

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CADLES OF WEST VIRIGINIA, LLC,
Plaintiff,
v.
MARIO ALVAREZ, et al.,
Defendants.

Case No.: 20-CV-2534 TWR (WVG)

**ORDER DENYING MOTION TO
QUASH FOR INSUFFICIENT
SERVICE OF PROCESS**

(ECF No. 39)

Defendants George Alvarez (“George”), Mario Alvarez (“Mario”), Darci Alvarez (“Darci”) and Mario R. Alvarez Sr. Cancer Foundation (“Cancer Foundation”) (collectively, “Defendants”) move to quash service of process based on insufficient service of process. (“Mot.,” ECF No. 39.) Plaintiff Cadles of West Virginia, LLC (“Plaintiff”) filed an opposition to Defendants’ motion to quash. (“Opp’n,” ECF No. 41.) Defendants filed a reply. (“Reply,” ECF Doc. No. 44.) Pursuant to Civil Local Rule 7.d.1, the Court finds the matter suitable for determination on the papers and without oral argument. For the reasons discussed herein, the Court **DENIES** Defendants’ motion to quash for insufficient service of process.

///
///
///

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Plaintiff is an Ohio Limited Liability Company. (Complaint (“Compl.”) ¶ 1, ECF
3 No. 1.) Defendants, George, Mario, and Darci reside and do business in San Diego,
4 California. (*Id.* ¶¶ 2–6.) Defendant, Cancer Foundation, conducts business in the state of
5 California, in or around Rancho Santa Fe, San Diego County; Mario Jr. is the President
6 and CEO of the foundation. (*Id.* ¶ 8.) On December 31, 2020, Plaintiff filed a Complaint
7 against Defendants alleging that Defendants are actively avoiding the payment of court
8 ordered cost and fees by fraudulently transferring and concealing assets. (*Id.* ¶¶ 129–30,
9 142–43.) “Once the complaint in this action was filed, the addresses for personal service
10 for the named Defendants were gathered from extensive and exhaustive research.”
11 (Opp’n, Dec’l of Assly Sayyar ¶ 7.) Mr. Assly Sayyar, attorney for Plaintiff, used the
12 various state judgment litigations, property records, state court records, and other
13 proceedings involving Defendants to locate addresses. (*Id.*) Mr. Sayyar located multiple
14 properties for each Defendant. (*Id.* at ¶ 8.) On February 3, 2021, Plaintiff attempted,
15 unsuccessfully, to serve each Defendant in-person at their San Diego Property, 16907
16 Going My Way, San Diego, California 92127 (“San Diego Property”). Thereafter, Plaintiff
17 attempted in-person service more than ten times and three times through mail at the San
18 Diego Property. (*Id.* at ¶ 11.) Starting on April 15, 2021, Plaintiff made several attempts
19 to serve Defendants, Mario Jr. and Darci, in-person and by-mail at their Miami Beach
20 Address, 4301 Collins Ave. #1005 and #906, Miami Beach, FL 33140 (“Miami Property”).
21 *Id.* On May 28, 2021, Plaintiff attempted to serve Defendants, Mario Jr. and Darci, by-
22 mail at their Hawaii property, 75-6130 Alii Drive, Kailu Kona, Hawaii 96740 (“Hawaii
23 Property”). *Id.* The service by mail attempts to the San Diego Property, Miami Property,
24 and Hawaii Property were returned with error messages including: “returned to sender,”
25 “insufficient address,” and “unable to forward,” without explanation. (*Id.* at ¶ 12.)

26 On June 4, 2021, Miguel Ruiz, California Process Server, served all Defendants at
27 their Laguna Beach address, 405 Hill Street, Laguna Beach, CA 92651 (“405 Laguna
28 Property”). (Opp’n, Dec’l of Miguel A. Ruiz ¶¶ 4–6.) Upon arrival at the address, Mr.

1 Ruiz asked a teenager sitting outside the property whether Mario, Darci, and George
2 resided there. (*Id.* at ¶ 5.) She responded that they lived “upstairs.” (*Id.*) Soon after, a
3 male adult informed Mr. Ruiz that Mario, George, and Darci lived in the “front house” at
4 401 Hill Street, Laguna Beach, CA 92651 (“401 Laguna Property”), Mr. Ruiz determined
5 that the statement was “incorrect” and “untruthful” and proceeded with service at the 405
6 Laguna Property. (*Id.* at ¶ 6.)

7 On July 14, 2021, Defendants moved to quash service of process pursuant to Federal
8 Rule of Civil Procedure 12(b)(5). Plaintiff filed an opposition to Defendants’ motion to
9 quash on September 7, 2021. On September 23, 2021, Defendants replied.

10 ANALYSIS

11 I. Legal Standard

12 Federal Rule of Civil Procedure (“Rule”) 12(b)(5) allows a defendant to move to
13 dismiss due to insufficient service of process. Fed. R. Civ. P. 12(b)(5). “A federal court
14 is without personal jurisdiction over a defendant unless the defendant has been served in
15 accordance with Fed.R.Civ.P. 4.” *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (citing
16 *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)). “Objections to the validity
17 of service of process must be specific and must point out in what manner the plaintiff has
18 failed to satisfy the requirements of proper service.” *Aquawood LLC v. Wide Eyes*
19 *Marketing Ltd.*, No. 11-cv-03046 SJO (AGRx), 2011 WL 13220333, at * 3 (C.D. Cal.
20 2011). When a defendant alleges that he was not served with process, “[a] signed return
21 of service constitutes prima facie evidence of valid service which can be overcome only by
22 strong and convincing evidence.” *S.E.C. v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161,
23 1163 (9th Cir.2007) (citation omitted.) “Once service is challenged, plaintiffs bear the
24 burden of establishing that service was valid under Rule 4.” *Brockmayer v. May*, 383 F.3d
25 798, 801 (9th Cir. 2004). “However, ‘Rule 4 is a flexible rule that should be liberally
26 construed so long as a party receives sufficient notice of the complaint.’” *Aquawood LLC*,
27 2011 WL 13220333, at * 3.

28 ///

1 Federal Rule of Civil Procedure 4(e) provides that service of process may be made
2 on an individual within any United States judicial district by, inter alia, “leaving a copy of
3 [the summons and complaint] at the individual's dwelling or usual place of abode with
4 someone of suitable age and discretion who resides there.” Fed. R. Civ. P. 4(e)(2)(B).
5 Service may also be provided pursuant to state law—here, California law. *See* Fed. R. Civ.
6 P. 4(e)(1). Under California law, “substitute service” is permissible. *See* Cal. Code Civ.
7 Proc. § 415.20(b). The relevant statute provides as follows:

8 If a copy of the summons and complaint cannot with reasonable diligence be
9 personally delivered to the person to be served, as specified in Section 416.60,
10 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the
11 summons and complaint at the person's dwelling house, usual place of abode, usual
12 place of business, or usual mailing address other than a United States Postal Service
13 post office box, in the presence of a competent member of the household or a person
14 apparently in charge of his or her office, place of business, or usual mailing address
15 other than a United States Postal Service post office box, at least 18 years of age,
16 who shall be informed of the contents thereof, and by thereafter mailing a copy of
the summons and of the complaint by first-class mail, postage prepaid to the person
to be served at the place where a copy of the summons and complaint were left.
Service of a summons in this manner is deemed complete on the 10th day after the
mailing.

17 Cal. Code Civ. Proc. § 415.20(b)

18 The determination of whether a particular residence counts as a party's place of usual
19 abode is “highly fact-specific.” *Craigslist, Inc. v. Hubert*, 278 F.R.D. 510, 515 (N.D. Cal.
20 2011). Multiple residences may qualify provided that each bears “sufficient indicia of
21 permanence.” *Id.*; *see also U.S. v. Rose*, 437 F. Supp.2d 1166, 1172 (S.D. Cal. 2006).
22 Furthermore, a defendant who has repeatedly represented to either the plaintiff or to outside
23 parties that one residence is his place of usual abode may be estopped from later contesting
24 that said residence was the proper location for service of process. *Id.* (citing *Jaffe and*
25 *Asher v. Van Brunt*, 158 F.R.D. 278, 280 (S.D.N.Y. 1994).

26 **II. Service on Defendants**

27 At issue is whether the 405 Laguna Property, at which process was served,
28 constituted Defendants’ place of usual abode for purposes of Rule 4(e) and Cal. Code Civ.

1 Proc. § 415.20(b). According to Plaintiff, substitute service was effected on Defendants in
2 accordance with § 415.20(b). Plaintiff has filed a proof of service signed by a process
3 server under penalty of perjury. (See ECF Nos. 26, 28, 29, 31.) The proof of service
4 reflects that a copy of the summons and complaint were left with a member of the
5 household over the age of 18 and that thereafter the documents were mailed to Defendants.
6 Plaintiffs have presented a prima facie case of valid service pursuant to § 415 .20(b), and,
7 under Ninth Circuit law, the prima facie case may “be overcome only by strong and
8 convincing evidence.” *SEC*, 509 F.3d at 1167 (internal quotation marks omitted).

9 Upon review, the Court finds that Defendants have not provided “strong and
10 convincing” evidence that the 405 Laguna Property is not a proper location for service of
11 process. Plaintiff believes, after several attempts of service at several other of Defendants’
12 addresses, that Defendants’ place of residence is the 405 Laguna property at which service
13 was effectuated. Plaintiff came to this conclusion based on testimony provided by Mario
14 during a deposition on April 13, 2021 (“April 2021 Deposition”), provided in Plaintiff’s
15 Opposition. (Opp’n, Ex.1.) Mario listed the Miami, San Diego, and Hawaii properties as
16 addresses that he receives mail. (*Id.* at 6–7.) Mario further elaborated and stated that his
17 home in Miami is typically his main address but, due to Covid-19, he has spent “a lot”
18 more time in California, either at the San Diego property or at the 401 Laguna Property
19 where his mother (Magali) resides. (*Id.* at 8.) Magali is the mother of George and Mario
20 and mother-in-law of Darci. (Reply at 2.) Defendants were not found at their San Diego
21 Property, Miami Property, or Hawaii Property and Plaintiff’s service by mail attempts to
22 these properties were returned with error messages. (Opp’n, Dec’l of Assly Sayyar ¶ 11–
23 12.) When service of Darci and Mario Jr. were attempted at their Miami property the server
24 learned that the units were vacant and used as a vacation home. (Opp’n at 7.) The only
25 location in which Defendants were located in-person and served was at the 405 Laguna
26 Property on June 4, 2021. (Opp’n, Dec’l of Assly Sayyar ¶ 11; Opp’n, Dec’l of Miguel A.
27 Ruiz ¶¶ 4–6.)
28

1 Defendants claim that the 405 Laguna Property is not their place of usual abode.
2 (Mot. at 3–4.) In Defendants’ motion, and the declarations provided by Mario and George,
3 the 405 Laguna Property was listed as the property that Mario’s mother stays when she is
4 not living in either the Hawaii or Miami properties. (Mot. at 3–4; Dec’l of George Alvarez
5 ¶ 4; Dec’l of Mario Alvarez ¶ 5.) George and Mario claim in their declarations that they
6 have spent very little time at the 405 Laguna Property, contradicting Mario’s response in
7 his April 2021 Deposition. (Dec’l of George Alvarez ¶ 5; Dec’l of Mario Alvarez ¶ 6;
8 Opp’n Ex.1.) However, in Defendants’ Reply, Defendants correct the address they used
9 for Magali’s address, 405 Laguna Property, and state that Nicholas Alvarez, the son of
10 Mario and Darci, and the nephew of George, lives at the 405 Laguna Property. (Reply
11 at 2.) Defendants claim Magali lives at the 401 Laguna property. *Id.* The 401 Laguna
12 Property is “down the slope that you access by steps outside the residence along the side
13 of the property.” *Id.* Both addresses appear to exist within the same physical property.
14 Plaintiff made a diligent effort to locate Defendants, through research and meetings with
15 counsel, attempted service on addresses that do qualify as Defendants’ place of usual
16 abode, and provided service on the Defendants’ current usual abode. Defendants have not
17 provided strong and convincing evidence proving otherwise.

18 In determining whether an address constitutes a place of usual abode, there must be
19 “sufficient indicia of permanence.” *Craigslist, Inc.*, 278 F.R.D. at 515. A person can have
20 more than one dwelling or usual place of abode if each “bears sufficient indicia of
21 permanence.” *Id.*; *see also Asmodus, Inc. v. Junbiao Ou*, No. EDCV 16-2511 JGB (DTBx),
22 2017 WL 5592914, at *8 (C.D. Cal. Feb. 3, 2017) (finding that a defendant’s investment
23 property qualified as his dwelling house or usual place of abode where there was evidence
24 that he resided there sporadically throughout the year). Furthermore, a defendant who has
25 represented to plaintiffs or outside parties that one residence is his place of usual abode,
26 “may be estopped from later contesting that said residence was the proper location for
27 service of process.” *Craigslist, Inc.*, 278 F.R.D. at 515. Here, Defendants have only been
28 located at the Laguna properties, their other properties have been identified by service

1 providers as vacant or known vacation properties (*See* Opp’n at 7.), and Defendants
2 previously listed the Laguna properties as their current residence. In Mario’s April 2021
3 Deposition, he refers to the 401 Laguna Property as one of the addresses he resides when
4 in California and spends “a lot” of time taking care of his mother. (Opp’n, Ex.1.) When
5 the service processor, Mr. Ruiz, arrived at the 405 Laguna Property, he was told Defendants
6 were “upstairs.” (Opp’n, Dec’l of Miguel A. Ruiz ¶ 4–6.) He was later instructed to
7 proceed to 401 Laguna Property, which is located on the same property, where he was told
8 the Defendants reside. (*Id.* at ¶ 6.) The 401 Laguna Property and the 405 Laguna Property
9 are both located on the same physical property, family members and Defendants reside at
10 the property, and the addresses have been used interchangeably by Defendants. The Court
11 finds that both Laguna addresses constitute a place of usual abode for Defendants.

12 Upon review, the Court finds that the declarations and evidence submitted by both
13 the Plaintiff and Defendants point to the fact that the 405 Laguna Property is the place of
14 usual abode for the Defendants. Defendants have not provided “strong and convincing
15 evidence” to prove service is improper. *See S.E.C*, 509 F.3d at 1163. Rule 4 is “liberally
16 construed so long as a party receives sufficient notice of the complaint.” *Aquawood LLC*,
17 2011 WL 13220333, at * 3. Here, the presence of the Defendants was confirmed to be at
18 the property, service was provided to an individual residing at the property, the property is
19 the Defendants’ place of usual abode, and service was effected on Defendants in
20 accordance with § 415.20(b)—parties have been put on notice of the complaint.


21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///
28 ///

1 **CONCLUSION**

2 The Court **DENIES** Defendants' Motion to Quash Service of Process Based on
3 Insufficient Service of Process. In light of the Court's decision, the Court **VACATES**
4 the hearing set for December 8, 2021.

5 **IT IS SO ORDERED.**

6 Dated: November 30, 2021

7 

8 Honorable Todd W. Robinson
9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28