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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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John Alexander,

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No. CV-07-176-PHX-LOA

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Plaintiff,

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**ORDER**

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vs.

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Lake Havasu City, an Arizona municipal  
corporation, et al,

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Defendants.

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This matter is before the Court on Plaintiff’s Motion to Strike Certain of  
Defendants’ Objections to Trial Witnesses and Exhibits. (docket # 67) Plaintiff  
contends that certain objections were not filed within the time limits set forth in  
Fed.R.Civ.P. 26(a)(3) and the Court’s June 18, 2007 and February 27, 2008 scheduling  
Orders.<sup>1</sup> Defendants oppose Plaintiff’s Motion to Strike. (docket # 70)

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In its June 19, 2007 Order, the Court set a July 31, 2008 deadline for  
“[w]ritten disclosure of all known witnesses, exhibits, and other matters under Rule  
26(a)(3), Fed.R.Civ.P. . . .” (docket # 32) On the parties’ stipulation, the Court  
subsequently extended the Rule 26(a)(3) disclosure deadline to September 29, 2008.  
(docket # 52)

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<sup>1</sup> Contrary to Plaintiff’s Motion, these Orders did not alter the 14-day objections  
deadline set forth in Rule 26(a)(3) after the express date given for counsel to disclose their  
trial witnesses and exhibits.

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1                   On September 29, 2008, Plaintiff electronically and timely filed his Pretrial  
2 Disclosures. (docket # 64) The Certificate of Service certifies that Plaintiff's counsel  
3 "on September 29, 2008, [] electronically transmitted the foregoing document to the  
4 Clerk's Office using the CM/ECF System for filing and transmittal of Notice of  
5 Electronic Filing to" counsel for Defendants that same day. (docket # 64 at 11) Although  
6 the Certificate of Service does not refer to hand-delivery, that same day, Plaintiff also  
7 hand-delivered a copy of his Pretrial Disclosures to Defendants' counsel. (docket # 67,  
8 Exh. 1) On October 17, 2008, Defendants filed objections to Plaintiff's Pretrial  
9 Disclosures. (docket # 66)

10                   Federal Rule of Civil Procedure 26(a)(3)(B) provides that:

11                   Unless the court orders otherwise, [pretrial] disclosures must be  
12                   made at least 30 days before trial. Within 14 days after they are  
13                   made, unless the court sets a different time, a party may serve and  
14                   promptly file a list of the following objections: any objections to the  
15                   use under Rule 32(a) of a deposition designated by another party  
16                   under Rule 26(a)(3)(A)(ii); and any objection, together with the  
17                   grounds for it, that may be made to the admissibility of materials  
18                   identified under Rule 26(a)(3)(a)(iii). An objection not so made -  
19                   except for one under Federal Rule of Evidence 402 or 403 - is waived  
20                   unless excused by the court for good cause.

21                   Fed.R.Civ.P. 26(a)(3)(B).

22                   Plaintiff claims that because he hand-delivered his Pretrial Disclosures to  
23                   Defendants on September 29, 2008, and because October 13, 2008 was a legal holiday,  
24                   the 14-day deadline for Defendants to file their objections in accordance with Rule  
25                   26(a)(3)(B) expired on October 14, 2008. Fed.R.Civ.P. 6(a)(4)(A). (docket # 67 at 2)  
26                   Plaintiff argues, therefore, that Defendants' Objections to Trial Witnesses and Exhibits,  
27                   docket # 66, should be stricken as untimely filed.

28                   Defendants, on the other hand, argue that pursuant to Fed.R.Civ.P. 6(d) and  
the Electronic Case Filing Administrative Policies and Procedures for the District of  
Arizona, a three-day mailing period applies to all electronically filed documents. (docket  
# 70) Defendants also note that the Certificate of Service only indicated that Plaintiff's  
Pretrial Disclosures had been electronically filed and did not reflect that it had also been

1 hand-delivered. (docket # 70) Allowing for the three-day mailing period, Defendants  
2 claim their objections were timely filed on October 17, 2008.

### 3 **II. Analysis**

4           The issue before the Court is one of first impression in this District:  
5 whether, for purposes of Federal Rule of Civil Procedure 6(d), a document is considered  
6 to have been served electronically when the Certificate of Service attached to the  
7 document states only that the document was electronically filed and served, but the  
8 proponent of the document also hand-delivers a copy of that document to opposing  
9 counsel. The crux of Plaintiff’s argument is that Defendants should not have the benefit  
10 of the three-day rule because Plaintiff served Defendants with his Pretrial Disclosures by  
11 hand-delivery and electronically. Plaintiff has not provided any authority or cases to  
12 support his argument. As discussed below, the Court finds that the method of service  
13 described in Plaintiff’s Certificate of Service is controlling in this case. Accordingly, the  
14 Court finds that Defendants’ Objections to Trial Witnesses and Exhibits, docket # 66,  
15 were timely filed and will deny Plaintiff’s Motion to Strike.

16           As amended on December 1, 2007, Federal Rule of Civil Procedure 6(d)  
17 provides for an additional three days “[w]hen a party may or must act within a specified  
18 time after service and service is made under Rule 5(b)(2)(C), (D), (E) or (F) . . . .”  
19 Electronic service is one of the forms of service for which the three additional days are  
20 added. See, Rule 5(b)(2)(E) (“sending it by electronic means if the person consented in  
21 writing--in which event service is complete upon transmission, but is not effective if the  
22 serving party learns that it did not reach the person to be served; . . . .”) Although Rule  
23 5(b)(2)(E) also provides that “service by electronic means is complete on transmission,”  
24 the three-day extension provided by Rule 6(d) nevertheless applies. See, *Flores v.*  
25 *Emerich & Fike*, 2006 WL 2536615, \* 7 (E.D. Cal. 2006); *Wile v. Paul Revere Life Ins.*  
26 *Co.*, 410 F.Supp.2d 1313, 1318 n. 2 (N.D. Ga . 2005).

1                   The Electronic Case Filing Administrative Policies and Procedures Manual  
2 (“ECF Manual”) for the District of Arizona is consistent with the Federal Rules of Civil  
3 Procedure and provides that:

4                   Whenever a documents is electronically filed in accordance with  
5 these procedures, the ECF system will generate a “Notice of Electronic  
6 Filing” (NEF) to the filing party, the assigned judge and any registered  
user in the case. The NEF will constitute service of a document for  
purposes of the Federal Rules of Civil Procedure. . . .

7 [www.azd.uscourts.gov](http://www.azd.uscourts.gov) at ECF Manual, Section II.D.2 at 9. Likewise, the Local Rules  
8 provide that “[t]ransmission of the Notice of Electronic Filing to a Registered User’s e-  
9 mail address constitutes service of the hyperlinked document(s). Only the Notice of  
10 Electronic Filing, generated and transmitted by the ECF system, is sufficient to constitute  
11 electronic service of an electronically filed document.” LRCiv 5.5(h). The Local Rules  
12 also state that “[f]iling of documents electronically in compliance with these rules and the  
13 [ECF] Manual will constitute filing with the Court for purposes of Rule 5(e) of the  
14 Federal Rules of Civil Procedure.” LRCiv 5.5(b).<sup>2</sup> The Court’s website clarifies that  
15 “[t]he Federal Rules governing the computation of deadlines still apply to all filed  
16 documents, including those electronically filed, so the 3-day mailing time would apply as  
17 provided by the Rules.” *Id.* at [FAQs/about electronic](#) case filing. Significantly, the ECF  
18 Manual further provides that:

19                   The *certificate must state the manner in which service or notice was*  
20 *accomplished* on each party and may be signed as “s/name” by a  
21 paralegal, secretary or other authorized assistant who made the service.  
A digital signature is also allowed . . . Any document that is *not filed*  
*electronically* (i.e., sealed) must be served as a paper copy.

22 *Id.* at 10 (emphasis added).

23                   The Court’s website also includes the following “frequently asked  
24 question,” and response:

25                   Is a certificate of service still required?

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27                   <sup>2</sup> It appears that the District’s Local Rules in this regard have not yet been formally  
28 amended to be consistent with the amendments to the Rules of Civil Procedure that  
eliminated former Rule 5(e). See, Rule 5(d)(3).

1 Answer: Under F.R.Civ.P. 5(d), a certificate of service is required.  
2 However, per the sample found in the link under Section II.D.3. of our  
3 Administrative Policies and Procedures Manual, the *Certificate should*  
4 *state if service was electronic or paper and, if paper, what method was*  
5 *used.* Part II, Section D of the Administrative Policies and Procedures  
6 Manual.

7 [www.azd.uscourts.gov/FAQs/about\\_electronic](http://www.azd.uscourts.gov/FAQs/about_electronic) case filing (emphasis added).

8 Neither the Federal Rules of Civil Procedure, nor the Local Rules for the  
9 District of Arizona, including the ECF Manual, authorize the hand-delivery of documents  
10 to effectuate service of a motion on the opposing party under the circumstances in this  
11 case. To the contrary, the District’s ECF Manual and the Local Rules clearly favor  
12 electronic filing and service, *see* LRCiv 5.5(c) (stating that “[u]nless otherwise ordered by  
13 the Court or as provided by the [ECF] Manual, electronic filing is mandatory for  
14 attorneys.”), and requires that a certificate of service specifically state whether service is  
15 made electronically or by “paper.” Consistent with that policy, the Court’s June 19, 2007  
16 order, issued as a result of the Rule 16 scheduling conference in this case wherein  
17 Plaintiff’s and Defendants’ counsel attended, provided that, “[p]ursuant to Rule  
18 5(b)(2)(D),<sup>3</sup> Fed.R.Civ.P. and this Court’s adoption of rules regarding electronic filing,  
19 the parties consent and agree that service under Rule 5(a) may be obtained on the other  
20 party by delivering a copy of the document by electronic means. Service by electronic  
21 means is complete upon transmission. Counsel also advise[d] the Court that they are  
22 registered and will comply with the District Court’s Case Management/Electronic Case  
23 Filing (“CM/ECF”) Administrative Policies and Procedures Manual. See the District  
24 Court’s internet site ([www.azd.uscourts.gov](http://www.azd.uscourts.gov)) and click onto the CM/ECF link for the  
25 details of the District Court’s electronic filing system.” (docket # 32 at 4) All parties  
26 were represented by counsel, who were, and remain, registered ECF users and who  
27 expressly consented to electronic filing and service. *Id.*

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28 <sup>3</sup> This order was entered before the amendments to Rule 5 on December 1, 2007.

1           In accordance with the application of electronic filing in this case, the  
2 Certificate of Service attached to Plaintiff’s Pretrial Disclosures specifically certified that  
3 service was electronically made without any reference to service by hand-delivery or  
4 other “paper” method. (docket # 64 at 11) Plaintiff electronically served Defendants  
5 with his Pretrial Disclosures, and then hand-delivered a copy of that same pleading to  
6 Defendants’ counsel that same day. Plaintiff now argues that the hand-delivery of his  
7 Pretrial Disclosures to Plaintiff on September 29, 2008 trumps the electronic service made  
8 that same day in an effort to deprive Defendants of the additional three days that are  
9 allowed when a pleading is electronically served. Fed.R.Civ.P. 6(d).

10           In *Cherry Line, S.A. v. Muma Services*, 2007 WL 778179, \* 1 (D. Del.  
11 2007), the defense counsel made a similar argument of untimeliness that Plaintiff makes  
12 here. There, the trial judge found “electronic service controls in the circumstances of the  
13 instant dispute, and is generally preferable to mail and hand delivery service. When a  
14 party chooses electronic means or mail delivery, separate hand delivery is gratuitous and  
15 has no effect on response times.” The district court in *Cherry Line* denied defendants’  
16 motion to strike. *Id.*

17           In view of the attorneys’ consent to electronic filing and service, docket #  
18 34 at 4; the attorneys’ status as registered users of the District Court’s ECF system; the  
19 ECF Manual’s provides the certificate of service must indicate whether service is made  
20 electronically or by paper; the fact that the Certificate of Service attached to Plaintiff’s  
21 Pretrial Disclosures refers only to the electronic service; and LRCiv 5.5(c)’s mandate that  
22 lawyers use electronic filing,<sup>4</sup> Defendants’ Objections to Plaintiff’s Trial Witnesses and  
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24           <sup>4</sup> Local rules are “laws of the United States,” *United States v. Hvas*, 355 U.S. 570,  
25 575 (1958), “have the force of law[,] are binding upon the parties and upon the court, and  
26 a departure from local rules that affects substantial rights requires reversal.” *Professional*  
27 *Programs Group v. Department of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994) (internal  
28 quotation marks omitted). “A departure is justified only if the effect is so slight and  
unimportant that the sensible treatment is to overlook [it].” *Id.* Moreover, a district court is  
under an obligation to construe local rules so that they do not conflict with federal rules and

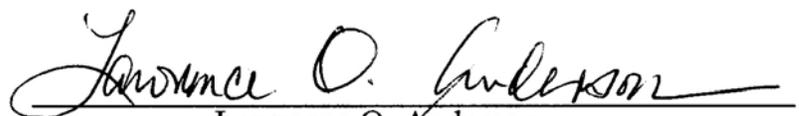
1 Exhibits, electronically served on Plaintiff's counsel, were timely served and filed with  
2 the Court. Plaintiff's hand-delivered copy of his Pretrial Disclosures is, at best, only a  
3 gratuitous, courtesy copy to defense counsel and does not override the District Court's  
4 rules regarding electronic filing or the Federal Rules' allowance for 3-days mailing time  
5 for electronic filing. Likewise, Plaintiff's hand-delivery of its Pretrial Disclosures does  
6 not modify the Certificate of Service attached to Plaintiff's own document which,  
7 significantly, referred only to electronic filing and notice.

8 In accordance with the Certificate of Service on Plaintiff's Pretrial  
9 Disclosures, that document was served electronically on defense counsel on September  
10 29, 2008. Pursuant to the Federal Rules of Civil Procedure 6(d) and 5(b)(2)(E), three  
11 days are added to Rule 26(a)(3)'s 14-day deadline for Defendants to file their objections  
12 to Plaintiff's Pretrial Disclosures. The 14<sup>th</sup> day after September 29, 2008 fell on  
13 Columbus Day, October 13, 2008, a "legal holiday" as identified in Rule 6(a)(4)(A).  
14 Thus, Defendants were allowed three additional days from October 14, 2008 to file their  
15 Objections. See, Rules 6(d) and 5(b)(2)(E). Defendants' Objections filed October 17,  
16 2008 were timely.

17 Accordingly,

18 **IT IS ORDERED** that Plaintiff's Motion to Strike Certain of Defendants'  
19 Objections to Trial Witnesses and Exhibits, docket # 67, is **DENIED**.

20 Dated this 10<sup>th</sup> day of November, 2008.

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22 Lawrence O. Anderson  
23 United States Magistrate Judge

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statutes. *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995); Rule 83(a)(1), Fed.R.Civ.P.