

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

SDT Holdings, LLC,

Civ. No. 08-687 (JRT/JJK)

Plaintiff,

v.

United States of America, John Doe,
and Mary Roe;

**REPORT AND RECOMMENDATION
TO DISMISS FOR LACK OF
PROSECUTION**

Defendants.

INTRODUCTION

This matter is before this Court for a report and recommendation to the District Court on whether this case should be dismissed for lack of prosecution. See 28 U.S.C. § 636(b)(1) and Local Rule 72.1. For the reasons stated below, this Court recommends that Plaintiff's Complaint (Doc. No. 1), be dismissed without prejudice for lack of prosecution.

BACKGROUND

On March 14, 2008, Plaintiff filed its Complaint in this matter and a summons was issued as to Defendants. (Doc. No. 1.) On May 2, 2008, the summons was re-issued as to Defendant United States of America, U.S. Attorney, and U.S. Attorney General. As of May 4, 2009, Plaintiff had not effected service of the summons and complaint on each Defendant, and more than 120 days had passed without an enlargement of time.

On May 4, 2009, this Court ordered Plaintiff to show cause why this case

should not be dismissed for lack of prosecution, allowing Plaintiffs until May 25, 2009, to file its response. (Doc. No. 6.) As of the date of this Report and Recommendation, Plaintiff has not responded to this Court's Order to Show Cause, nor has it effected service of the summons and complaint on each Defendant.

DISCUSSION

This case should be dismissed without prejudice pursuant to Federal Rules of Civil Procedure 4(c)(1) and 4(m). Rule 4(c)(1) states:

A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

Fed. R. Civ. P. 4(c)(1). Rule 4(m) states:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. . . .

Fed. R. Civ. P. 4(m).

The facts and circumstances of each case should be evaluated to determine if dismissal for failure to prosecute is warranted. *Navarro v. Chief of Police, Des Moines, Iowa*, 523 F.2d 214, 217 (8th Cir. 1975). Here, Plaintiff did not serve the summons on Defendants within the 120-day period allowed by the Rules. Plaintiff has been notified of this deficiency through the service of the

Court's Order to Show Cause. Plaintiff has not responded to the Court's Order, and therefore has not shown good cause for the failure of service. Pursuant to Federal Rule of Civil Procedure 4(m), the Court "must dismiss the action without prejudice against [the] [D]efendant or order that service be made within a specified time." Because of the lack of response by Plaintiff, this Court recommends dismissing this case without prejudice.

RECOMMENDATION

For the reasons stated, **IT IS HEREBY RECOMMENDED** that:

1. Plaintiff's Complaint (Doc. No. 1), be **DISMISSED WITHOUT PREJUDICE**; and
2. The Clerk of Court be directed to return the Original Share Certificate, representing Two Million Eight Hundred Thousand (2,800,000) Shares of Espre Solutions Inc. stock issued to Plaintiff SDT Holdings dated March 7, 2008, from the Court Registry, to Plaintiff SDT Holdings.

Date: June 1, 2009

s/Jeffrey J. Keyes

JEFFREY J. KEYES
United States Magistrate Judge

Under D. Minn. LR 72.2(b), any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by **June 15, 2009**, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure may operate as a forfeiture of the objecting party's

right to seek review in the Court of Appeals. A party may respond to the objecting party's brief within ten days after service thereof. A judge shall make a de novo determination of those portions to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable to the Court of Appeals.