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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Tiffany Truong)

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Plaintiff,)

CV 12-1700-PHX-JAT

10

vs.)

ORDER

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LVNV Funding LLC; Blatt Hasenmiller,)
Leibsker & Moore, LLC; and Katherine J.)
Merolo,)

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Defendants.)

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On December 20, 2012, this Court required Plaintiff to appear on January 10, 2013 and show cause why this case should not be dismissed for failure to serve. The Court held the hearing on January 10, 2013, and Plaintiff did not appear, nor did Plaintiff file anything. As a result, the Court dismissed this case due to Plaintiff's failure to properly serve (in accordance with this Court's order of August 14, 2012) any of the Defendants within the time limits of Federal Rule of Civil Procedure 4(m).

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Over three months later, Plaintiff filed a motion for reconsideration of the dismissal. Because judgment was never entered, the motion is not time barred under Federal Rule of Civil Procedure 59 or 60. However, motions for reconsideration must be filed under Local Rule Civil 7.2(g)(2) within 14 days of the order on which the party seeks reconsideration. Based on this rule, Plaintiff's motion for reconsideration is untimely.

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Moreover, Plaintiff's motion fails on the merits. Specifically, the Court held the January 10, 2013 hearing to address service. In her motion for reconsideration, Plaintiff's

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1 sole argument as to service is:

2 Plaintiff asks the Court's [sic] to allow Plaintiff to provide appropriate service
3 on defendants. Plaintiff promises to obey all future court orders and deadlines.
4 Plaintiff needs the assistance of the Court in order to pursue Plaintiff's FDCPA
and FRAUD complaint. Therefore, Plaintiff asks that the Court consider
reopening Plaintiff's case.

5 Doc. 14.

6 There are two avenues for relief under Rule 4(m) (*see Lemoge v. United States*, 587
7 F.3d 1188, 1198 (9th Cir.2009)):

- 8 • "The first is mandatory[.]"*Id.* (citation and footnote omitted). Based upon the plain
9 language of that Rule, "the district court **must** extend time for service upon a showing
10 of good cause." *Id.* (citation and footnote omitted).
- 11 • "The second is discretionary [.]"*Id.* (citation omitted). Notwithstanding Rule 4(m),
12 "if good cause is not established, the district court **may** extend time for service upon
13 a showing of excusable neglect." *Id.* (citation omitted).

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

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

20 **A. Good Cause**

21 To establish good cause, Plaintiff must show:

- 22 1) excusable neglect;
- 23 2) the party to be served received actual notice of the suit;
- 24 3) the party to be served would suffer no prejudice; and
- 25 4) Plaintiff would suffer severe prejudice if the complaint were dismissed. *Id.* (citing

26 *Lemoge*, 587 F.3d at 1198).

27 **B. Excusable Neglect**

28 In the absence of good cause, the court must proceed to the second step of the
analysis, and decide whether, in its discretion, to extend the prescribed time for
service of the FAC. The Ninth Circuit has declined to "articulate a specific
test that a court must apply in exercising its discretion under Rule 4(m)[.]"
noting "that, under the terms of the rule, the court's discretion is broad." *Gill*
v. Waikiki Lanai, Inc., 2011 WL 3648772, at *7 (D.Hawai'i Aug.18, 2011)

1 (quoting *In re Sheehan*, 253 F.3d at 513 (citation omitted)).

2 *Trueman*, 2011 WL 6721327 at *5.

3 However, that broad discretion is not limitless. *Efaw v. Williams*, 473 F.3d 1038,
4 1041 (9th Cir. 2007). “To determine whether a party’s failure to meet a deadline constitutes
5 ‘excusable neglect,’ courts must apply a four-factor equitable test... .” *Trueman*, 2011 WL
6 6721327 at *5.

7 That four factor equitable test requires, at a minimum, examination of:

8 (1) the danger of prejudice to the opposing party;¹

9 (2) the length of the delay and its potential impact on judicial proceedings;

10 (3) the reason for the delay;² and

11 (4) whether the movant acted in good faith.

12 *Ahanchian v Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010).

13 Those four enumerated factors are “not an exclusive list[,]” however. *Lemoge*,
14 587 F.3d at 1195 (internal quotation marks and citation omitted). “In some
15 circumstances, the prejudice a denial would cause to the movant must also be
16 considered, but it is not a fact that must be assessed in each and every case.”
S.E.C. v. Platforms Wireless Int’l Corp., 617 F.3d 1072, 1092 (9th Cir.2010)
(internal quotation marks and citation omitted).

17 *Trueman*, 2011 WL 6721327 at *6.

18 First, because Plaintiff has offered no reason for her failure to timely serve, she has
19 not shown “good cause.” Second, the Court must consider excusable neglect. The Court
20 does not have any evidence of whether there will be prejudice to the opposing party. The
21 length of the delay, between when service was due, December 9, 2012, and when Plaintiff
22 moved for reconsideration, April 17, 2013, is over four months. Plaintiff has offered no

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24 ¹“Prejudice to defendants ‘requires greater harm than simply that relief would delay
25 the resolution of the case.’” *Trueman*, 2011 WL 6721327, *4 (quoting *Lemoge*, 587 F.3d at
1196).

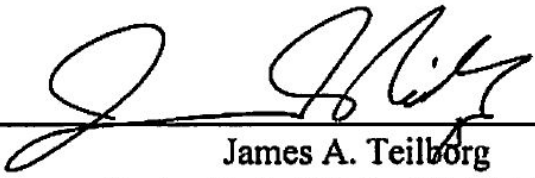
26 ²The Court of Appeals has instructed that excusable neglect encompasses
27 “negligence” and “carelessness.” *Lemoge*, 587 F.3d at 1192.

1 reason for either her delay in serving nor her delay in seeking reconsideration. Finally,
2 Plaintiff has offered no evidence that she has proceeding in good faith. However, not timely
3 serving, not attending a Court ordered hearing, and not seeking timely reconsideration of an
4 order all evidence a lack of diligence which undercuts any argument that Plaintiff is in good
5 faith making her best efforts to timely serve and prosecute this case. Thus, Plaintiff has
6 failed to establish that the excusable neglect factors favor an extension of time.

7 Accordingly, **IT IS ORDERED** Plaintiff's motion for reconsideration (Doc. 14) is
8 denied as untimely. Alternatively, it is denied on the merits as she has failed to show that she
9 is entitled to an extension of time to serve.

10 **IT IS FURTHER ORDERED** that consistent with this Court's order of January 10,
11 2013, the Clerk of the Court shall enter judgment of dismissal, without prejudice.

12 DATED this 27th day of September, 2013.

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17 James A. Teilborg
18 Senior United States District Judge
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