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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 SOUTHERN CALIFORNIA
19 INSTITUTE OF LAW, a California
20 corporation,

21 Plaintiff,

22 vs.

23 TCS EDUCATION SYSTEM, an
24 Illinois corporation; DAVID J.
25 FIGULI, an individual; and GLOBAL
26 EQUITIES, LTD. d/b/a HIGHER
27 EDUCATION GROUP, a Colorado
28 limited liability company,

Defendants.

CASE NO.: CV10-8026 PSG (AJWx)

[Assigned to Hon. Philip S. Gutierrez]

**PLAINTIFF'S RESPONSE TO ORDER
TO SHOW CAUSE REGARDING
DISMISSAL PURSUANT TO FED. R.
CIV. P. 4(m)**

Action Filed: Oct. 25, 2010

Hearing Date: None Set
Ctrm: 880

1 Plaintiff Southern California Institute of Law respectfully submits this
2 Response to the Court's Order To Show Cause Regarding Dismissal Pursuant to Fed.
3 R. Civ. P. 4(m), filed herein on April 4, 2011.

4 **I. INTRODUCTION**

5 Plaintiff filed its Complaint for Injunctive Relief and Damages on October 25,
6 2010 ("Complaint"). The Complaint was promptly served on defendant TCS
7 Education System ("TCS") and, as discussed below, extensive efforts then ensued to
8 serve defendants David J. Figuli ("Figuli"), a practicing Colorado attorney, and his
9 wholly-owned limited liability company, defendant Global Equities, LLC d/b/a
10 Higher Education Group ("Global").¹

11 There are three reasons why plaintiff was unable to serve these defendants
12 within the 120 day time frame. First, the residential and business address for the
13 defendants is in a remote part of Colorado behind an electric gate with no means for
14 contacting the occupants. Second, Figuli is a seasoned lawyer who is using his
15 resources and experience to evade personal service. Third, it was only after multiple
16 attempts to serve defendants personally and by substituted means that the plaintiff
17 finally succeeded using a substituted service procedure authorized by California law.
18 *See e.g., Neadeau v. Foster*, 129 Cal. App. 3d 234, 237 (1982) (holding that Code
19 Civ. Proc. § 415.40 authorizes substituted service on nonresident defendants or their
20 agents by certified mail). Substituted service was accomplished when Figuli's agent
21 signed for a certified mail envelope containing the summons, complaint and other
22 Court papers ("Service Papers"). The agent signed for envelopes containing the
23 Service Papers on three separate occasions in two different locations, including,
24 most particularly, for the papers mailed to defendants' business address which is also

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27 ¹ Global Equities, LLC was formerly known as "Global Equities, Ltd." *See* Declaration of George
28 A. Shohet ("Shohet Decl."), filed concurrently herewith, ¶ 3. Plaintiff will correct the name of this
defendant in its amended complaint which will be filed on or before April 26, 2011.

1 Figuli's residence. The agent signed for the last envelope mailed to the business and
2 residential address on April 7, 2011.

3 Good cause exists to grant plaintiff relief from Rule 4(m) and extend the 120
4 day time period. To dismiss Figuli and Global under the circumstances would only
5 reward evasive conduct and place the plaintiff in the position of having to begin the
6 chase again.² In addition, plaintiff was diligent in attempting service on these
7 defendants in spite of their evasiveness. Therefore, the Court should not dismiss
8 these defendants from the case.

9 **I. FACTUAL BACKGROUND**

10 On October 26, 2010, the day after the Complaint was filed, plaintiff's counsel
11 sent an e-mail to Figuli transmitting a copy of the Complaint and requesting that he
12 accept service on behalf of himself and Global. Shohet Decl. ¶ 2. The e-mail
13 address used to communicate with Mr. Figuli was the same e-mail address he
14 regularly used when communicating with the plaintiff during the parties'
15 negotiations regarding the potential acquisition of the plaintiff by TCS. *Id.* Figuli
16 was the key negotiator for TCS and was provided with the plaintiff's confidential
17 documents during the due diligence phase of the negotiation. Complaint, ¶20.
18 Given the fact that Mr. Figuli is an attorney, plaintiff's counsel wanted to extend him
19 the courtesy of accepting service through acknowledgment. Shohet Decl. ¶ 2.
20 However, plaintiff's counsel received no response to the e-mail. *Id.*

21 Using address information set forth on e-mail correspondence exchanged
22 between the plaintiff and Figuli, plaintiff's counsel identified defendants' business
23 address in Evergreen, Colorado (referred to herein as the "Blue Creek Road
24 address") and a United States Post Office Box that Figuli and Global use in Conifer,

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26 ²Plaintiff alleges, *inter alia*, claims for trade secret misappropriation against Figuli and Global and
27 intends to add a claim for tortious interference with contract against these defendants in its
28 amended complaint.

1 Colorado. *Id.* ¶ 4. Evergreen and Conifer are part of Jefferson County. *Id.* ¶ 6.
2 Plaintiff's counsel confirmed that the Blue Creek Road address is the official address
3 identified on the Colorado Secretary of State's web site for Global and Figuli, who is
4 identified as its agent for service of process. *Id.* ¶ 4.³ The Blue Creek Road address
5 was also identified as Figuli's address on the Colorado State Bar's web site. *Id.* In
6 addition, Figuli stated under oath in a declaration that he filed in a case before the
7 United States District Court for the District of Hawaii that the Blue Creek Road
8 address is his place of residence. *Id.*⁴

9 In addition plaintiff's counsel confirmed that the Conifer Post Office Box is
10 registered to Figuli and Global. *See* Declaration of Pamela Vaughn Regarding
11 Service of Process on Defendants David J. Figuli and Global Equities, LLC d/b/a
12 Higher Education Group ("Vaughn Decl."), filed concurrently herewith, ¶ 2. Ms.
13 Vaughn is the Postmaster of the Conifer Post Office. *Id.* ¶ 1.

14 Between November 9 and December 20, 2010, Deputy Sorenson of the
15 Jefferson County Sheriff's Department attempted service eight times on Figuli and
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17 ³ Federal courts may take judicial notice of information contained on government web sites. Fed.
18 R. Evid.201; *United States v. Bervaldi*, 226 F.3d 1256, 1266 n.9 (11th Cir. 2000) (taking judicial
19 notice of time of sunrise, as listed on the web page of the United States Naval Observatory); *Levan*
20 *v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1235 n.12 (11th Cir. 1999) (taking judicial notice of a
21 Prime Interest Rate, as provided on the Federal Reserve Board web site); *Modesto Irrigation Dist.*
22 *v. Pacific Gas & Elec. Co.*, 61 F. Supp. 2d 1058, 1066 (N.D. Cal. 1999) (taking judicial
23 notice of documents submitted to the Federal Energy Regulatory Commission because they were
24 available on that agency's web page); *Queen Insurance Company of America v. Larson*, 225 F.2d
25 46, 49 (9th Cir. 1955) (taking judicial notice of U.S. Weather Bureau's wind velocity
26 classifications). *Sanchez v. Canales*, 574 F.3d 1169, 1176 (9th Cir. 2009) (dissenting opinion). *Cf.*
27 *Kyllo v. United States*, 533 U.S. 27 (2001) (citing a National Law Enforcement and
28 Corrections Technology Center web site containing information on surveillance devices).

⁴ The Court may take judicial notice of the files of other federal courts pursuant to Fed. R. Evid.
201. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir..2001); *Doe v. Golden & Walters,*
PLLC, 173 S.W.3d 260, 264 (Ky.App. 2005) (PACER electronic database available on the internet
are "capable of accurate and ready determination" as would be hard copy records held by clerk of
court).

1 Global at the Blue Creek Road address. Declaration of Stuart Sorenson Regarding
2 Attempted Service of Process on Defendants David J. Figuli and Global Equities,
3 LLC d/b/a Higher Education Group ("Sorenson Decl."), filed concurrently herewith,
4 ¶¶ 4-11. These attempts were made at various times of day. *Id.* The dwelling at the
5 Blue Creek Road address is inaccessible. *Id.* ¶ 5. It is located in a wooded, hillside
6 area behind an electric gate with no intercom. *Id.* On November 29, 2010, Sherriff's
7 Deputy Sorenson telephoned Figuli and left a message on his voice mail explaining
8 that he was attempting service and requested a return call. *Id.* ¶ 7. Figuli never
9 called the Deputy back.⁵

10 In late November 2010, TCS and the plaintiff agreed to explore the possibility
11 of settlement. Shoet Decl. ¶ 7. A face-to-face meeting was scheduled in Los
12 Angeles for December 1, 2010. *Id.* Figuli was supposed to attend the meeting. *Id.*
13 A few hours before the meeting occurred, TCS's in-house counsel notified plaintiff's
14 counsel that Figuli was refusing to attend because he did not want to be served with
15 process. *Id.* TCS's counsel apologized about the sudden change and asked if it was
16 possible for Figuli to participate by telephone. *Id.* Figuli participated in the meeting
17 by telephone. *Id.*

18 On December 20, 2010, Deputy Sorenson made his last attempt at personally
19 serving Figuli and Global. Sorenson Decl., ¶11. After consulting with the Deputy,
20 plaintiff's counsel determined that personal service on Figuli would likely require
21 extraordinary effort and expense and could not be assured given Figuli's clear
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25 ⁵ Through their research, plaintiff's counsel obtained another address for Figuli which turned out to
26 be the former address for Figuli's law firm. Sorenson Decl. ¶ 3. The Figuli Law Group maintains
27 a web site at <http://figulilawgroup.com>. The web site contains no physical address for the firm,
28 only an e-mail address, telephone and fax numbers. Shoet Decl. ¶ 5. Figuli is identified on the
web site as a "Partner" in the firm. *Id.*

1 intention to avoid service.⁶ Plaintiff's counsel then researched alternative means for
2 serving Figuli and Global. Under California law, the use of certified mail is a proper
3 means of substituted service on an out-of-state defendant. However, it is necessary
4 to serve the defendant by either obtaining the defendant's signature on the delivery
5 notice or that of the defendant's employee or agent. *Neadeau v. Foster, supra; Cruz*
6 *v. FagorAmerica*, 146 Cal. App. 4th 488, 496 (2007) (substituted service allowed
7 when defendant's employee who regularly received mail on defendant's behalf
8 signed the return receipt).

9 In February and March 2011, plaintiff's counsel mailed by certified mail
10 envelopes containing the Service Papers to the Blue Creek Road address and
11 defendants' post office box in Conifer. Shoet Decl. ¶¶ 8-10 and 12-13. One Hilarie
12 Anderson accepted delivery of three of the envelopes; two that were sent to the
13 Conifer post office box and one that was sent to the Blue Creek address. *Id.* Ms.
14 Anderson signed for the envelopes sent to defendants' Post Office box on February
15 15 and April 6, 2011. *Id.* On April 7, 2011, she signed for the envelope addressed
16 to the Blue Creek Road address -- the official business address for Global and Figuli
17 and Figuli's residential address. *Id.* ¶ 13.

18 Proof that Ms. Anderson is Figuli's agent is shown by the fact that she recently
19 filed an Annual Report for Global with the Colorado Secretary of State's office. *Id.*
20 ¶ 11. The report was filed under penalty of perjury with Ms. Anderson confirming
21 the accuracy of the information set forth in the report. *Id.* In that filing, Ms.
22 Anderson identifies her address as the Blue Creek Road address. *Id.* She further
23 identifies Figuli as Global's agent for service of process and that both Figuli and
24 Global are located at the Blue Creek Road address. *Id.* Plaintiff requests that the
25 Court take judicial notice of that filing which is attached to the Shoet Decl. as
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27 ⁶ In 2009, Deputy Sorenson had unsuccessfully attempted service on Figuli in an unrelated case.
28 Sorenson Decl. ¶ 12.

1 Exhibit 11. See authorities cited in footnote 3, *supra*. Further evidence of Ms.
2 Anderson's status as defendants' agent is shown by the fact that there were only two
3 keys issued to Figuli for the Conifer post office box. Vaughn Decl. ¶ 4. On two
4 separate occasions Ms. Anderson collected the delivery notice from that box and
5 then collected the envelopes from the Conifer Post Office which contained the
6 Service Papers. Vaughn Decl. ¶ 3; Shohet Decl. ¶ 13. She also signed for an
7 envelope containing the Service Papers which was mailed to defendants' the Blue
8 Creek Road address. Shohet Decl. ¶ 12.

9 **II. GOOD CAUSE EXISTS FOR GRANTING THE PLAINTIFF RELIEF**
10 **FROM THE 120 DAY RULE**

11 Rule 4(m) of the Federal Rules of Civil Procedure requires service of process
12 on a defendant to be made within 120 days of the filing of the complaint. The
13 purpose of Rule 4(m) is to assure that defendants will be promptly notified of the
14 lawsuit, thereby preventing possible prejudice resulting from delay, such as loss of
15 evidence, dimming of witnesses' memories, etc. See *Electrical Specialty Co. v.*
16 *Road & Ranch Supply, Inc.*, 967 F.2d 309, 311 (9th Cir. 1992). If the Court
17 dismisses a defendant from a case under the rule, it should do so "without prejudice"
18 to the plaintiff's right to refile. Fed. R. Civ. P. 4(m); *Bowling v. Hasbro, Inc.*, 403
19 F.3d 1373, 1376 (Fed. Cir. 2005); *Power v. Starwalt*, 866 F.2d 964, 966 (7th Cir.
20 1989).

21 Rule 4(m) is not absolute. If good cause exists for delay in accomplishing
22 service, "the court *must* extend the time for service by an appropriate period." *Id.*
23 (*emphasis added*). Even if good cause does not exist, the Court may in its discretion
24 extend the time period. *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001). Relief
25 from the 120 day rule may be obtained before or *after* the expiration of the period.
26 *Mann v. American Airlines*, 324 F. 3d 1088, 1090 (9th Cir. 2003); *see also United*
27 *States v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006).

1 Although Rule 4(m) does not define good cause, it is usually equated with
2 "excusable neglect" under Rule 6(b)(1)(B), Fed. R. Civ. P. *MCI*
3 *Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F. 3d 1086, 1097 (3rd. Cir.
4 1995). Whether good cause exists is determined on a case by case basis. *In re*
5 *Sheehan*, 253 F.3d at 512. A plaintiff may show good cause where it has attempted
6 to serve a defendant but had not yet completed it, it was confused about the
7 requirements for service of process, or it was prevented from serving a defendant
8 because of events outside of its control. *Mateo v. M/S KISO*, 805 F. Supp. 792, 795
9 (N.D.Cal.1992) ((abrogated on other grounds by *Brockmeyer v. May*, 361 F.3d 1222,
10 1226 (9th Cir.2004)).

11 The courts have held that a defendant's attempt to evade service constitutes
12 good cause for plaintiff's delay in accomplishing service. *See e.g., Hendry v.*
13 *Schneider*, 116 F. 3d 446, 447, 449 (10th Cir. 1997) (defendant who successfully
14 avoided service for a span of nearly two months beyond the 120 day period was
15 precluded from contending that the plaintiff lacked good cause for the delay); *Ruiz*
16 *Valera v. Sanchez Velez*, 814 F.2d 821, 823-24 (1st Cir. 1987) ("Evasion of service
17 by a putative defendant constitutes good cause for failure of service"); *Intrade*
18 *Industries, Inc. v. Foreign Cargo Mgmt. Corp.*, No. 1:07-CV-1893 AWI GSA, 2008
19 WL 5397495, at **1-2 (E.D. Cal. Dec.24, 2008) ("Plaintiff provides evidence of
20 good faith attempts to serve Defendants. Whether Defendants are evading service or
21 merely businessmen who travel, it appears they have been difficult to ser[ve].").

22 Figuli has made it very difficult for the plaintiff to serve him personally. He
23 lives in a remote area behind a locked gate with no intercom, has no other known
24 physical address where he conducts his law practice or business and is evading
25 service.

26 In addition, delay in service which is attributable to settlement efforts may
27 constitute good cause. *Heiser v. Association of Apartment Owners of Polo Beach*

1 *Club*, 848 F. Supp. 1482, 1488 (D. Haw.1993).

2 The Complaint was filed on October 25, 2010 and the 120 period expired on
3 or about February 22, 2011. During the period from at least December 1, 2010
4 through January 28, 2011, plaintiff and TCS were actively engaged in a settlement
5 discussion. Shohet Decl. ¶¶ 7-8. Multiple drafts of a written memorandum of terms
6 were exchanged. *Id.* Although the plaintiff sought to serve Figuli and Global during
7 this period, the intensity of plaintiff's effort was reduced to avoid potential
8 distraction and expense. *Id.* ¶ 8. However, once it became apparent that a
9 settlement was not feasible, the plaintiff aggressively pursued its efforts at serving
10 these defendants again. *Id.*

11 The first set of certified mail envelopes were mailed to the defendants on
12 February 10, 2011 from Boulder, Colorado rather than here in Los Angeles. *Id.* ¶ 9.
13 The envelopes bore a return address in Boulder and were disguised to appear to be
14 ordinary business correspondence. *Id.* Ms. Anderson picked up the first envelope
15 at the Conifer Post Office on February 15, 2011. *Id.* ¶ 10; Vaughn Decl. ¶ 3. The
16 envelope addressed to the Blue Creek Road address was not picked up and
17 ultimately returned to the post office in Boulder. Shohet Decl. ¶ 10..

18 Rather than immediately send additional envelopes with the Service Papers to
19 the defendants, plaintiff's counsel waited a few weeks. *Id.* ¶ 12. This was done in an
20 effort to determine if, after the passage of some time, Ms. Anderson would again
21 collect the envelopes on defendants' behalf. *Id.* In March 2011, plaintiff's counsel
22 sent another set of envelopes containing the Service Papers by certified mail to
23 defendants' Conifer Post Office box and the Blue Creek Road address. *Id.* This
24 time the envelopes were conspicuously marked with large labels stating that they
25 contained the Service Papers for this case. *Id.* Both envelopes were delivered to
26 Ms. Anderson who took possession of the envelopes for Figuli and Global. *Id.*


1 On April 7, 2011, Ms. Anderson signed for the envelope addressed to Figuli
2 and Global at the Blue Creek Road address. *Id.* ¶¶ 12-13. Using this date as the
3 effective date for substituted service means that the plaintiff exceeded the 120 day
4 period by approximately 44 days. This relatively short delay has not prejudiced any
5 party in this case and is excusable in light of plaintiff's diligence, Figuli's
6 evasiveness and the parties' settlement discussions. *Id.* ¶ 14. A copy of this
7 Response and the supporting declarations are being served on Figuli and Global by
8 certified mail. *Id.*

9 **IV. CONCLUSION**

10 For good cause shown, plaintiff respectfully requests that the Court grant the
11 plaintiff relief from Rule 4(m). Alternatively, if the Court does not find that good
12 cause exists for the delay in serving Figuli and Global, plaintiff requests that the
13 Court exercise its discretion and refrain from dismissing the defendants from the
14 case.

15 DATED: April 17, 2011

16 THE LAW OFFICES OF GEORGE A. SHOJET
17 KREINDLER & KREINDLER LLP

18 
19 By: _____

20 George A. Shojet
21 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of the foregoing document via Central District of California CM/ECF system on April 18, 2011

/s/ George A. Shoheit

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