

**Luis, Nancy**

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**From:** Smith, Steve  
**Sent:** Tuesday, September 02, 2008 2:49 PM  
**To:** 'nchatterjee@orrick.com'  
**Cc:** 'javalos@orrick.com'  
**Subject:** Waiver of Service

Dear Mr. Chatterjee:

The waiver, which your office drafted and asked my clients to sign, provides as follows: "I understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from July 24, 2008, the date this request was sent (or 90 days if it was sent outside the United States)."

Your waiver also provides that "If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and return the waiver form, you are allowed more time to respond than if summons had been served." See also FRCP 4(d)(3). You have now filed that document with the court. For you to take the position that my clients' time to file a motion is 20 days from the date I signed the waiver is disingenuous.

You have also accused me and my client of "playing games" by signing the waiver and insisting on the time to respond that is provided therein. I find this accusation especially offensive given that you drafted the waiver, sent it to my clients and asked them to sign it within 60 days of July 24, 2008. This was your suggestion, not ours. I signed the waiver on behalf of the defendants 28 days earlier than the time you requested, and you claim we are playing games because we are insisting on the rights provided in the waiver?

Finally, the Rule itself provides the authority for what happens if the plaintiff seeks to serve in parallel by normal process and by waiver. Rule 4(d)(3) -- see also the 1993 Note of the Advisory Committee -- explicitly states that the time to respond is extended if the waiver is signed "before being served with process." You have not taken the position that any defendant was served with process prior to August 25, 2008, the date I signed the waiver. I am also not aware of any service of process prior to August 25, 2008. You have not filed any such proof of service of process on any defendant. The only thing you have filed is the waiver itself, which explicitly states that the defendants' response date is 90 days after the date the waiver was sent to defendants.

So, defendants' time to respond to the complaint is 90 days from July 24, 2008 -- which is October 22, 2008. If you have any basis to claim otherwise, please let me know immediately.

Steve Smith

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