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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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JAN E. KRUSKA,

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No. CV 08-0054-PHX-SMM

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Plaintiff,

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MEMORANDUM OF DECISION AND ORDER

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v.

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PERVERTED JUSTICE
FOUNDATION
INCORPORATED.ORG, et. al.,

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Defendants.

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Before the Court is Defendant Christopher Brocious’ (“Brocious”) Motion to Dismiss Plaintiff Jan E. Kruska’s (“Kruska”) Amended Complaint Pursuant to Rules 4(m) and 12(b)(2), (3), and (5). (Doc. 251, Mot. to Dismiss.) Brocious’ motion is brought based upon insufficient service of process, lack of personal jurisdiction, and improper venue. (Id.) To date, Kruska has not filed a response to Brocious’ Motion to Dismiss as ordered by the Court (Doc. 253, Ct. Order.)¹ After consideration of the issues, the Court finds the following.

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BACKGROUND

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On January 10, 2008, Kruska filed suit against a number of individuals and organizations, including Brocious. (Doc. 1, Compl.) In response, Brocious filed a Cross-Motion to Dismiss for lack of personal jurisdiction, insufficient service of process, and

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¹Kruska never responded to Brocious’ Motion to Dismiss (Doc. 251, Mot. to Dismiss) that was filed on April 16, 2010. The Court ordered that Kruska submit a response by June 11, 2010. (Doc. 253, Ct. Order.)

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1 improper venue. (Doc. 68, Cross-Mot. To Dismiss.) The Court granted Brocious' Cross-
2 Motion to Dismiss on lack of personal jurisdiction grounds, but granted Kruska leave to file
3 an Amended Complaint. (Doc. 138, Ct. Order.)

4 Kruska's Amended Complaint maintained the claims made in her Original Complaint.
5 (Compare Doc. 1, Compl., at 13-19, with Doc. 140, Am. Compl., at 32-38.) Brocious
6 responded with a second Motion to Dismiss, reasserting lack of personal jurisdiction,
7 insufficient service of process, and improper venue. (Doc. 141, Mot. to Dismiss.) The Court
8 denied Brocious' Motion to Dismiss, finding personal jurisdiction on the grounds that
9 Brocious purposefully directed his actions towards the State of Arizona, that Kruska's claims
10 arose out of Brocious' forum-related actions, and that the exercise of jurisdiction was
11 reasonable. (Doc. 201, Ct. Order, at 14.) "Good cause" for failure to timely serve Brocious
12 was found because he had received actual notice of the lawsuit, would suffer no prejudice
13 if a time extension was granted, and Kruska would be severely prejudiced if the complaint
14 was dismissed (Id. at 18-20.) Therefore, Kruska was given an extension until November 6,
15 2009 to effect proper service upon Brocious. (Id. at 21:5-6.)

16 In her Motion to Amend Service, Kruska attempted service on Brocious' attorney,
17 Steven G. Ford ("Ford"), under Federal Rule of Civil Procedure 4(e) through e-mail and
18 personal service at his office. (Doc. 203, Mot. to Am. Serv., at 5-6.) Kruska's Motion to
19 Amend Service was denied by the Court on the grounds that proper service was never
20 effectuated under Federal Rule of Civil Procedure 4(d), 4(e)(1), or 4(e)(2). (Doc. 217, Ct.
21 Order, at 2:18-26, 5:3-8.) The Court granted Kruska one final extension of time, until
22 January 4, 2010, to effect proper service upon Brocious. (Id. at 7:5-6.) On April 16, 2010,
23 Brocious filed a Motion to Dismiss the Amended Complaint, again, reasserting insufficient
24 service of process, lack of personal jurisdiction, and improper venue. (Doc. 251, Mot. to
25 Dismiss.)

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1 The Court, having previously ruled on the issues of personal jurisdiction and improper
2 venue (Doc. 201, Ct. Order), now focuses on service issues regarding the Original and
3 Amended Complaints.

4 **STANDARD OF REVIEW**

5 The Court is permitted to dismiss an action for insufficient service of process. Fed.
6 R. Civ. P. 12(b)(5). In a Motion to Dismiss for insufficient service of process pursuant to
7 Rule 12(b)(5), the plaintiff bears the burden of establishing that service was properly
8 effected. See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004).

9 **DISCUSSION**

10 *I. Original Complaint was Properly Served Under Rule 4.2(c) of the Arizona Rules of*
11 *Civil Procedure*

12 The Court previously ruled that service of Kruska’s Original Complaint was improper
13 under Ohio law because she failed to involve the court clerk. See Oh. R. Civ. P. 4.1(A).
14 (Doc. 201, Ct. Order, at 17:3-5.) The Court, however, has not ruled on service of the
15 Original Complaint under Arizona law. Federal Rule of Civil Procedure Rule 4(e)(1) allows
16 an individual to be served by “following state law for serving a summons in an action
17 brought in courts of general jurisdiction in the state where the district court is located”
18 Fed. R. Civ. P. 4(e)(1). Rule 4.2(c) of the Arizona Rules of Civil Procedure allows for
19 service by mail. Ariz. R. Civ. P. 4.2(c).

20 When the whereabouts of a party outside the state is known, service may be
21 made by depositing the summons and a copy of the pleading being served in
22 the post office, postage prepaid, to be sent to the person to be served by any
23 form of mail requiring a signed and returned receipt. Service by mail pursuant
24 to this subpart and the return thereof may be made by the party procuring
25 service or by that party’s attorney. Upon return through the post office of the
26 signed receipt, the serving party shall file an affidavit with the court stating (1)
27 that the party being served is known to be located outside the state, (2) that the
28 summons and a copy of the pleading were dispatched to the party being
served; (3) that such papers were in fact received by the party as evidence by
the receipt, a copy of which shall be attached to the affidavit; and (4) the date
of receipt by the party being served and the date of the return of the receipt to
the sender.

27 Id.

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1 Kruska filed her affidavit, attached to her Amended Complaint, with the Court on
2 December 16, 2008. On March 6, 2008, knowing Brocious was located outside of Arizona,
3 Kruska mailed her summons and Original Complaint to Brocious' home address in Ohio.
4 (Doc. 140, Aff. ¶ 83, Ex. A.) On March 18, 2008, Brocious signed and returned the USPS
5 return receipt, proof that the summons and pleading were dispatched to, and actually received
6 by Brocious. (Id. at ¶ 84, Ex. A.) Kruska's affidavit provides the date of receipt by
7 Brocious, March 18, 2008 (Id. ¶ 84.), but fails to provide the return date of the receipt to
8 Kruska, as required by Rule 4.2(c) of the Arizona Rules of Civil Procedure.

9 Generally, "Pro se litigants must follow the same rules of procedure that govern other
10 litigants." King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (citing United States v. Merrill,
11 746 F.2d 458, 465 (9th Cir. 1984)). However, failure to follow technical procedural
12 requirements does not warrant dismissal where "(a) the party . . . to be served personally
13 received actual notice, (b) the defendant[] would suffer no prejudice from the defect in
14 service, (c) there is a justifiable excuse for [the] failure to serve properly, and (d) the plaintiff
15 would be severely prejudiced if his complaint were dismissed." Borzeka v. Heckler, 739 F.2d
16 444, 447 (9th Cir.1984).

17 Brocious received actual notice of the lawsuit when he signed the certified mailing
18 (Doc. 140, Aff., Ex. A.). The Ninth Circuit has held that "So long as a party receives
19 sufficient notice of the complaint, Rule 4 is to be 'liberally construed' to uphold service."
20 Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) (citing
21 Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1404 (9th Cir. 1994)); see also United Food
22 & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir.1984)
23 ("Rule 4 is a flexible rule that should be liberally construed so long as a party receives
24 sufficient notice of the complaint.")

25 Kruska's failure to note the return date of the receipt in her affidavit does not have a
26 substantive effect on service of process, and therefore Brocious would suffer no prejudice
27 from the technical defect in service. In Draper v. Coombs, the Ninth Circuit "recognize[d]
28 that the plaintiff represented himself and therefore, in evaluating his compliance with the

1 technical rules of civil procedure, we treat him with great leniency.” 792 F.2d 915, 924 (9th
2 Cir. 1986) (analogizing to Pembrook v. Wilson, 370 F.2d 37 (9th Cir. 1966)). Kruska, as a
3 pro se litigant, is afforded similar treatment.

4 Kruska sent a true copy of the summons, complaint, and waiver of service via certified
5 mail. When Brocious did not return the waiver form, she hired a process server who made
6 thirteen attempts to serve Brocious in Ohio. (Doc. 140, Am. Compl., at 9-10.) Kruska has
7 vigilantly attempted to serve Brocious (Doc. 201, Ct. Order, at 19:22-27), and would be
8 severely prejudiced if her complaint was dismissed for a mere technical noncompliance with
9 Rule 4.2(c) of the Arizona Rules of Civil Procedure. Since the Borzeka factors balance in
10 favor of Kruska, her technically defective service is not enough to render service of the
11 Original Complaint insufficient. Therefore, Kruska’s Original Complaint was properly
12 served under Rule 4.2(c) of the Arizona Rules of Civil Procedure.

13 II. Amended Complaint was Served Properly in Accordance with Rule 5

14 The Court now turns to whether the Amended Complaint (Doc. 140, Am. Compl) was
15 ever properly served upon Brocious. Kruska’s Amended Complaint constitutes “a pleading
16 filed after the original complaint” and therefore, requires service under Federal Rule of Civil
17 Procedure 5. Fed. R. Civ. P. 5(a)(1)(b). Rule 5 also provides that “if [a] party is represented
18 by an attorney, service must be made on the attorney.” Fed. R. Civ. P. 5(b)(1). Ford, as
19 Brocious’ attorney, is the appropriate recipient for service of Kruska’s Amended Complaint.
20 Under Rule 5, one method of effecting proper service of an amended complaint is to “mail[]
21 it to the person’s last known address – in which event service is complete upon mailing.”
22 Fed. R. Civ. P. 5(b)(2)(c). In December of 2008, Kruska mailed her Amended Complaint
23 to Ford’s office at Alvarez & Gilbert, PLLC (Doc. 140, Am. Compl., at 44, 63.) Kruska, has
24 thus, effected proper service of her Amended Complaint pursuant to Rule 5.

25 III. Kruska’s Amended Complaint Supersedes the Original Complaint

26 Brocious, in his Motion to Dismiss, contends that, by virtue of this Court’s Dismissal
27 Order (Doc. 138, Ct. Order), the Original Complaint no longer exists as to Brocious. (Doc.
28 251, Mot. to Dismiss, at 2:24-25.) Brocious further contends that the filing of Kruska’s

1 Amended Complaint superseded her Original Complaint (Doc. 251, Mot. to Dismiss, at 3:1-
2 2.) See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967) (holding that an “amended complaint
3 supersedes the original, the latter being treated thereafter as non-existent”). The Court
4 similarly finds that “Once amended, the original [complaint] no longer performs any function
5 as a pleading” Bullen v. De Bretteville, 239 F.2d 824, 833 (9th Cir. 1956). Therefore,
6 Kruska’s Amended Complaint supersedes her Original Complaint and is treated as
7 nonexistent.

8 In conclusion, Kruska’s Amended Complaint, a pleading filed after the original
9 complaint, requires service under Rule 5. The Amended Complaint was properly served
10 when Kruska mailed a copy of her Amended Complaint to Ford’s office at Alvarez &
11 Gomez, PLLC, in December of 2008. (Doc. 140, Am. Compl., at 44, 63.) Kruska’s
12 Amended Complaint superseded her Original Complaint, therefore the Original Complaint
13 no longer exists.

14 IV. Insufficient Service of Amended Complaint as Argued by Brocious

15 Brocious argues that service of the Amended Complaint under Rule 4 is necessary
16 because the Amended Complaint contains “new and additional claims” for relief
17 O’Callaghan v. Sifre, 242 F.R.D. 69 (S.D.N.Y. 2007) (Doc. 251, Mot. to Dismiss, at 3:16-
18 20.) O’Callaghan, and thus, Brocious, relies upon Federal Rule of Civil Procedure 5(a)(2),
19 stating that “no service [under Rule 4] is required on a party who is in default for failing to
20 appear. But a pleading that asserts a new claim for relief against such a party must be served
21 on that party under Rule 4.” Fed. R. Civ. P. 5(a)(2).

22 A. Brocious has “Appeared” for Purposes of Federal Rule of Civil Procedure 5(a)(2)

23 In determining whether or not Federal Rule of Civil Procedure 5(a)(2) applies, the
24 Court must first establish if Brocious has “appeared.” An appearance is defined as “A
25 coming into court as a party or interested person, or as a lawyer on behalf of a party or
26 interested person . . . whether by formally participating . . . or by . . . motion” Black’s
27 Law Dictionary 113-14 (9th ed. 2009).

1 In Collins v. Finley, the court found a general appearance when “Collins . . . moved
2 to dismiss the complaint” 65 F.2d 625 (9th Cir. 1933). Similarly, in Patton v. Adm’r
3 of Civil Aeronautics, the court ruled that the defendants made general appearances “by filing
4 a motion to dismiss on the ground that the District Court lacked ‘jurisdiction over the subject
5 matter of said action’” 217 F.2d 395, 396 (9th Cir. 1954). Similarly, in the present
6 case, Ford, on Brocious’ behalf, has filed several Motions to Dismiss (Doc. 68, 141, 251,
7 Mots. to Dismiss) partially grounded in lack of jurisdiction claims. These filings demonstrate
8 a “clear purpose to defend the suit” Direct Mail Specialists, Inc. v. Eclat Computerized
9 Techs., Inc., 840 F.2d 685, 689 (9th Cir. 1988) (quoting Wilson v. Moore & Assocs., Inc.,
10 564 F.2d 366, 369 (9th Cir. 1977)), and therefore, constitute the equivalent of a formal court
11 appearance. Wilson, 564 F.2d at 369. Brocious has “appeared.” He has not defaulted by
12 failing to appear for purposes of Rule 5(a)(2).

13 *B. A Party that has “Appeared” Does Not Require Service Under Rule 4 (As Per Rule*
14 *5(a)(2)), Even if New Claims for Relief are Sought*

15 Rule 5(a)(2) does not specifically mention whether or not service is required, in
16 accordance with Rule 4, when new claims for relief are asserted against a party that has
17 “appeared.” Employee Painters’ Trust v. Ethan Enterprises, Inc., provides that “An amended
18 complaint need only be served in the manner provided by Rule 4 when (1) a party is ‘in
19 default for failure to appear’ and (2) the ‘pleadings assert new or additional claims for
20 relief.’” 480 F.3d 993, 999 (9th Cir. 2007) (citing Fed. R. Civ. P. 5(a)). The Court in
21 Employee Painters’s Trust, held that service of an amended complaint on officers was
22 effective even though the parties and District Court mistakenly believed that Rule 4 governed
23 service of the amended complaint. Id. The court explained that the plaintiff’s amended
24 complaint, like Kruska’s, was a “pleading subsequent to the original complaint,” and thus,
25 fell squarely within the provisions of Rule 5. Id.

26 The individual defendants in Employee Painters’ Trust, like Brocious, were *not* in
27 default for failure to appear. Id. When the amended complaint was filed in Employee
28 Painters’ Trust, the defendants had actively participated in the litigation by filing an answer

1 to the original complaint and contesting a disputed counterclaim. *Id.* Brocious, in a similar
2 fashion, actively participated in the present litigation by filing a Cross-Motion to Dismiss
3 (Doc. 68, Cross-Mot. to Dismiss), as well as a Reply in Support of a Cross-Motion to
4 Dismiss (Doc. 78, Reply in Supp. of a Cross-Mot. to Dismiss), prior to the filing of Kruska’s
5 Amended Complaint. (Doc. 140, Am. Compl.)

6 Since the Court has determined that Brocious is not in default for failure to appear,
7 “It is . . . immaterial whether or not the amended complaint asserted ‘new or additional
8 claims.’” *Employee Painters’ Trust*, 480 F.3d at 999 (citing Charles Alan Wright & Arthur
9 R. Miller, *Federal Practice and Procedure* § 1144 (3d. Ed. 2002) (noting that, “by appearing
10 in the action the party . . . may become vulnerable to service . . . for new or additional relief
11 under . . . methods set out in Rule 5(b).”)).

12 Furthermore, service on Ford is “consistent with the basic theory of Rule 5[,] that
13 following an appearance[,] service of papers on the attorney . . . will expedite the
14 adjudication of the case on the merits and, at the same time, constitute sufficient notice to the
15 party to comply with the constitutional requirements of due process.” *Id.* § 1146. Brocious,
16 as a party that has “appeared,” does not require service of the Amended Complaint on him
17 personally under Rule 4.

18 *V. The Court has Personal Jurisdiction over Brocious*

19 Brocious continues to argue that this Court lacks personal jurisdiction over him. (Doc.
20 251, Mot. to Dismiss, at 5-7.) However, this issue was ruled on in a previous Court Order,
21 and the Court found personal jurisdiction because Brocious purposefully directed his actions
22 towards the State of Arizona, Kruska’s claim arose out of Brocious’ forum-related actions,
23 and the exercise of jurisdiction over Brocious was reasonable. (Doc. 201, Ct. Order, at 14.)

24 The “law of the case doctrine” provides that courts do not “reexamine an issue
25 previously decided by the same or higher court in the same case.” *Lucas Auto. Eng’g, Inc.*
26 *v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766 (9th Cir. 2001). However, a court has
27 discretion to depart from the law of the case where (1) the first decision was clearly
28 erroneous; (2) there has been an intervening change of law; (3) the evidence is substantially

1 different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise
2 result. United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). A district court abuses
3 its discretion when it applies the doctrine of the law of the case without one of these five
4 requisite conditions. Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993). None of the five
5 requisite conditions from Alexander are applicable in the present case. Brocious merely
6 repeats the arguments made in his prior Motion to Dismiss without citing to any new case
7 law or identifying any manifest injustice that would result. Personal jurisdiction over
8 Brocious remains proper for the reasons stated in the previous Court Order. (Doc. 201, Ct.
9 Order, at 14.)

10 VI. Venue is Proper

11 Brocious also continues to argue that venue is improper. (Doc. 251, Mot. to Dismiss,
12 at 7-8.) This Court has already ruled that venue is proper on the grounds that a “substantial
13 part of the events . . . giving rise to the claim occurred” within Arizona. (Doc. 201, Ct.
14 Order, at 15:4-6) (citing 28 U.S.C. § 1391(b)(2)). The “law of the case doctrine” is similarly
15 applicable to Brocious’ argument for improper venue (Doc. 251, Mot. to Dismiss, at 7.)
16 Brocious has asserted no new claims for why venue is improper. Venue remains proper as
17 reasoned in the previous Court Order. (Doc. 201, Ct. Order, at 15:4-6.)

18 **CONCLUSION**

19 Kruska’s Original Complaint was properly served upon Brocious pursuant to Rule 4
20 of the Federal Rules of Civil Procedure. However, the Original Complaint was superseded
21 by Kruska’s Amended Complaint, rendering the Original Complaint nonexistent. Kruska’s
22 Amended Complaint is subject to service under Rule 5 because it is a pleading filed after the
23 original complaint. Service was properly effected, under Rule 5, when Kruska mailed the
24 Amended Complaint to the defense counsel’s office.

25 Brocious’ argument that Kruska’s Amended Complaint is subject to Rule 5(a)(2) fails
26 since Brocious has “appeared” in this litigation through filing several Motions to Dismiss.
27 Therefore, service of the Amended Complaint in accordance with Rule 4 is unnecessary.
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1 In a previous Order, this Court has already ruled that there is personal jurisdiction
2 over Brocious and that venue is proper. Brocious does not present reasons for reassessing
3 this Court's previous ruling on these issues.

4 Accordingly,

5 **IT IS HEREBY ORDERED** that Defendant Brocious' Motion to Dismiss Amended
6 Complaint (Doc. 251, Am. Compl.) is **DENIED**.

7 **IT IS FURTHER ORDERED** that Defendant Brocious' Motion to Dismiss
8 Amended Complaint is **DENIED** as to insufficient service of process.

9 **IT IS FURTHER ORDERED** that Defendant Brocious' Motion to Dismiss
10 Amended Complaint is **DENIED** as to lack of personal jurisdiction.

11 **IT IS FURTHER ORDERED** that Defendant Brocious' Motion to Dismiss
12 Amended Complaint is **DENIED** as to improper venue.

13 **IT IS FURTHER ORDERED** that a Scheduling Conference is set for September 13,
14 2010 at 3:00 p.m. in Courtroom 605.

15 DATED this 9th day of August, 2010.

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19 Stephen M. McNamee
20 United States District Judge
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