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6 **UNITED STATES DISTRICT COURT**  
7 **EASTERN DISTRICT OF CALIFORNIA**

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9 DONALD BARTON,

10 Plaintiff,

11 v.

12 NOW FOODS, INC., *et al.*,

13 Defendants.

Case No. 1:17-cv-1222-LJO-EPG

**FINDINGS AND RECOMMENDATIONS  
TO DISMISS THE ACTION WITHOUT  
PREJUDICE FOR FAILURE TO SERVE  
SUMMONS AND COMPLAINT IN  
COMPLIANCE WITH RULE 4 OF THE  
FEDERAL RULES OF CIVIL  
PROCEDURE**

(ECF Nos. 1, 6)

**FOURTEEN (14) DAY DEADLINE**

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16 Donald Barton (“Plaintiff”) commenced this product liability action by the filing of a  
17 Complaint on September 11, 2017. (ECF No. 1). The Court issued summonses as to Richard  
18 Elwood, Jim Emme, Now Foods Inc., and Whole Foods-FRS (“Defendants”) on September 11,  
19 2017. (ECF No. 2).

20 On February 12, 2018, the Court held a telephonic status conference. (ECF No. 6).  
21 Plaintiff advised the Court regarding the status of service on Defendants, and the Court set a  
22 new deadline to complete service of process of April 6, 2018. *Id.*

23 Rule 4(l) of the Federal Rules of Civil Procedure provides, in relevant part, “Unless  
24 service is waived, proof of service must be made to the court.” Furthermore, Rule 4(m)  
25 provides, in pertinent part:

26  
27 If a defendant is not served within 90 days after the complaint is  
28 filed, the court—on motion or on its own after notice to the  
plaintiff—must dismiss the action without prejudice against that

1 defendant or order that service be made within a specified time.  
2 But if the plaintiff shows good cause for the failure, the court  
3 must extend the time for service for an appropriate period.

4 More than 90 days have elapsed since the filing of the complaint in this action, and the  
5 court-ordered extended deadline for service of process has expired. To date, Plaintiff has failed  
6 to file proof of service of the summons and complaint upon the defendants in compliance with  
7 Federal Rules of Civil Procedure 4(l), and the defendants have not appeared in this action.  
8 Accordingly, the Court RECOMMENDS that this action be dismissed without prejudice.

9 These findings and recommendations will be submitted to the United States District  
10 Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within  
11 fourteen (14) days after being served with a copy of these findings and recommendations, any  
12 party may file written objections with the Court and serve a copy on all parties. Such a  
13 document should be captioned "Objections to Magistrate Judge's Findings and  
14 Recommendations." Any reply to the objections shall be served and filed within seven (7) days  
15 after service of the objections.

16 Failure to file objections within the specified time may result in the waiver of rights on  
17 appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (quoting *Baxter v. Sullivan*,  
18 923 F.2d 1391, 1394 (9th Cir. 1991)).

19 IT IS SO ORDERED.

20 Dated: May 24, 2018

21 /s/ Eric P. Groj  
22 UNITED STATES MAGISTRATE JUDGE  
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