

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

5	GUILLERMO BONILLA, SANDRA	)	2:16-cv-01742 LEK
6	AMAYA BONILLA,	)	
7		)	
8	Plaintiffs,	)	
9		)	
10	vs.	)	
11		)	
12	CALIFORNIA HIGHWAY PATROL AN	)	
13	AGENCY OF THE STATE OF	)	
14	CALIFORNIA; OFFER MCKENZIE	)	
15	AND SGT. PETERSON and DOES 1	)	
16	TO 50,	)	
17		)	
18	Defendants.	)	
19		)	

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS  
DEFENDANT PETERSON FOR FAILURE TO SERVE**

Before the Court is Defendant California Highway Patrol ("Highway Patrol") and Muriel McKenzie's ("McKenzie" and collectively "Defendants") Motion to Dismiss for Failure to Serve ("Motion"), filed on January 29, 2019. [Dkt. no. 75.] Plaintiffs Guillermo Bonilla and Sandra Amaya Bonilla ("Plaintiffs") filed their memorandum in opposition on February 20, 2019, and Defendants filed their reply on March 5, 2019. [Dkt. nos. 79, 89.] The Court finds this matter suitable for disposition without a hearing pursuant to L.R. 230(g) of the Local Rules of the United States District Court for the Eastern District of California ("Local Rules"). For the reasons set forth below, Defendants' Motion is hereby granted, subject to

1 the Highway Patrol's filing of the supporting documentation  
2 described in this Order.

3 **BACKGROUND**

4 Plaintiffs, who were proceeding pro se at the time,  
5 initiated this action in state court on November 24, 2015, and  
6 the Highway Patrol removed the case on July 25, 2016, based on  
7 federal question jurisdiction. [Notice of Removal of Action;  
8 Under 28 U.S.C. § 1441(a) (Federal Question) ("Notice of  
9 Removal"), filed 7/25/16 (dkt. no. 1), Exh. A (Complaint -  
10 Personal Injury, Property Damage, Wrongful Death ("Complaint"));  
11 Notice of Removal at ¶¶ 4-5.] McKenzie and Highway Patrol  
12 Sergeant Peterson ("Peterson") were named as defendants in the  
13 Complaint, but they had not been served at the time of removal.  
14 [Complaint at pg. 1; Notice of Removal at ¶ 3.] After this  
15 Court ruled on the Highway Patrol's motion to dismiss the  
16 original Complaint, Plaintiffs filed their First Amended  
17 Complaint ("Amended Complaint") on March 16, 2017. [Dkt. nos. 7  
18 (motion to dismiss), 23 (amended order ruling on the motion to  
19 dismiss), 29 (Amended Complaint).] The Amended Complaint named  
20 the Highway Patrol, McKenzie, and Peterson as defendants.  
21 [Amended Complaint at ¶¶ 5-7.]

22 **I. Service Issues**

23 After the filing of the Amended Complaint, Plaintiffs  
24 and the Highway Patrol reported that McKenzie and Peterson

1 had both retired from the [Highway Patrol] at the  
2 time the original Complaint was attempted to be  
3 served on them at the [Highway Patrol]. Because  
4 they had retired, the [Highway Patrol] would not  
5 accept service of the Summons and Complaint on  
6 their behalf. Plaintiff's undersigned counsel  
7 was then informed by the [Highway Patrol] that  
8 the [Highway Patrol] would not provide the  
9 addresses of defendants Officer McKenzie and Sgt.  
10 Peterson, and Plaintiff's undersigned counsel has  
11 been unsuccessful in locating these two  
12 defendants for service.

13 . . . .

14  
15  
16 Defendant California Highway Patrol was  
17 served and has appeared. Officer McKenzie and  
18 Sgt. Peterson have not been served. Plaintiff's  
19 counsel is in the process of propounding  
20 discovery requests to Defendant California  
21 Highway Patrol to obtain the addresses of Officer  
22 McKenzie and Sgt. Peterson so that the Summons  
23 and the First Amended Complaint can be served on  
24 them.

25  
26 [Joint Status Report, filed 4/3/17 (dkt. no. 30), at ¶¶ 1-2.]

27 Plaintiffs and the Highway Patrol submitted letter briefs that  
28 addressed their dispute about the provision of McKenzie's and  
29 Peterson's addresses. [Dkt. no. 37 (letter briefs by  
30 Plaintiffs' counsel, dated 6/2/17 and 6/3/17, and counsel's  
31 supplemental letter brief dated 6/12/17); dkt. no. 38 (letter  
32 brief by the Highway Patrol's counsel, dated 5/30/17).] At a  
33 subsequent discovery conference, this Court ordered the Highway  
34 Patrol to provide McKenzie's and Peterson's addresses to  
35 Plaintiffs' counsel by June 21, 2017. [Minutes, filed 6/14/17  
36 (dkt. no. 36).] McKenzie was served on August 4, 2017. [Return

1 of Service, filed 9/1/17 (dkt. no. 39.] Peterson has never been  
2 served.

3 **II. Representation Issues**

4 As previously stated, Plaintiffs initiated this action  
5 pro se. Cyrus Zal, Esq., became Plaintiffs' counsel of record  
6 as of September 1, 2016. [Substitution of Attorney by  
7 Plaintiffs and Order, filed 9/1/16 (dkt. no. 11).] On  
8 September 28, 2017, Mr. Zal filed a motion to withdraw as  
9 Plaintiffs' counsel, and the motion was granted in an  
10 October 17, 2017 minute order. [Dkt. nos. 44, 48.]

11 On June 11, 2018, Mr. Zal again became Plaintiffs'  
12 counsel of record. [Consent Order Granting Substitution of  
13 Attorney, filed 6/11/18 (dkt. no. 57) (as to Guillermo Bonilla);  
14 Consent Order Granting Substitution of Attorney, filed 6/11/18  
15 (dkt. no. 58) (as to Sandra Bonilla).] Mr. Zal has represented  
16 Plaintiffs since that time.

17 **III. The Motion**

18 In the instant Motion, Defendants seek dismissal of  
19 Plaintiffs' claims against Peterson because they failed to  
20 complete service upon him within ninety days after the filing of  
21 the Amended Complaint. Plaintiffs oppose the Motion on the  
22 grounds that: 1) the Highway Patrol failed to comply with this  
23 Court's order at the June 14, 2017 discovery conference; and  
24 2) the unusual circumstances created by Plaintiffs'

1 representation history excuse their failure to complete service  
2 on Peterson in a timely manner.

3 **DISCUSSION**

4 Fed. R. Civ. P. 4(m) states, in pertinent part:

5 If a defendant is not served within 90 days after  
6 the complaint is filed, the court -- on motion or  
7 on its own after notice to the plaintiff -- must  
8 dismiss the action without prejudice against that  
9 defendant or order that service be made within a  
10 specified time. But if the plaintiff shows good  
11 cause for the failure, the court must extend the  
12 time for service for an appropriate period.

13  
14 This district court has stated:

15 Rule 4(m) requires a "two-step analysis" for  
16 determining relief. In re Sheehan, 253 F.3d 507,  
17 512 (9th Cir. 2001). First, the district court  
18 "must extend the time period" for service upon a  
19 showing of good cause. Id. When determining  
20 whether the good cause requirement has been  
21 satisfied, the court must consider whether:  
22 "(a) the party to be served personally received  
23 actual notice of the lawsuit; (b) the defendant  
24 would suffer no prejudice; and (c) plaintiff  
25 would be severely prejudiced if his complaint  
26 were dismissed." Boudette v. Barnette, 923 F.2d  
27 754, 756 (9th Cir. 1991) (citing Hart v. United  
28 States, 817 F.2d 78, 80-81 (9th Cir. 1987)).

29  
30 Second, if good cause is not established,  
31 "the court has the discretion to dismiss without  
32 prejudice or to extend the time period."  
33 Sheehan, 253 F.3d at 512. On its face,  
34 "Rule 4(m) does not tie the hands of the district  
35 court after the 120-day period has expired."  
36 Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir.  
37 2007) (citation omitted).<sup>[1]</sup> Rather, "Rule 4(m)

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<sup>1</sup> The version of Rule 4(m) that was in effect at the time of the Ninth Circuit's decision in Efaw required service to be made within 120 days after the complaint was filed. See Efaw, 473 F.3d at 1040.

1 explicitly permits a district court to grant an  
2 extension of time to serve the complaint after  
3 the 120-day period." Id. In making this  
4 decision, courts may consider factors such as "a  
5 statute of limitations bar, prejudice to the  
6 defendant, actual notice of a lawsuit, and  
7 eventual service." Id. (citation omitted).  
8

9 Rodriguez v. Cnty. of San Joaquin, No. 2:16-cv-00770-TLN-JDP,

10 2021 WL 1214569, at \*3 (E.D. Cal. Mar. 31, 2021). In Boudette,  
11 the Ninth Circuit also stated that, "[a]t a minimum, 'good  
12 cause' means excusable neglect[,]" and the Ninth Circuit stated  
13 the factors of actual notice, prejudice to the defendant, and  
14 severe prejudice to the plaintiff are considered in addition to  
15 the issue of excusable neglect. 923 F.2d at 756.

16 Plaintiffs did not dispute that, during the time that  
17 they have been attempting to serve Peterson, he was no longer  
18 employed with the Highway Patrol. See Joint Status Report at  
19 ¶ 1. Defendants represent that their counsel provided  
20 Plaintiffs' counsel with Peterson's address on June 20, 2017.  
21 [Mem. in Supp. of Motion at 3.] Mr. Zal states the Highway  
22 Patrol provided him with a post office box address for Peterson,  
23 and the Highway Patrol subsequently informed him that this was  
24 Peterson's last known address. [Decl. of Cyrus Zal in Opp. to  
25 Motion to Dismiss Def. Sgt. Peterson for Failure to Serve ("Zal  
26 Decl."), filed 2/20/19 (dkt. no. 80), at ¶¶ 7-8.] Plaintiffs  
27 argue the Highway Patrol was required "to provide to Plaintiffs  
28 a suitable address where Defendant Sgt. Peterson could be served

1 with the First Amended Complaint.” [Mem. in Opp. at 2.]  
2 However, this Court did not order the Highway Patrol to provide  
3 the specific address at which Peterson could be served. This  
4 Court ordered the Highway Patrol to provide Peterson’s address,  
5 and this Court stated that Plaintiffs could use the address to  
6 effect service. See Minutes, filed 6/14/17 (dkt. no. 36).

7 Defendants represent that Peterson’s post office box  
8 address that was provided to Plaintiffs’ counsel is Peterson’s  
9 last known address. [Reply at 2.] Assuming that is an accurate  
10 representation, the Highway Patrol complied with this Court’s  
11 order at the June 14, 2017 discovery conference, and Plaintiffs  
12 were required to use the post office box address to conduct  
13 additional research to determine where Peterson could be served.  
14 The Highway Patrol is ORDERED to file an affidavit or  
15 declaration, by someone with personal knowledge of the relevant  
16 Highway Patrol records, certifying that the address provided to  
17 Plaintiffs’ counsel on June 20, 2017 was Peterson’s last known  
18 address at that time. Subject to the foregoing, this Court  
19 rejects Plaintiffs’ argument that the Highway Patrol’s failure  
20 to comply with this Court’s June 14, 2017 excuses their failure  
21 to serve Peterson.

22 Plaintiffs also argue the unique circumstances created  
23 by the issues related to their representation status constitute  
24 good cause. Although Mr. Zal’s motion to withdraw as

1 Plaintiffs' counsel was not granted until October 17, 2017, he  
2 states there was "a complete and irreparable breakdown in the  
3 attorney-client relationship between Plaintiffs and [him]  
4 beginning around the middle of June of 2017[,]" which "resulted  
5 in my being unable to provide any further legal services to  
6 Plaintiffs in this case[,]" with the exception of communicating  
7 with the Highway Patrol's counsel regarding limited issues and  
8 completing some of Plaintiffs' discovery obligations. [Zal  
9 Decl. at ¶ 4.] In fact, on August 14, 2017, Plaintiffs provided  
10 Mr. Zal with written notice that they were terminating his  
11 services. [Id.] Mr. Zal asserts that, during the time that  
12 Plaintiffs were representing themselves pro se, they were unable  
13 to address the service issue because of their "complete lack of  
14 sophistication and lack of knowledge in legal matters and  
15 procedures[.]" [Id. at ¶ 10.] However, Plaintiffs' pro se  
16 status at that time did not excuse them from complying with the  
17 applicable court rules regarding service. See, e.g., Cortinas  
18 v. Huerta, 1:17-cv-00130-AWI-GSA-PC, 2021 WL 1294999, at \*2  
19 (E.D. Cal. Apr. 7, 2021) ("Plaintiff is not relieved of his  
20 obligation to comply with court's rules and procedures simply  
21 because he is proceeding pro se." (citing King v. Atiyeh, 814  
22 F.2d 565, 567 (9th Cir. 1987); Ghazali v. Moran, 46 F.3d 52, 54



1 (9th Cir. 1995); Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th  
2 Cir. 1986)).<sup>2</sup>

3           Although Mr. Zal became Plaintiffs' counsel of record  
4 again on June 11, 2018, because he was "distracted by . . .  
5 health issues[,]” he forgot that Peterson had never been served  
6 in this case. [Zal Decl. at ¶ 11.] While it was understandably  
7 difficult for Mr. Zal to maintain his law practice while he  
8 dealt with his health issues, by the time Mr. Zal became counsel  
9 of record again, more than a year had already passed since the  
10 Highway Patrol provided Plaintiffs with Peterson's last known  
11 address. Further, Plaintiffs did not ask this Court for  
12 additional time to serve Peterson until they filed their  
13 memorandum in opposition to Defendants' Motion on February 20,  
14 2019, more than eight months after Mr. Zal resumed his  
15 representation of Plaintiffs. Under the circumstances of this  
16 case, this Court cannot find that Plaintiffs' failure to serve  
17 Peterson was the result of excusable neglect. See Boudette, 923  
18 F.2d at 756.

19           Further, the other factors in the good cause analysis  
20 weigh against a finding of good cause in this case. See  
21 Rodriguez, 2021 WL 1214569, at \*3 (quoting Boudette v. Barnette,

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<sup>2</sup> King has been overruled in part on other grounds. Lacey v. Maricopa Cnty., 693 F.3d 896, 925-28 (9th Cir. 2012) (per curiam).

1 923 F.2d 754, 756 (9th Cir. 1991)). First, there is no  
2 indication in the record that Peterson has received actual  
3 notice of this action. Second, Peterson would be prejudiced if  
4 Plaintiffs were allowed additional time for service because, by  
5 the time Defendants filed the instant Motion on January 29,  
6 2019, the action had been pending for three years, the discovery  
7 deadline had passed, and the motions deadline was imminent. See  
8 Minutes, filed 9/7/18 (dkt. no. 69) (stating the discovery  
9 deadline was extended to 11/30/18 and the motions deadline was  
10 extended to 2/28/19). Third, this Court finds that Plaintiffs  
11 would not be severely prejudiced if their claims against  
12 Peterson were dismissed because the analysis of their claims  
13 against Peterson is likely to be the same as the analysis of  
14 their claims against McKenzie. See generally Order Granting  
15 Defendants' Motion for Summary Judgment, filed 4/22/21 (dkt.  
16 no. 93). Plaintiffs have therefore failed to establish good  
17 cause for their failure to complete service upon Peterson.

18 This Court has the discretion to allow Plaintiffs  
19 additional time to serve Peterson, even in the absence of good  
20 cause. See Rodriguez, 2021 WL 1214569, at \*3 (quoting Sheehan,  
21 253 F.3d at 512). However, the circumstances of this case  
22 discussed above also weigh against the exercise of that  
23 discretion. Plaintiffs' request for additional time to serve  
24 Peterson with the Amended Complaint is therefore denied.

1 Defendants' Motion is granted and Plaintiffs' claims  
2 against Peterson are dismissed, without prejudice, for failure  
3 to serve. This ruling is **subject to** the Highway Patrol's  
4 compliance with this Court's order to file the affidavit or  
5 declaration described herein. The affidavit or declaration must  
6 be filed by **May 7, 2021**. If the Highway Patrol fails to file an  
7 affidavit or declaration, or if its filing indicates that  
8 another address for Peterson was available when the post office  
9 box address for Peterson provided to Plaintiffs, this Order will  
10 be withdrawn.

11 **CONCLUSION**

12 On the basis of the foregoing, Defendants' Motion to  
13 Dismiss Defendant Peterson for Failure to Serve, filed  
14 January 29, 2019, is HEREBY GRANTED, subject to the Highway  
15 Patrol's filing of the supporting documentation described in  
16 this Order. If the Highway Patrol's submission complies with  
17 this Order, this Court will issue an order directing the Clerk's  
18 Office to terminate Peterson as a party and to close this case.

19 IT IS SO ORDERED.  
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DATED AT HONOLULU, HAWAII, April 22, 2021.



/s/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States District Judge

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**GUILLERMO BONILLA, ET AL. VS. CALIFORNIA HIGHWAY PATROL, ET AL;**  
**2:16-CV-01742 LEK; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**  
**DEFENDANT PETERSON FOR FAILURE TO SERVE**