis added). Indeed, Defendant's positions are

so insubstantial that they are not subject to serious debate among reasonable jurists. We are disappointed that Defendant has chosen to make these arguments, particularly in such unwarranted tone, without due regard for scarce judicial resources. We view counsel's failure to exercise good professional judgment with disfavor, and caution counsel to carefully consider not only his duty to zealously represent his client, but also his obligations as an officer of the court.

Plaintiffs' Ex Parte Application to Extend Time to Serve Defendant CMI is **GRANTED**. The clerk is hereby directed to issue a summons forthwith. Plaintiffs shall effect service on Defendant **within fourteen (14) days** after issuance of such summons.

Given the posture of this issue, we strongly urge Defendant to consider, for the sake of efficiency and in the interests of justice, whether it should (1) simply waive service; or (2) authorize its counsel to accept service without requiring Plaintiffs to go through the formal service process.

IT IS SO ORDERED.

– : –

Initials of Deputy Clerk Bea