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Third-Party Plaintiff, R& O Construction Company

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WEST CHARLESTON LOFTS I, LLC, a)
Nevada limited liability company; WCL) Case No.: 2:09-cv-00392-PMP-LRL
COMMERCIAL, LLC, a Nevada limited)
liability company,)
)
Plaintiffs and Counterclaim Defendants,)

vs.) **MOTION TO ENLARGE TIME FOR**
) **SERVICE OF SUMMONS AND**
) **COMPLAINT**

R&O CONSTRUCTION COMPANY, a Utah)
corporation; DOES I through X; and ROE)
CORPORATIONS I through X, inclusive)
)
Defendant and Counterclaimant)

_____)
R&O CONSTRUCTION COMPANY, a Utah)
corporation,)
)
Third-Party Plaintiff,)
)

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vs.)
)
CHARLES G. HALL, an individual;)
CHRISTINA J. HALL, an individual;)
MENAHG II, LLC, a Nevada limited liability)
company; PIERRE GATEL, an individual; LEE)
JIEUN, as Trustee of the LEE NEVADA)
TRUST, an individual; TINA LO, an)
individual; SCOTT CLEMENTS; an individual;)
PARK209 LLC, a Nevada limited liability)
company; SUZANNE RENEE WEST, an)
individual; HONG HUNT, an individual;)
JAMES C. HUNT JR., an individual; DLS RP,)
LLC, a Nevada limited liability company;)
MARK A. STUHMER, an individual;)
EUGENE ANTHONY RAH, an individual;)
HAYMAN PROPERTIES, LLC, a Nevada)
limited liability company; DARREN CAHILL,)
an individual; VICTORIA CAHILL, an)
individual; ULTRA INVESTMENTS, LLC, a)
Nevada limited liability company; GREGORY)
FREEMAN, an individual; THOM A.)
ANTONOPOLOUS, an individual; CANDACE)
BAILEY, an individual; JILL ECKHAUS, an)
individual; AUGUST W. CHANG, an)
individual; GAMOCS, LLC, a Nevada limited)
liability company; JAMES W. PENGILLY, as)
Trustee of the JAMES W. PENGILLY TRUST;)
SARAH WILLEY, a Nevada limited liability)
company; GARY M. FREY, an individual;)
MARIO ERNST, an individual; SUSAN)
STONE, as Trustee of the STONE CREST)
TRUST; VICTORIA O'GARA, as Trustee of)
the VICTORIA O' GARA TRUST; PERRY)
GORE, and MARY GORE, as Trustee of the)
GZ SPENDTHRIFT TRUST; BLAKE L.)
SARTINI II, an individual; JBIZ HOLDINGS)
LLC, a Nevada limited liability company)
individual;)
Third-Party Defendants.)
_____)

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MOTION TO ENLARGE TIME FOR SERVICE OF SUMMONS AND COMPLAINT

Defendant/Counterclaimant/Third-Party Plaintiff R&O Construction Company (“R&O”), by and through its counsel of record, hereby submits its Motion to Enlarge Time for Service of the Summons and Complaint.

This Motion is made and based upon the Points and Authorities attached hereto, the papers and pleadings on file herein, and such oral argument as may be entertained by the Court at the time and place of the hearing of this matter.

POINTS AND AUTHORITIES

I.

RELEVANT BACKGROUND

On July 23, 2012, R&O’s Third Amended Third-Party Complaint (the “Amended Complaint”) was filed as Document No. 187. Pursuant to Fed.R.Civ.P. 4(m), the Amended Complaint is to be served within 120 days of filing, which is November 20, 2012. However, despite due diligence in serving all parties with the Amended Complaint, there are three parties that R&O will be unable to serve within the 120 period - Suzanne West (“West”), Eugene Rah (“Rah”), and Sarah Willey (“Willey”). Below is a summary of the attempts to serve West, Rah, and Willey.

West

Attempted service was made on West at her last known address by Bert Lott, process server # 1471, on October 17, 2102, October 22, 2012, October 25, 2012, and October 27, 2012. See Exhibit A. On each occasion, no response was received at the door, and no lights were observed on at the residence. See *id.* Mr. Lott did speak with a neighbor who indicated that she believes West’s son lives at the last known address, but he travels often and is away from the property for the

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majority of the time. *See id.* Mr. Lott was unable to confirm if West lives at the last known address.¹

Rah

Attempted service was made on Rah at his last known address by Mr. Lott on October 22, 2012. *See* Exhibit B. On this occasion, Mr. Lott was informed by the occupant that Rah no longer lives at this last known address. *See id.*

Willey

Attempted service was made on Willey at her last known address by Mr. Lott on October 17, 2102, October 22, 2012, October 25, 2012, and October 27, 2012. *See* Exhibit C. On each occasion, no response was received at the door, no lights were observed on at the residence, and Mr. Lott could not obtain a response, or other information regarding Willey’s whereabouts, from the neighbors. *See id.*

II.

LEGAL STANDARD

Rule 4 states as follows, in relevant part:

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.

(emphasis added).² “Rule 4(m) ... *requires* a district court to grant an extension of time when the

¹ As noted below in Section III, West clearly has knowledge of this lawsuit, as she has filed a Joinder to a Motion to Dismiss and filed her own Motion for Judgment on the Pleadings.

² *See also* Fed.R.Civ.P. 6(b), which states that “[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time ... with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires.” Here, the original time

1 plaintiff shows good cause for the delay. Additionally, the rule permits the district court to grant an
2 extension even in the absence of good cause. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007)
3 (emphasis in original).
4

5 District courts have broad discretion to extend time for service under Rule 4(m). In
6 *Henderson v. United States*, 517 U.S. 654, 661, 116 S.Ct. 1638, 134 L.Ed.2d 880
7 (1996), the Supreme Court stated that Rule 4's 120-day time period for service
8 "operates not as an outer limit subject to reduction, but as an irreducible allowance."
9 This court in *Mann*, held that Rule 4(m) gave the district court discretion to extend
10 time of service. On its face, Rule 4(m) does not tie the hands of the district court after
11 the 120-day period has expired.

12 *Id.* at 1041 (citations omitted).

13 Under the Rule [4] a plaintiff has two potential avenues to relief from a dismissal for
14 failure to comply with the 120-day service window: first, he may establish "good
15 cause" for his failure to timely serve the defendant, in which case the district court
16 *must* grant an enlargement of time for service, second, the district court *may*, in its
17 discretion, grant an extension even if plaintiff has, not demonstrated "good cause."

18 *Brandon H. v. Kennewick School Dist. No. 17*, 133 F.3d 925 at *1 (9th Cir. 1997) (citations omitted;
19 emphasis in original).

20 "At a minimum, 'good cause' means excusable neglect. Further, the court may grant an
21 extension even in the absence of good cause, taking into account various factors: 'a statute of
22 limitations bar, prejudice to the defendant, actual notice of the lawsuit, and eventual service.'" *Tain*
23 *v. Hennessey*, 2009 WL 2151883 at *1 (S.D. Cal. 2009) (citations omitted).

24 III.

25 LEGAL ARGUMENT

26 As noted above, there is good cause for R&O's inability to serve West, Rah, and Willey with

27 _____
28 to serve the Amended Complaint has not expired. But, as will be discussed below, R&O has good
cause for not serving West, Rah, and Willey.

1 the Summons and Complaint within the 120 time period, despite R&O’s attempts at service.
2 Moreover, with regard to West, she clearly has knowledge of the suit and is therefore not prejudiced
3 by not yet being served. In fact, West had demonstrated her knowledge of the suit by filing a Joinder
4 to Third-Party Defendant Park 209’s Motion to Dismiss (*see* Dkt. 248) and by filing her own Motion
5 for Judgment on the Pleadings (*see* Dkt. 189).

6
7 Moreover, it appears from the Mr. Lott’s Proofs of Service, *see* Exhibits A-C attached hereto,
8 that West, Rah, and Willey may no longer reside at their last known address. Therefore, R&O needs
9 additional time to conduct a “skip trace” or to otherwise locate the third-party defendants, which
10 R&O believes will lead to the eventual service of process. *See Tain*, 2009 WL 2151883 at *1 (“the
11 court may grant an extension even in the absence of good cause, taking into account various factors:
12 ‘a statute of limitations bar, prejudice to the defendant, actual notice of the lawsuit, and eventual
13 service”).

14
15 Based upon the foregoing, R&O respectfully requests an additional 90-120 days to serve
16 West, Rah, and Willey, as well as any other third-party defendant that may not have been served yet.³
17 R&O has demonstrated good cause, and under Rule 4, the Court must grant R&O an extension to
18 serve the Amended Complaint and Summons. *See Efaw*, 473 F.3d at 1040.

19
20 However, if for some reason the Court finds that R&O has not demonstrated good cause, the
21 Court still has discretion to grant R&O’s request for enlargement of time, which R&O requests. *See*
22 *id.* This is supported by the facts mentioned above, as well as the fact that there are 29 third-party
23

24
25 ³
26 Upon information and belief, all other third-party defendants have been served, but in the event that
27 this information is incorrect, R&O respectfully requests that any Order granting this Motion enlarges
28 the time for service as to all third-party defendants.

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defendants, and R&O has served all but three within the original 120 time period after filing the Amended Complaint. Thus, it is evident that R&O has been diligent in serving, or attempting to serve, the Summons and Amended Complaint on all third-party defendants. Therefore, R&O respectfully requests 90-120 additional days to serve the Summons and Amended Complaint.

IV.

CONCLUSION

Based upon the foregoing, R&O respectfully requests that the Court grant R&O's Motion to Enlarge Time for Service of the Summons and Complaint.

DATED this 20th day of November, 2012

SMITH LARSEN & WIXOM

/s/ Kent F. Larsen, Esq.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 20th day of November, 2012, service of the foregoing **Motion to Enlarge Time for Service of Summons and Complaint** was served electronically via CM/ECF and/or mailed, postage prepaid, to the following:

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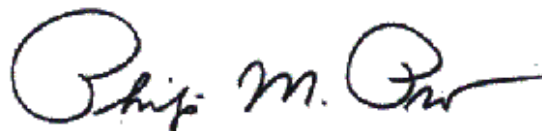
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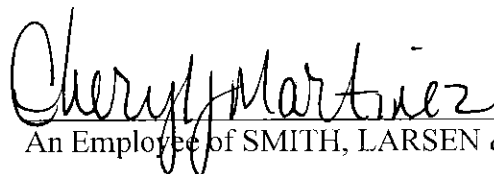
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IT IS ORDERED that the deadline for service of Summons and Complaint is extended 90 days from the date of entry of this order.



PHILIP M. PRO
UNITED STATES DISTRICT JUDGE

Dated: November 21, 2012.



An Employee of SMITH, LARSEN & WIXOM