

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

KELVIN WELLS, ET AL  
VERSUS  
CRAIG FUGATE, ET AL

CIVIL ACTION  
NUMBER 09-1012-BAJ-SCR

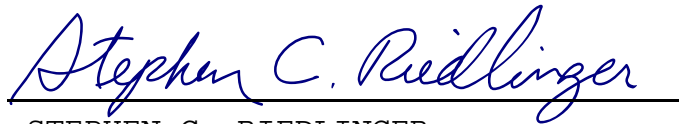
NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have 14 days from the date of service of this Notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Supplemental Magistrate Judge's Report. The failure of a party to file written objections to the proposed findings, conclusions, and recommendation contained in the Supplemental Magistrate Judge's Report and Recommendation within 10 days after being served with a copy of the Report shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge that have been accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, October 12, 2010.



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STEPHEN C. RIEDLINGER  
UNITED STATES MAGISTRATE JUDGE

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**MAGISTRATE JUDGE'S REPORT**

This case is before the court for the plaintiffs to show cause why their claims against defendants FEMA and W. Craig Fugate should not be dismissed pursuant to Rule 4(m), Fed.R.Civ.P., for failure to serve the defendants. Record document number 10. Plaintiffs filed a response.<sup>1</sup>

A review of the record showed that none of the defendants has filed an answer or otherwise made an appearance. Furthermore, the review showed that defendants FEMA and W. Craig Fugate have not been properly served. Proper service on an agency of the United States, and a United States office or employee sued in his official capacity, requires that a copy of the summons and the complaint be delivered to the U.S. Attorney for the district where the action is brought, i.e. the Middle District of Louisiana in this case. Rule 4(i)(1) and (2), Fed.R.Civ.P. The record does not show that the U.S. Attorney for the Middle District of Louisiana has been

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<sup>1</sup> Record document number 11.

served.<sup>2</sup> The U.S. Marshal advised the court that the plaintiffs have been contacted twice (on December 14 and 31, 2009) and advised that they must submit a completed U.S. Marshal Form 285 for service on the U.S. Attorney. Because the plaintiffs have not done so, the U.S. Marshal has not served the U.S. Attorney. The time allowed by Rule 4(m) to serve defendants FEMA and Fugate has expired.

Therefore, the plaintiffs were ordered to show cause, in writing, on May 21, 2010 why their claims against defendants FEMA and W. Craig Fugate should not be dismissed pursuant to Rule 4(m). In their written response the plaintiffs maintained that they submitted several Form 285s to the U.S. Marshal. However, the plaintiffs did not attach to their response a copy of any Form 285 for service on the U.S. Attorney.<sup>3</sup>

There is no evidence in the record that the plaintiffs ever submitted a Form 285 to the U.S. Marshall for service on the U.S. Attorney for this district.<sup>4</sup> Nor does the record show that the plaintiffs have taken any action since the Order to Show Cause was

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<sup>2</sup> Plaintiffs were previously notified by the court of the failure to serve the U.S. Attorney. Record document number 9.

<sup>3</sup> Service on the United States Attorney General is not a substitute for service on the U.S. Attorney for this district - both must be served to satisfy Rule 4.

<sup>4</sup> The clerk of court issued a summons to the U.S. Attorney David R. Dugas. Record document number 4. Plaintiffs submitted a Form 285 for service on "U.S. Attorney, Eric Holder" at 950 Pennsylvania Ave. N.W. Washington D.C 20530. Eric Holder is the U.S. Attorney General, not the U.S. Attorney for this district. The U.S. Marshal did serve the Attorney General. Record document number 7.

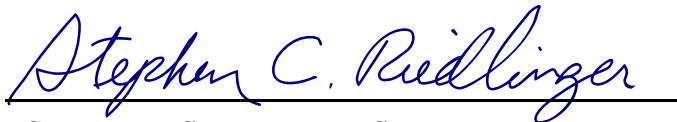
issued, now more than five months ago, to provide the U.S. Marshal with the necessary Form 285 when the show cause order explained that it is necessary and has not been provided. Instead of simply submitting a Form 285 for service on the U.S. Attorney, the plaintiffs argued that they have done enough already for the U.S. Marshal to serve the U.S. Attorney.

Because the record does not show that the U.S. Attorney has been served, and further shows that the failure to serve him is the fault of the plaintiffs alone, and the time to serve the defendants has expired, the plaintiffs claims against defendants FEMA and Fugate should be dismissed pursuant to Rule 4(m).<sup>5</sup>

#### RECOMMENDATION

It is the recommendation of the magistrate judge that the plaintiffs' claims against defendants FEMA and W. Craig Fugate be dismissed, pursuant to Rule 4(m), for failure to timely complete service of process by serving the U.S. Attorney for this district.

Baton Rouge, Louisiana, October 12, 2010.



STEPHEN C. RIEDLINGER  
UNITED STATES MAGISTRATE JUDGE

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<sup>5</sup> It is well established that a dismissal without prejudice is permitted by Rule 4(m) even when a re-filed complaint would be time-barred. *Winters v. Teledyne Movable Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 1985); *McDonald v. United States*, 898 F.2d 466 (5th Cir. 1990); *Traina v. United States*, 911 F.2d 1155 (5th Cir. 1990); *Peters v. United States*, 9 F.3d 344 (5th Cir. 1993); *contra, Millan v. USAA General Indem. Co.*, 456 F.3d 321 (5th Cir. 10/16/2008)(applying Rule 41(b) standard to Rule 4(m) dismissal).