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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Oliver Reishus and Roxanne Brinker,
husband and wife,

No. CV-10-0760-PHX-LOA

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Plaintiffs,

**ORDER AND
ORDER TO SHOW CAUSE**

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vs.

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Efran Almaraz and Alejandra Estrada,
individually as husband and wife, d/b/a EA
Trucking; Paulo Egusquiza and Jane Doe
Egusquiza, individually and as husband
and wife, d/b/a Best Tires Distributors;
Eduardo Merino, a single man,

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Defendants.

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This matter is before the Court on the parties' Joint Motion to Quash Service of Process Upon Defendant Eduardo Merino and Request for Order Regarding Testimony of Eduardo Merino. (Doc. 97)

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Plaintiffs attempted to serve Eduardo Merino through Truck Process Agents of America ("TPAA"). TPAA accepted service of the Amended Complaint and Summons, which named Mr. Merino as a defendant. In the pending joint motion, the parties agree that TPAA did not have authority to accept service on behalf of Mr. Merino, and that service on TPAA was insufficient to effect lawful service upon Mr. Merino. (Doc. 97) In view of the parties' agreement that service on Eduardo Merino was insufficient, the Court will grant the joint motion to quash service of process upon him.

1 **A. Improper Service**

2 When a plaintiff fails to serve a defendant in accordance with Federal Rule of Civil
3 Procedure 4, and does not show good cause for such failure, the district court “on motion
4 or on its own after notice to the plaintiff--must dismiss the action without prejudice
5 against that defendant or order that service be made within a specified time.” Rule 4,
6 Fed.R.Civ.P.; *Stanley v. Goodwin*, 475 F.Supp.2d 1026, 1034-35 (D.Haw. 2006), *aff’d*,
7 262 F. App’x 786 (9th Cir. 2007). “[B]ut if the plaintiff shows good cause for the failure,
8 the court must extend the time for service for an appropriate period.” Rule 4, Fed.
9 R.Civ.P. “District courts have broad discretion to extend time for service under Rule
10 4(m).” *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007). Rule 4(m) “requires a
11 district court to grant an extension of time when the plaintiff shows good cause for the
12 delay,” but it “permits the district court to grant an extension even in the absence of good
13 cause.” *Id.* at 1040 (emphases in original). “In making extension decisions under Rule
14 4(m) a district court may consider factors ‘like a statute of limitations bar, prejudice to the
15 defendant, actual notice of a lawsuit, and eventual service.’” *Id.* at 1041 (quoting *Troxell*
16 *v. Fedders of N. Am., Inc.*, 160 F.3d 381, 383 (7th Cir. 1998)).

17 Because Mr. Merino has not been properly served within 120 days of the filing of
18 the Second Amended Complaint on September 30, 2010, doc. 53, which added him as a
19 party, the Court will order Plaintiffs to properly serve Mr. Merino with process on or
20 before March 31, 2011, or Plaintiffs shall show cause on or before the same date why Mr.
21 Merino should not be dismissed from this lawsuit. Absent timely notice to the Court of
22 lawful service or a showing of good cause, Mr. Merino will be dismissed with prejudice
23 as a party to this lawsuit. Dismissal of Mr. Merino from this lawsuit would remove any
24 doubt that this District Court may not have complete diversity and subject matter
25 jurisdiction over this case.

26 The parties also request that the Court enter an order regarding the use of Mr.
27 Merino’s testimony at trial and expert disclosures relating to Mr. Merino’s testimony.
28 The parties’ representations during the Rule 16 conference and prior filings indicate that

1 they have been unable to locate Mr. Merino. (doc. 99 discussing efforts to locate Mr.
2 Merino) Because Mr. Merino's whereabouts are currently unknown, the Court finds it
3 premature to enter any orders regarding the use of his testimony or related matters. The
4 deadlines set forth in the Scheduling Order, as amended on February 2, 2011, are firm and
5 binding. (docs. 18, 91) However, the Court would consider motions to modify relevant
6 deadlines¹ or enter appropriate orders pertaining to Mr. Merino's testimony in the event
7 he is located through the exercise of due diligence and in the absence of evidence of bad
8 faith.

9 Accordingly,

10 **IT IS ORDERED** that the Joint Motion to Quash Service of Process Upon
11 Defendant Eduardo Merino, doc. 97, is **GRANTED**.

12 **IT IS FURTHER ORDERED** that the Joint Request for Order Regarding
13 Testimony of Eduardo Merino, doc. 97, is **DENIED** without prejudice.

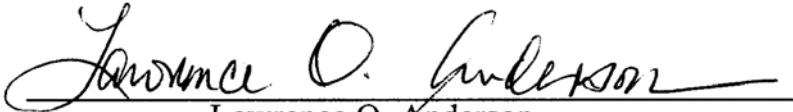
14 **IT IS FURTHER ORDERED** that the Court's February 23, 2011 Order, doc. 99,
15 is **VACATED** to the extent that it directed Defendants Almaraz, EA Trucking, their non-
16 party liability insurance, and defense counsel to file a status report "providing the details
17 of their efforts to determine Eduardo Merino's whereabouts, the non-privileged informa-
18 tion discovered in that regards, his willingness to cooperate with Plaintiffs' discovery
19 efforts and comply with this order." (Doc. 99)

20 **IT IS FURTHER ORDERED** that Plaintiffs shall properly serve Mr. Merino
21 with process on or before **Thursday, March 31, 2011** or Plaintiffs shall show cause on or
22 before **Thursday, March 31, 2011** why Mr. Merino should not be dismissed from this
23 lawsuit. Absent timely notice to the Court of proper service or a showing of good cause
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27 ¹ Motions to extend deadlines must comply with Federal Rule of Civil Procedure
28 6(b).

1 before the March 31, 2011, Mr. Merino will be dismissed as a party to this lawsuit with
2 prejudice.

3 Dated this 25th day of February, 2011.

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6 Lawrence O. Anderson
United States Magistrate Judge

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