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5	UNITED STATES DIS WESTERN DISTRICT O	FWASHINGTON
6	AT TACO	MA
7	JAMES B. PINKERTON,	
8	Plaintiff,	CASE NO. C16-5634BHS
9	V.	ORDER GRANTING IN PART AND DENYING IN PART
10	HANSON MOTORS, INC. and STEVEN	DEFENDANTS' MOTION TO DISMISS
11	W. HANSON,	DISIMISS
12	Defendants.	
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14	This matter comes before the Court on De	
15	Steven Hanson's (collectively "Hanson") second	
16	process and insufficiency of service of process (I	
17	(Dkt. 23). The Court has considered the pleading	
18	the motion and the remainder of the file and here	by grants in part and denies in part the
19	motion for the reasons stated herein.	
20	I. PROCEDURAL	HISTORY
21	On July 15, 2016, Plaintiff James Pinkerton ("Pinkerton") filed an employment	
22	discrimination complaint against Hanson. Dkt. 1	
I	1	

On December 15, 2016, Hanson moved to dismiss for insuffiency of process and
 insufficiency of service of process. Dkt. 5. On February 8, 2017, the Court granted the
 motion on the merits and granted Pinkerton leave to perfect service. Dkt. 11. On
 February 17, 2017, Pinkerton filed an affidavit of service of summons and complaint
 showing that Matthew Howard served the papers on Frank Kersul. Dkt. 15.
 On March 8, 2017, Hanson moved to dismiss for insuffiency of process and

insufficiency of service of process. Dkt. 17. On April 6, 2017, Pinkerton responded.
Dkt. 22. On April 7, 2017, Hanson moved for an extension of time to reply. Dkt. 23. On
April 8, 2017, Pinkerton stipulated to the extension of time.<sup>1</sup> Dkt. 24. On April 12,
2017, Hanson replied. Dkt. 25.

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## **II. DISCUSSION**

12 Hanson seeks dismissal of Pinkerton's claims for insufficiency of service of 13 process. The plaintiff bears the burden of establishing the validity of service under Rule 14 4. See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). In some instances, Rule 4 15 may be liberally construed "so long as the opposing party receives sufficient notice of the complaint." United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 16 17 1371, 1382 (9th Cir. 1984). The sufficient notice exception, however, is not a license to 18 ignore Rule 4. The Ninth Circuit has held that failure to comply with service 19 requirements does not warrant dismissal if: "(a) the party that had to be served personally 20received actual notice, (b) the defendant would suffer no prejudice from the defect in 21

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<sup>&</sup>lt;sup>1</sup> The motion is granted, and the Court will consider the reply.

service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the
 plaintiff would be severely prejudiced if his complaint were dismissed." *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984). A party's pro se status, alone, is not a
 justifiable excuse for defective service. *See Hamilton v. Endell*, 981 F.2d 1062, 1065
 (9th Cir. 1992).

6 In this case, it is undisputed that Pinkerton failed to perfect service. First, a factual 7 dispute exists whether Mr. Kersul is authorized to accept service on behalf of the 8 corporation. Mr. Kersul is the General Sales Manager in Olympia, and Mr. Howard 9 declares that employees at Hanson, including Mr. Kersul himself, informed him that Mr. 10Kersul could accept service on behalf of the corporation. The Washington Supreme Court has explained that an individual "must have some substantial part in the 11 12 management of its affairs generally or in a particular district or locality" to be a 13 "managing agent" of a corporation for purposes of RCW 4.28.080(9). Johanson v. 14 United Truck Lines, 62 Wn.2d 437, 440 (1963) (citation omitted); accord Shipp v. Mason 15 Gen. Hosp. Found., 147 Wn.App. 1023, 2008 WL 4868879, at \*3-4 (2008). It would 16 appear that a general manager would be considered a managing agent under the relevant 17 statute. The Court, however, declines to resolve this issue at this time because Pinkerton 18 failed to deliver the correct documents.

Hanson contends that Mr. Howard served an amended complaint that varies from
the complaint on file. Pinkerton concedes this point, but contends the error was
"inadvertent and unintentional . . . ." Dkt. 22 at 2. Regardless of the reason for the error,
Pinkerton's failure to serve the proper complaint is dispositive. *Galekovich v. City of*

1	Vancouver, 11-5736BHS, 2012 WL 750445, at *4 (W.D. Wash. Mar. 8, 2012) ("the	
2	Court finds that the service was improper on all the foregoing Defendants and Holmes	
3	because the complaint that Plaintiff attempted to serve was not the same complaint that	
4	he filed in Court."). Therefore, the Court grants Hanson's motion on the merits.	
5	The next issue is an appropriate remedy for Pinkerton's second failure to perfect	
6	service.	
7	Upon determining that process has not been properly served on a defendent, district courts possess bread discretion to either dismiss the	
8	of process. However, dismissal of a complaint is inappropriate when there	
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11	Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Because dismissal without	
12	prejudice may implicate statute of limitations concerns, the Court finds that quashing	
13	service is the more appropriate remedy at this time. Moreover, under the Ninth Circuit's	
14	four-part test, Pinkerton's failure to comply with service requirements does not warrant	
15	dismissal. Hamilton, 981 F.2d at 1065. Hanson has notice of the original complaint, the	
16	defect in service is technical, the failure to properly serve the original compliant is	
17	justifiable, and Pinkerton could be severely prejudiced is his complaint is dismissed	
18	without prejudice. Therefore, the Court denies Hanson's motion as to the remedy of	
19	dismissing Pinkerton's complaint.	
20	III. ORDER	
21	Therefore, it is hereby <b>ORDERED</b> that Hanson's motion to dismiss for	
22	insuffiency of process and insufficiency of service of process (Dkt. 17) is GRANTED in	

1	part and DENIED in part and Hanson's motion for extension of time (Dkt. 23) is
2	<b>GRANTED</b> . Pinkerton must file an affidavit of service of summons and complaint no
3	later than May 19, 2017. Failure to comply or otherwise respond will result in
4	<b>DISMISSAL without prejudice</b> without further order of the Court. Failure to perfect
5	service a third time will most likely result in <b>DISMISSAL without prejudice</b> .
6	Dated this 3rd day of May, 2017.
7	k. AC
8	BENJAMIN H. SETTLE
9	United States District Judge
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