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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Michael Grady; Jennifer Grady, )

No. CV 11-2060-PHX-JAT

10

Plaintiffs, )

**ORDER**

11

vs. )

12

Bank of Elmwood; Elmwood Financial )  
Corporation; Jonathan Levin; Sarah Levin, )

14

Defendants. )

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Tri City National Bank, )

16

Counterclaimant, )

17

vs. )

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Michael Grady and Jennifer Grady, )

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Counterdefendant. )

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The Federal Deposit Insurance )  
Corporation as Receiver for Bank of )  
Elmwood, )

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Intervenor. )

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Pending before the Court is Jess and Jane Doe Levin, Michael D. and Jane Doe Benben, Jr., David C. and Jane Doe Easley, S. John and Jane Doe May, and William H. Pugh and Jane Doe Pugh, III's motion to dismiss for failure to serve pursuant to Federal Rule of Civil Procedure 4(m).

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Everyone agrees that service of the amended complaint was due by September 21,

1 2012. Everyone agrees that counsel for these Defendants agreed to waive service on their  
2 behalf 102 days before this deadline expired. Everyone further agrees that Plaintiffs had the  
3 identity of all of these Defendants 93 days before this deadline.<sup>1</sup> Everyone finally agrees that  
4 Plaintiffs failed to serve any of these Defendants within 120 days as is required by Rule 4(m).  
5 After these Defendants moved to dismiss, Plaintiff filed a motion for extension of time to  
6 serve claiming that the failure to send the waivers to defense counsel was “a simple  
7 oversight.”

## 8 **I. Legal Standard**

9 There are “two avenues for relief[ ]” under Rule 4(m). *Lemoge v. United*  
10 *States*, 587 F.3d 1188, 1198 (9th Cir.2009). “The first is mandatory[.]” *Id.*  
11 (citation and footnote omitted). Based upon the plain language of that Rule,  
12 “the district court must extend time for service upon a showing of good cause.”  
13 *Id.* (citation and footnote omitted). “The second is discretionary [.]” *Id.*  
14 (citation omitted). Notwithstanding Rule 4(m), “if good cause is not  
15 established, the district court may extend time for service upon a showing of  
16 excusable neglect.” *Id.* (citation omitted).

17 Engaging in the “two-step analysis” which the Ninth Circuit “requires[,]” the  
18 court will first consider whether on this record there is good cause, thus  
19 mandating an extension of time for service under Rule 4(m). *See In re*  
20 *Sheehan*, 253 F.3d at 512. Courts must determine whether good cause “has  
21 been shown on a case by case basis.” *Id.* (citation omitted).

22 *Trueman v. Johnson*, 2011 WL 6721327, \*3 (D. Ariz. December 21, 2011).

### 23 **A. Good Cause**

24 To establish good cause, Plaintiffs must show: 1) excusable neglect; 2) the party to  
25 be served received actual notice of the suit; 3) the party to be served would suffer no  
26 prejudice; and 4) Plaintiffs would suffer sever prejudice if the complaint were dismissed. *Id.*  
27 (citing *Lemoge*, 587 F.3d at 1198).

28 In this case, Plaintiffs make no argument that they can show good cause. *See Doc.*  
101 at 4 (arguing only excusable neglect). Accordingly, the Court finds that they have failed  
to meet this test.

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<sup>1</sup> Plaintiffs make an argument that the first 27 days of their 120 days was spent attempting to learn the names of the spouses named in the amended complaint as Does. However, all parties agree that Defendants’ counsel provided these names by June 21, 2012.



1           “Prejudice to defendants ‘requires greater harm than simply that relief would delay  
2 the resolution of the case.’” *Trueman*, 2011 WL 6721327, \*4 (quoting *Lemoge*, 587 F.3d at  
3 1196). Here, the only prejudice articulated by the Defendants is delay, and how that delay  
4 impacts them. Under *Lemoge*, delay alone is inadequate to be prejudice. However, given  
5 these Defendants’ unique professional status where, as bank officers and directors, they must  
6 continue to report this outstanding litigation in their professional capacities, the delay against  
7 them is more acute than all litigants general desire for cases to be resolved. Thus, the Court  
8 finds this factor weighs against extending time to serve.

## 9                           **2. Length of Delay and its Impact on the Proceedings**

10           The length of delay from when Plaintiffs could have undisputedly sent waivers of  
11 service to the non-served Defendants’ counsel, June 21, 2012, to today is over five months.  
12 This is significant in this case which has been pending over three years (including the time  
13 in state court). Due to the age of this case, discovery closes January 31, 2013 and dispositive  
14 motions are due February 21, 2013. Had Plaintiffs promptly served Defendants in June, they  
15 likely could have completed discovery within the Court’s deadlines. Now, Plaintiffs seek  
16 an additional 60 days to serve, which would mean these Defendants would not be served by  
17 this Court’s discovery deadline, necessitating that the Court, and the other Defendants reopen  
18 discovery due to Plaintiffs’ delay.<sup>2</sup> Thus, this factor weighs against extending time to serve.

## 19                           **3. Reason for Delay**

20           The only reason Plaintiffs give for their delay is “oversight.” Defendants argue this  
21 is the equivalent of giving no reason at all.

22           If this Court were in a position of evaluating this factor without guidance from the  
23 Court of Appeals, the Court might be inclined to agree with Defendants that “excusable”  
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25                           <sup>2</sup> Separately pending is Plaintiffs’ motion to extend deadlines because Plaintiffs failed  
26 to timely disclose certain experts. Thus, Plaintiffs might argue that these deadlines may be  
27 extended regardless, so there is no delay. However, the Court finds that, even if the Court  
28 ultimately extends these deadlines, Plaintiffs failure to meet certain deadlines should not  
work to Plaintiffs’ benefit in Plaintiffs’ failure to meet other deadlines.

1 neglect should require an “excuse.” However, the Court of Appeals has instructed that  
2 excusable neglect encompasses “negligence” and “carelessness.” *Lemoge*, 587 F.3d at 1192.  
3 Plaintiffs’ reason for not serving is both negligent and careless. Thus, this factor weighs in  
4 favor of allowing the extension.

#### 5 **4. Movants’ Good Faith**

6 Defendants argue that Plaintiffs’ entire use of the judicial system to avoid the  
7 Trustee’s Sale of their house had been in bad faith. Doc. 105 at 4. Such an argument, even  
8 if true, does not speak to whether Plaintiffs acted in bad faith in their failure to timely serve  
9 the newly named Defendants. Plaintiffs state that their oversight in failing to serve was in  
10 good faith. The Court finds this fact weighs in favor of extending time to serve.

#### 11 **5. Prejudice to Movants**

12 Plaintiffs argue they will be prejudiced if the Court does not extend time for service.  
13 Specifically, Plaintiffs’ argue:

14 There are several counts in the Amended Complaint alleged against the  
15 individual defendants for negligence, negligence per se, fraud, consumer fraud,  
16 and similar such violations. The statute of limitations for those torts range  
17 from one (1) year to three (3) years. As the Complaint set[s] forth in detail, the  
18 operative facts on which those claims are based primarily occurred in 2008 —  
19 over four years ago.

20 Doc. 101 at 5.

21 The problem with Plaintiffs’ argument is that when Plaintiffs’ filed the amended  
22 complaint on May 24, 2012, the statute of limitations had already run. Indeed, the Court  
23 denied leave to amend to add a slander claim because the statute of limitations had run; and  
24 as a result, such amendment would have been futile. Doc. 47 at 8. Thus, while Plaintiffs are  
25 correct that, legally, the running of a statute of limitations would weigh in their favor for  
26 extending time to serve,<sup>3</sup> in this case, based on Plaintiffs’ own argument, the statute of  
27 limitations will have run either way. Thus, this factor weighs against extending the time to  
28 serve.

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<sup>3</sup> See, e.g., *Efaw*, 473 F.3d at 1041.

1 **II. Conclusion**

2 Having weighed the non-exhaustive factors articulated by the Court of Appeals, the  
3 Court finds that two factors favor extending time to serve and two factors favor not extending  
4 time to serve. Further, the optional factor weighs against extending the time to serve. In  
5 addition to these factors, the Court will consider all of the circumstances surrounding this  
6 equitable decision. *See Lemoge*, 587 F.3d at 1192.

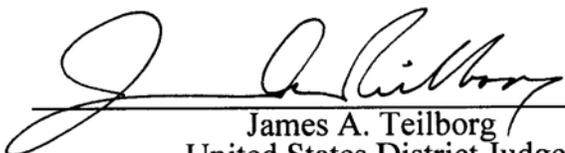
7 Due to the age of this case, and the fact that the circumstances giving rise to this case  
8 have been known to Plaintiffs since 2008, the Court will not extend time to serve. The need  
9 of the Court, the Defendants and the public to resolve this litigation (which was commenced  
10 in state court on July 10, 2009) weighs heavily in favor of not extending discovery with  
11 newly added Defendants. Further, due to the statute of limitations issues raised by Plaintiffs,  
12 even if the Court were to extend time, service would be futile.

13 Based on the foregoing,

14 **IT IS ORDERED** that Plaintiffs’ motion to extend time to serve (Doc. 101) is denied.

15 **IT IS FURTHER ORDERED** that the Motion to Dismiss (Doc. 94) of Jess and Jane  
16 Doe Levin, Michael D. and Jane Doe Benben, Jr., David C. and Jane Doe Easley, S. John and  
17 Jane Doe May, and William H. Pugh and Jane Doe Pugh, III for failure to serve is granted;  
18 the Clerk of the Court shall terminate these Defendants.

19 DATED this 13th day of December, 2012.

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23 James A. Teilborg  
24 United States District Judge  
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