

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF CALIFORNIA

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5	ERNEST ALTMANN,	)	
		)	
6	Plaintiff,	)	2:09-cv-02361-GEB-GGH
		)	
7	v.	)	<u>ORDER DENYING MOTION TO EXTEND</u>
		)	<u>TIME FOR SERVICE</u>
8	INDYMAC FEDERAL BANK; GREEN TREE	)	
	SERVICING, LLC; NATIONAL CITY	)	
9	MORTGAGE, A DIVISION OF NATIONAL	)	
	CITY BANK; FIRST BANK dba FIRST	)	
10	BANK MORTGAGE; QUALITY LOAN	)	
	SERVICE CORP.; BANK OF AMERICA;	)	
11	MORTGAGE ELECTRONIC REGISTRATION	)	
	SYSTEMS, INC.; REMIEN MORTGAGE	)	
12	FAMILY, INC.; ROBERT REMIEN;	)	
	GEORGE ROJAS,	)	
13		)	
	Defendants.	)	
14		)	

On December 9, 2009, Plaintiff was issued an order notifying Plaintiff under Rule 4(m) of the Federal Rules of Civil Procedure ("Rule 4(m)") "that **Defendants Remien Mortgage Family, Inc. and Robert Remien could be dismissed as defendants in this action under Rule 4(m) unless Plaintiff provides proof of service and/or 'shows good cause for the failure' to serve these defendants within Rule 4(m)'s 120 day prescribed period, in a filing due no later than 4:00 p.m. on December 23, 2009.**" (Order Continuing Status Conference 2:1-6.) (emphasis in original); see also Ruiz Varela v. Sanchez Velez, 814 F.2d 821, 823 (1st Cir. 1987) (stating that dismissal under predecessor Federal Rule of Civil Procedure Rule 4(j) "can be ordered on the court's initiative only with 'notice' to the plaintiff") Defendants Remien and Remien Mortgage (the "unserved Defendants") were named in Plaintiff's initial complaint filed on August 25, 2009, and have not yet been served.

1 (Compl. 2:5-7.) Under Rule 4(m)'s 120 day service period, the  
2 complaint was required to have been served on the unserved Defendants  
3 by December 23, 2009.

4 Plaintiff did not file a response to the Rule 4(m) dismissal  
5 notice. Instead, Plaintiff filed a "Motion for Enlargement of Time to  
6 Serve Defendants Robert Remien and Remien Mortgage Family, Inc." The  
7 motion is noticed for hearing on February 22, 2010. In this motion,  
8 Plaintiff "requests the Court grant him an additional 90 days to  
9 obtain the current address of Defendants Robert Remien and Remien  
10 Mortgage Family, Inc and perfect service." (Mot. for Enlargement of  
11 Time ("Mot.") 4:13-26.) Plaintiff motion merely states that  
12 "[n]umerous attempts have been made to serve Remien and Remien  
13 Mortgage. The addresses for Defendants Remien and Remien Mortgage are  
14 no longer good. However, research is being done through Lexis Nexis  
15 to locate new addresses for service." (Mot. 3:17-19.) In support,  
16 Plaintiff's counsel declares: "An additional search will be instituted  
17 through the people and business finder services of Lexis/Nexis. once  
18 new locations are discovered, the complaint will be sent out for  
19 service. Inquiry is also being made through the Secretary of State's  
20 office for newer public documents and information." (Lapin Decl. ¶  
21 13.)

22 "Rule 4(m) requires a two-step analysis in deciding whether  
23 or not to extend the prescribed time period for the service of a  
24 complaint." In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001) (citing  
25 Fed. R. Civ. P. 4(m)); see also Lemoge v. United States, 587 F.3d  
26 1188, 1198 (9th Cir. 2009) (outlining the "two avenues for relief"  
27 provided by Rule 4(m)). "First, upon a showing of good cause for the  
28 defective service, the court must extend the time period. Second, if

1 there is no good cause, the court has discretion to dismiss without  
2 prejudice or to extend the time period." Id.

3 "Good cause to avoid dismissal may be demonstrated by  
4 establishing, at a minimum, excusable neglect." Lemoge, 587 F.3d  
5 1188, 1198 n.3 (9th Cir. 2009) (citing Boudette v. Barnette, 923 F.2d  
6 754, 756 (9th Cir. 1991)). However, to bring excusable neglect "to  
7 the level of good cause" "a plaintiff may be required to show the  
8 following factors": "(a) the party to be served received actual notice  
9 of the lawsuit; (b) the defendant would suffer no prejudice; and (c)  
10 plaintiff would be severely prejudiced if his complaint were  
11 dismissed." In re Sheehan, 253 F.3d at 512 (citing Boudette, 923 F.2d  
12 at 756).

13 Plaintiff argues in his motion, in conclusory fashion, that  
14 Plaintiff has "demonstrated good cause for his inability to serve  
15 defendants within 120 days." (Mot. 4:9-10.) Although Plaintiff  
16 supports his motion with his counsel's conclusory averments that  
17 "[n]umerous attempts" have been made to serve the unserved Defendants,  
18 Plaintiff does not explain when these "attempts" were made, when he  
19 first learned that the addresses for the unserved Defendants were "no  
20 longer good," or why his Lexis Nexis search and inquiry with the  
21 Secretary of State's office were not conducted or made earlier.

22 Plaintiff's counsel made nearly identical conclusory  
23 statements in another case assigned to the undersigned Judge, Lingad  
24 v. Indymac Federal Bank, 2:09-cv-02347-GEB-JFM, in which counsel has  
25 also filed a motion requesting additional time to serve unserved  
26 defendants. This suggest Plaintiff's counsel opines that providing  
27 unverifiable information concerning her attempts to effect service is  
28 a sufficient response to a Rule 4(m) dismissal notice. Providing

1 verifiable information could aid the Court in its decision of whether  
2 good cause exists, and if so, how long of an extension should be  
3 granted; and, if it does not exist, whether the Court should  
4 nonetheless exercise its discretion by granting additional time to  
5 Plaintiff to perfect service.

6 Plaintiff has not provided the Court with sufficient  
7 information to determine whether his failure to effectuate service  
8 resulted from "professional incompetence," "an easily manufactured  
9 excuse incapable of verification of the court," "a complete lack of  
10 diligence" or "inadvertence despite counsel's substantial good faith  
11 efforts towards compliance." Dominic v. Hess Oil V.I. Corp., 841 F.2d  
12 513, 517 )3d Cir. 1988). "Courts that have considered this issue  
13 . . . agree that counsel's inadvertent failure or half-hearted efforts  
14 to serve a defendant within the statutory period does not constitute  
15 good cause." Friedman v. Estate of Presser, 929 F.2d 1151, 1157 (6th  
16 Cir. 1991). Plaintiff clearly has not demonstrated that good cause  
17 justifies his failure to serve the unserved Defendants.

18 Even though Plaintiff has failed to demonstrate good cause,  
19 the issue remains whether the Court should exercise its discretion and  
20 provide Plaintiff with additional time to serve the unserved  
21 Defendants. See Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2007)  
22 (stating that Rule 4(m) "*permits* the district court to grant an  
23 extension even in the absence of good cause" (emphasis in original)).  
24 The Ninth Circuit has explained the scope of the district court's  
25 discretion under Rule 4(m) as follows:

26 District courts have broad discretion to extend  
27 time for service under Rule 4(m). . . . On its  
28 face, Rule 4(m) does not tie the hands of the  
district court after the 120-day period has  
expired. Rather, Rule 4(m) explicitly permits

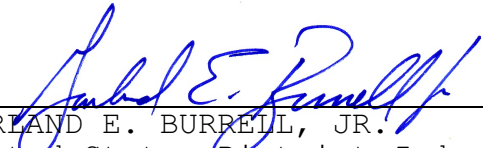
1 a district court to grant an extension of time  
2 to serve the complaint *after* the 120-day  
3 period. *However, no court has ruled that the*  
4 *discretion is limitless.* In making extension  
5 decisions under Rule 4(m) a district court may  
6 consider factors like statute of limitations  
7 bar, prejudice to the defendant, actual notice  
8 of a lawsuit, and eventual service.

9 Id. (quotations and citations omitted) (emphasis added).

10 Plaintiff has not provided the Court with a persuasive  
11 reason for why it should exercise its discretion by extending the time  
12 period in which Plaintiff may serve the unserved Defendants. Nor has  
13 Plaintiff suggested that any applicable statute of limitations will  
14 bar his claims, or that either of the unserved Defendants has actual  
15 notice of the lawsuit. Since Plaintiff has not provided sufficient  
16 justification for his inability to timely serve the unserved  
17 Defendants, and has not provided facts persuading the Court to  
18 exercise its discretion in favor of the extension of the service  
19 period Plaintiff requests, the Court declines to exercise its  
20 discretion under Rule 4(m) to extend the time for service.

21 Therefore, the unserved Defendants - Remien Mortgage Family,  
22 Inc. and Robert Remien - are dismissed without prejudice from this  
23 action. Plaintiff's motion filed December 23, 2009 and noticed for  
24 hearing on February 22, 2010, is DENIED and the hearing date is  
25 VACATED.

26 Dated: February 3, 2010

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GARLAND E. BURRELL, JR.  
United States District Judge