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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 MALIBU MEDIA, LLC

11 Plaintiff,

12 v.

13 [redacted]

14 Defendant

Case No. 3:15-cv-04443-WHA

**NOTICE OF MOTION AND MOTION TO
QUASH SERVICE AND DISMISS
PURSUANT TO 12(B)(4), 12(B)(5), AND
4(M) FOR INSUFFICIENT SERVICE OF
PROCESS RESULTING IN LACK OF
PERSONAL JURISDICTION**

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this 29th day of February, 2016, a true and correct copy of the foregoing was transmitted to counsel or record for Plaintiff via ECF, with unredacted copies sent by electronic mail to Plaintiff's counsel of record.

/s/ Nicholas R. Ranallo

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

MALIBU MEDIA, LLC

Plaintiff,

v.

[redacted]

Defendant

Case No. 3:15-cv-04443-WHA

**BRIEF IN SUPPORT OF MOTION TO
QUASH SERVICE AND DISMISS
PURSUANT TO 12(B)(4) AND 12(B)(5) FOR
INSUFFICIENT PROCESS AND
INSUFFICIENT SERVICE OF PROCESS
AND RESULTING LACK OF PERSONAL
JURISDICTION**

Comes now Defendant [redacted] by and through his attorney Nicholas Ranallo, and moves to dismiss Plaintiff’s claims pursuant to Federal Rule of Civil Procedure 12(b)(4), 12(b)(5), and 4(m) for insufficient process and insufficient service of process resulting in a lack of personal jurisdiction.

I. Introduction and Factual Background

As the Court is by now aware, Plaintiff is a prodigious litigant. Plaintiff has filed 116 actions in this district in the last half-year, and has filed more than 5000 cases across the country over the last several years. The sheer number of cases ensures that Plaintiff will not be able to litigate each in a timely fashion, and Plaintiff has already been plagued by service issues in the cases in this district, including the instant case.¹

¹ Not only are Plaintiff’s actual litigation responsibilities too burdensome to effectively handle, but the requests for more time to complete these responsibilities have themselves become too burdensome for Plaintiff to handle in a timely manner. See Plaintiff’s Proposal for Streamlining Procedure, filed in

1 The instant case was initiated by Plaintiff's filing of a complaint on September 27, 2015 –
2 more than 5 months ago. See ECF No. 1. Following a subpoena to the Defendant's ISP, Plaintiff
3 obtained the identity of the Defendant on January 6, 2016 – nearly three weeks before their original
4 deadline for service, and a month before their extended deadline. See ECF No. 16 at ¶2. After more
5 than two weeks of total inactivity, Plaintiff finally sought leave to file an Amended Complaint
6 naming Defendant as the alleged infringer, mere days before its original time period for service
7 expired. Plaintiff then sought its first extension of time to serve on January 25th, the last day for it
8 to accomplish service under Rule 4(m). This court granted Plaintiff's motion on January 26, 2016,
9 and gave Plaintiff until February 6th to complete service on the Defendant. See ECF No. 17.
10 Notably, Plaintiff did not actually file the amended complaint on the docket at any time.

11 Plaintiff again sat on its hands for over a week before even getting a summons to its server,
12 and at no time did Plaintiff seek a further extension of its deadline for service. There is ample reason
13 to believe that such a request would have been promptly denied. See, e.g. 3:15-cv-4280, 3:15-cv-
14 4246 and 3:15-cv-4248. Instead, Plaintiff simply disregarded the explicit instructions of this court,
15 and proceeded to effectuate its purported service after this Court's explicit deadline. See Return of
16 Service, ECF No. 19.

17 For the reasons set forth below, Defendant respectfully requests that this Court dismiss this
18 matter for failure to effectuate service within the applicable time period without a showing of good
19 cause, as it has done in other cases where Plaintiff has failed to diligently pursue its claims.

20 21 **II. Applicable Law and Orders**

22 Federal Rule of Civil Procedure 4(m) dictates that "If a defendant is not served within 90
23 days² after the complaint is filed the court – on motion or on its own after notice to the plaintiff –

24
25 _____
26 numerous Malibu Media cases, including 3:15-cv-4287. A copy of Plaintiff's proposal is annexed hereto as
27 Exhibit A.

28 ² The time period for Rule 4(m) was recently shortened to 90 days from 120 days (the applicable original period in this case), though the difference is immaterial for the purpose of the instant motion. Plaintiff has far exceeded both periods, and the applicable deadline is that set by the Court in its January 26th Order.

1 must dismiss the action without prejudice against the defendant...” The court may extend the period
 2 for service upon a showing of good cause. Dismissal of a party is appropriate where a Plaintiff fails
 3 to show good cause for delays in service. See *Walker v. Sumner*, 14 F.3d 1415,1421-22 (9th Cir.
 4 1994). “Good cause only exists in rare circumstances.” *DeGroote v. City of Mesa*, No CV07-1969-
 5 PHX-MHM, Order on Motion for Default Judgment (D.Ariz. Feb. 25, 2009). Mere neglect or
 6 inadvertence of counsel is not sufficient to constitute good cause. See *Townsel v. Contra Costa*
 7 *County*, 820 F.2d 319 (9th Cir. 1987); *Wei v. State of Hawaii*, 763 F.2d 370 (9th Cir. 1985)(allowing
 8 counsel’s inadvertent failure to meet deadline to constitute good cause would allow the good cause
 9 exception to swallow the rule. It is decidedly the Plaintiff’s burden to establish the required good
 10 cause. See, e.g. *McWherter v. CBI Services, Inc.* 153 FR.D. 161 (D.Haw. 1994), aff’d. 105 F.3d
 11 665 (9th Cir. 1997); *Bunn v. Gleason*, 250 F.R.D. 86 (D.Mass.2008)(quoting Wright & Miller);
 12 *Bachenski v. Malnati*, 11 F.3d 1371 (7th Cir. 1993). Proper service of the summons and complaint
 13 is a necessary prerequisite to a Court’s assertion of personal jurisdiction against a defendant. See
 14 *Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991).

15 16 **III. Argument**

17 **A. Plaintiff Has Failed To Serve Defendant Within the Time Period Prescribed By Fed. R.** 18 **Civ. Proc. 4(m) and the Orders of This Court.**

19 As an initial matter, it should be undisputed that Plaintiff has not timely served Defendant in
 20 this matter. This Court’s Order of January 26th granted Plaintiff’s First Motion for an Extension
 21 to Serve the Defendant, and unequivocally ordered that it should be accomplished by February 6,
 22 2016. See ECF No. 17. According to Plaintiff’s own Affidavit of Service, Plaintiff’s purported
 23 service was not accomplished until after the deadline.³ Thus, this court should dismiss Plaintiff’s
 24 complaint unless Plaintiff establishes good cause for its failure, which it cannot do.

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27 ³ Notably, Plaintiff’s Affidavit of Service incorrectly indicates that Defendant was served at 4:23 a.m. This
 28 is still further evidence of the haphazard way that Plaintiff and its agents have approached this litigation.

1 to amend sometime around January 11 or January 12th, leaving it two full weeks before its original
2 service deadline and nearly four weeks before its extended deadline of February 6th. Plaintiff
3 squandered this time, however, and made no effort to move this case forward until January 22nd –
4 when it had only three days left until its original deadline. Plaintiff then cried “Emergency!”, and
5 filed a motion for an extension of time to serve on the day its original service period ended.
6 Plaintiff’s request was nonetheless granted, and Plaintiff was given nearly two more weeks to
7 accomplish service. Plaintiff again squandered nearly the entirety of this period before it even
8 delivered the summons to its process server, and then proceeded to file an incorrect affidavit
9 conceding late service, hoping that this would somehow satisfy the court that it had diligently carried
10 out its responsibilities under Rule 4(m) and this Court’s orders. As noted above, however,
11 inadvertence or negligence of counsel does not satisfy the applicable ‘good cause’ standard. As this
12 Court has previously noted, Plaintiff’s “Counsel have not acted diligently. They neglected to timely
13 prepare and file the sealing motion, and they have requested extensions at the last minute...Malibu’s
14 failure to timely serve the defendant is the result of flawed follow-through on counsel’s part.”
15 *Malibu Media v. Doe*, 3:15-cv-4248, ECF No. 25, Order Denying Request for Extension and
16 Dismissing Case for Failure to Timely Serve Defendant, (N.D. Cal. Feb. 17, 2016).

17 Defendant does not believe that Plaintiff has satisfied its responsibilities nor shown good cause
18 for its failure to do so. As such, Defendant respectfully requests that this Court dismiss this matter
19 pursuant to Federal Rules of Civil Procedure 4(m) and 12(b)(5).

20 D. Plaintiff Failure to Separately File the Amended Complaint Constitutes Insufficient
21 Process Under 12(b)(4).

22 As is readily apparent from looking at the docket in this case, Plaintiff has not actually filed
23 the Amended Complaint against the putative defendant in this matter, despite being given
24 permission to do so via this Court’s January 26th Order. The Northern District of California’s
25 instructions for e-filing under seal make it apparent that the separate filing of the document proposed
26 to be sealed is a necessary step in the process. See <http://www.cand.uscourts.gov/ecf/underseal>
27 (“use the appropriate event to e-file redacted copies of the documents after e-filing your
28

1 Administrative Motion to File Under Seal...). There can be no doubt that the filing of an Amended
2 Complaint is a necessary prerequisite for proper service of the same. See, e.g. *Alvarez v. Rainbow*
3 *Textiles, Inc.*, 168 F.R.D. 201 (S.D. Tex. 1996)(holding that service of process was not valid where
4 complaint served had not been filed) . Here, Plaintiff has simply skipped the step. For this reason
5 alone, Plaintiff's complaint should be dismissed.

6
7 **CONCLUSION**

8 Plaintiff has failed to separately file the Amended Complaint in this matter, and has likewise
9 failed to timely serve the Defendant. Plaintiff cannot show good cause for its failures, which it must
10 do if it is to avoid dismissal. As such, and for the reasons more fully set forth above, Defendant
11 respectfully requests that the Court dismiss this matter.

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13
14 DATED: February 29, 2016

NICHOLAS RANALLO, ATTORNEY AT LAW

15
16 By: _____/s/ Nicholas Ranallo
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