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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Jose Carlos Guerrero Torres,

No. CV-13-2300-PHX-LOA

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Plaintiff,

**ORDER**

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vs.

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Carolyn W. Colvin, Acting  
Commissioner of Social Security  
Administration,

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Defendant.

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This Social Security appeal is again before the Court on the Plaintiff’s Motion to  
16 Allow Plaintiff to Proceed with Claim. (Doc. 20) Despite acknowledging that he has not  
17 fully complied with the service requirements on the “United States” pursuant to Rule 4(i),  
18 Plaintiff invites the Court “[t]o allow the case to move forward on its merits and direct  
19 Defendants to file their Answer. (*Id.* at 2) Despite established authority to the contrary,  
20 Plaintiff has not provided the Court with any case law or other authority that a district court  
21 may disregard Rule 4’s formalities for service of process when an unserved defendant  
22 purportedly has actual notice of an action or appeal.<sup>1</sup> The Court declines Plaintiff’s invitation

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<sup>1</sup> See, e.g., *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347  
(1999) (“An individual or entity named as a defendant is not obliged to engage in litigation  
25 unless notified of the action, and brought under a court’s authority, *by formal process.*”  
26 (emphasis added); *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) (“Neither  
27 actual notice, nor simply naming the person in the caption of the complaint will subject  
28 defendant[ ] to personal jurisdiction if service was not made in substantial compliance with  
Rule 4.”). “Service of process (in the absence of a voluntary appearance or a conscious  
waiver) is an indispensable prerequisite to the court’s jurisdiction to proceed.” *Liao v.*

1 to disregard the formalities of service, but will generously construe Plaintiff’s motion as  
2 requesting another extension of time to effectuate valid service. (Doc. 16) The Commissioner  
3 of the Social Security Administration (“SSA”) has not appeared in this District Court matter  
4 to date.<sup>2</sup>

### 5 **I. Background**

6 Plaintiff filed a complaint on November 11, 2013, appealing the Commissioner’s  
7 adverse ruling at the administrative level of his claim for Social Security disability benefits.  
8 (Doc. 1) Plaintiff requested *in forma pauperis* status so he could proceed without prepaying  
9 a filing fee or service-of-process costs. (Doc. 2) After screening the complaint pursuant to  
10 28 U.S.C. § 1915(e)(2), the Court ordered Plaintiff to file an amended complaint because it  
11 failed to state a claim upon which relief could be granted. (Doc. 6) Plaintiff consented to  
12 magistrate-judge jurisdiction on December 3, 2013, and filed a timely amended complaint  
13 on December 9, 2013. (Docs. 7-8) Upon his counsel’s request that Plaintiff be responsible  
14 for service of the summons and complaint, which is contrary to Rule 4(c)(3), Fed.R.Civ.P.,  
15 the Court ordered that Plaintiff be responsible for service of process on the Commissioner.  
16 (Doc. 9)

17 After issuing a Rule 16 scheduling order, the Court ordered Plaintiff to take certain  
18 actions, on or before May 30, 2014, or this appeal would be dismissed without prejudice for  
19 lack of prosecution or failure to serve process within 120 days per Rule 4(m) without further  
20 notice.(Doc. 15) In a prompt response to the Court’s May 19, 2014 Order to Show Cause,  
21 Plaintiff moved for an extension of time to serve process, explaining various challenges  
22 several attorneys encountered in representing Plaintiff and attempting to timely serve  
23 process. (Doc. 16) Plaintiff requested a 6-day extension of time to serve process, representing  
24 these challenges resulted in the “Defendants” being served with the amended complaint

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26 *Ashcroft*, 2009 WL 636191 (N.D. Cal. March 11, 2009) (citing *Beecher v. Wallace*, 381 F.2d  
27 372, 373 (9th Cir. 1967)).

28 <sup>2</sup> Plaintiff’s counsel appears to use the terms “United States” and “Commissioner”  
synonymously.

1 “[o]n March 17, 2014 - six days after the 120 days expired on March 11, 2014.” (*Id.* at 1,  
2 Exhs. 1 and 2). The Court found that “excusable neglect resulted in Plaintiff’s failure to  
3 serve the Commissioner within 120 days after the complaint was filed.” (Doc. 17 at 3) The  
4 Court granted Plaintiff an extension to serve the Commissioner and retroactively extended  
5 the service-of-process deadline to March 17, 2014, the date Plaintiff’s counsel requested.  
6 (*Id.*) In its Order, the Court did not express an opinion whether Plaintiff had lawfully served  
7 the Commissioner pursuant to Rule 4(i), Fed.R.Civ.P.

8 On July 3, 2014, Plaintiff filed the pending motion, indicating that Plaintiff served the  
9 Office of General Counsel and the United States Attorney General on March 17 and March  
10 25, 2014, respectively. (Doc. 20 at 1) He indicates that “[u]nfortunately, summons were (sic)  
11 not issued to the civil process clerk at the Attorney General’s office by mistake.” (*Id.*)  
12 Plaintiff represents the “Attorney General’s” office in Phoenix was notified of the case by  
13 phone call on May 19, 2014, and that “[t]wo out of three of the agencies have been served  
14 and the Attorney General’s office in Phoenix is well aware of the case[, but] [t]he Attorney  
15 General’s Office has indicated to Plaintiff’s attorneys that they will not waive the final  
16 service of process.” (*Id.* at 2) According to Plaintiff, “[d]elaying the case further or  
17 dismissing the case would harm only Plaintiff . . . Therefore, we ask the Court to allow the  
18 case to move forward on its merits and direct Defendants to file their Answer.” (*Id.*)

## 19 **II. Service of Process**

### 20 **A. Generally**

21 “A federal court is without personal jurisdiction over a defendant unless the defendant  
22 has been served in accordance with Fed.R.Civ.P. 4.” *Benny v. Pipes*, 799 F.2d 489, 492 (9th  
23 Cir. 1986) (citation omitted); *see also S.E.C. v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007).  
24 “Rule 4 is a flexible rule that should be liberally construed so long as a party receives  
25 sufficient notice of the complaint.” *United Food & Commercial Workers Union v. Alpha*  
26 *Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984) (citations omitted). “Indeed, ‘the purpose of  
27 service is to give the defendant notice of the institution of the proceedings.’” *Sweeney v.*  
28 *Darricarrere*, 2009 WL 2132696, at \*4 (D. Ariz. July 14, 2009) (quoting Charles A. Wright

1 & Arthur R. Miller, *Federal Practice and Procedure*, Civil 3d § 1094 at 511). “However,  
2 Rule 4 is a flexible rule that should be liberally construed so long as a party receives  
3 sufficient notice of the complaint.” *Direct Mail Specialists, Inc. v. Eclat Computerized*  
4 *Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (citation and internal quotation marks  
5 omitted). “Nonetheless, without substantial compliance with Rule 4 neither actual notice nor  
6 simply naming the defendant in the complaint will provide personal jurisdiction.” *Id.*  
7 (citation and internal quotation marks omitted).

### 8 **B. Extensions of Time to Serve Process**

9 Federal Rule of Civil Procedure 4(m) provides that an action against a defendant  
10 shall be dismissed without prejudice if that defendant is not served with a copy of the  
11 summons and complaint within 120 days after the filing of the complaint, unless the plaintiff  
12 can show good cause why service was not made within the 120 day period. The 120-day rule  
13 “is intended to force parties and their attorneys to be diligent in prosecuting their causes of  
14 action.” *Townsel v. Contra Costa Cnty.*, 820 F.2d 319, 320 (9th Cir. 1987).

15 An appeal to a district court from an adverse ruling on a Social Security benefits  
16 claim may be dismissed for failure to properly serve the Commissioner. *See White v.*  
17 *Commissioner of Social Sec.*, 2014 WL 1027523 (E.D. Cal. March 17, 2014); *Bodner v.*  
18 *Colvin*, 2014 WL 1577477 (D. Nev. April 17, 2014); *Synnestvedt v. Astrue*, 2010 WL  
19 125649 (W.D. Okla. Jan. 7, 2010). Where service is made properly on the United States  
20 Attorney, but the complaint names the organization of the United States being sued instead  
21 of the United States, service is still proper upon the United States. *Doe v. Hagee*, 473  
22 F.Supp.2d 989 (N.D. Cal. 2007).

23 A district court has broad discretion in deciding whether to extend the time for service  
24 of process. *U.S. v. 164 Watches, More or Less Bearing on Registered Trademark of Guess?*  
25 *Inc.*, 366 F.3d 767, 772 (9th Cir. 2004); *In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001).  
26 A district court may, for instance, extend time for service retroactively after the 120-day  
27 service period has expired. *See Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir.  
28 2003). If the court does not find good cause to extend time for service as contemplated under

1 Rule 4(m), a court may nevertheless extend the time for service upon a showing of excusable  
2 neglect. *Lemoge v. U .S.*, 587 F.3d 1188, 1198 (9th Cir. 2009) (citing *In re Sheehan*, 253  
3 F.3d at 512-14). Factors to consider in the exercise of that wide discretion are, *inter alia*,  
4 whether the defendant has suffered prejudice in the delay of service and would the plaintiff  
5 be severely prejudiced if his complaint were dismissed. *Id.* (quoting *Boudette v. Barnette*,  
6 923 F.2d 754, 756 (9th Cir. 1991)).

### 7 **C. Service on the United States or its Agencies**

8 Federal Rule of Civil Procedure 4(i) dictates how a plaintiff effectuates service upon  
9 the United States and its agencies, corporations, officers, or employees. Under Rule 4(i)(1),  
10 Fed.R.Civ.P., a party must first deliver copies of the summons and complaint to the United  
11 States Attorney for the district where the action is brought (or to an Assistant United States  
12 Attorney or designated clerical employee), or send copies of each by registered or certified  
13 mail to the civil-process clerk at the United States Attorney's Office. *See* Rule  
14 4(i)(1)(A)(i)-(ii), Fed.R.Civ.P. A party must also send copies of the summons and complaint  
15 by registered or certified mail to the Attorney General of the United States at Washington,  
16 D.C. *See* Fed.R.Civ.P. 4(i)(1)(B).

17 Importantly for this case, in order to serve a United States agency, like the Social  
18 Security Administration, or the SSA's Commissioner if sued in her official capacity, original  
19 process must be served upon the agency or employee if a named defendant by (1) serving  
20 the United States pursuant to Fed.R.Civ.P. 4(i)(1)(A),(B); and (2) sending a copy of the  
21 summons and complaint by registered or certified mail to the federal agency or employee  
22 named as a defendant. *See* Rule 4(i)(2),<sup>3</sup> Fed.R.Civ.P.; *Salas v. Dyer*, 2011 WL 1158570, at  
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24 <sup>3</sup> Federal Rule of Civil Procedure 4(i)(2) provides as follows:

25 **(2) Agency; Corporation; Officer or Employee Sued in an Official**  
26 **Capacity.** To serve a United States agency or corporation, or a United States  
27 officer or employee sued only in an official capacity, a party must serve the  
28 United States [in the manner prescribed in Rule 4(i)(1)] and also send a copy  
of the summons and of the complaint by registered or certified mail to the  
agency, corporation, officer, or employee.

1 \*3 (D. Ariz. March 10, 2011), report and recommendation adopted by 2011 WL 1156749  
2 (D. Ariz. March 29, 2011).

3 Contrary to Plaintiff's apparent belief, the United States cannot waive service of  
4 process. *See Constien v. U.S.*, 628 F.3d 1207, 1213 (10th Cir. 2010) (citing Rule 4, advisory  
5 committee's note, 1993 Amendments) ("The United States is not expected to waive service  
6 for the reason that its mail receiving facilities are inadequate to assure that the notice is  
7 actually received by the correct person in the Department of Justice."), *cert. denied, Constien*  
8 *v. U.S.*, 131 S.Ct. 2884 (2011). The Federal Rules also provide a "cure provision." Rule  
9 4(i)(4), Fed.R.Civ.P., states that "[t]he court must allow a party a reasonable time to cure its  
10 failure to . . . serve a person required to be served under Rule 4(i)(2), if the party has served  
11 either the United States attorney or the Attorney General of the United States." 4(i)(4),  
12 Fed.R.Civ.P.; *Wright v. Colvin*, 2014 WL 325647 (D. Neb. Jan. 29, 2014).

### 13 **III. Discussion**

14 Here, Plaintiff appears to be attempting to serve the United States, a non-party, rather  
15 than the SSA's Commissioner, the only party-defendant sued herein in her official capacity.  
16 *See* Rule 4(i)(2), Fed.R.Civ.P.

17 The Court finds that excusable neglect resulted in Plaintiff's failure to serve the  
18 Commissioner by the extended service-of-process deadline of March 17, 2014, the date  
19 Plaintiff's counsel misrepresented, likely inadvertently, the Commissioner was lawfully  
20 served. Clearly, Plaintiff's counsel is inexperienced with the federal rules for service and the  
21 Court will not prejudice Plaintiff for his lawyer's inadequacies at this time. The Court  
22 discerns the Commissioner will suffer no prejudice if the Court allows one final extension.  
23 Moreover, if the Court dismisses this appeal without prejudice, Plaintiff's appeal will likely  
24 be time-barred, if re-filed.

25 The Court will retroactively extend the service deadline to Friday, August 15, 2014  
26 to properly serve the Commissioner. Plaintiff and his counsel are forewarned that, due to the

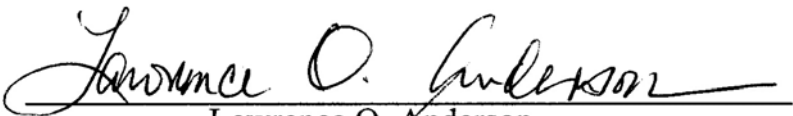
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28 Rule 4(i)(2), Fed.R.Civ.P.

1 age of this appeal, Plaintiff's failure to lawfully serve the Commissioner by the August 15,  
2 2014 deadline, will result in the dismissal of this appeal. *See Jackson v. Hayakawa*, 682 F.2d  
3 1344, 1347 (9th Cir. 1982).

4 Based on the foregoing,

5 **IT IS ORDERED** that Plaintiff's Motion to Allow Plaintiff to Proceed with Claim,  
6 doc. 20, is **DENIED**. In the interest of justice and pursuant to Rule 4(i)(4), Fed.R.Civ.P., the  
7 Court hereby extends the time to properly serve the Commissioner with process from March  
8 17, 2014, *nunc pro tunc*, to **Friday, August 15, 2014**, a reasonable time to complete service.  
9 There shall not be any additional extensions to properly serve the Commissioner with  
10 process. Plaintiff's failure to properly serve the Commissioner by the August 15, 2014 will  
11 result in the dismissal of this appeal.

12 Dated this 30th day of July, 2014.

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15 Lawrence O. Anderson  
16 United States Magistrate Judge  
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