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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Sandpiper Resorts Development Corporation, an Arizona corporation for profit; and Dourian Foster Investments Inc., an Arizona corporation for profit,

No. CV 08-1360-PHX-MHM

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Plaintiffs,

**ORDER**

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v.

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Global Realty Investments, LLC, a Nevada limited liability company; Caroline Hartman-Altenbernd and Kelly Altenbernd, husband and wife individually; Toscana Developers, LLC, a Florida limited liability company; Cynthia Estes and John Doe Estes, husband and wife individually; Estes Development Corporation, a West Virginia corporation; Black Corporations 1 through 5; White Limited Liability Companies, 1 through 5,

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Defendants.

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Currently before the Court is the Motion to Dismiss (Dkt.#33) filed by Defendants Caroline Hartman-Altenbernd and Kelly Altenbernd, Plaintiffs' Motion for Leave to Serve Defendant Cynthia Estes by Publication; Motion to Deem Service on Estes Development Corporation Valid or in the Alternative to Serve Estes Corporation (Dkt.#42), Plaintiffs' Motion for Hearing on the aforementioned motion (Dkt.#43), and Plaintiffs' Motion for Hearing or Conference re: Plaintiff's Motion for Status Hearing (Dkt.#44). Having

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1 considered these motions and their accompanying papers, the Court issues the following Order.

2 **I. Background**

3 **A. The underlying claims for fraud and breach of contract**

4 Plaintiffs are suing Defendants for breach of contract and fraud that allegedly occurred  
5 in the context of a bankruptcy proceeding. As explained by Plaintiffs, the crux of the fraud  
6 was that Defendants contracted to purchase certain property from Plaintiffs on an “as is”  
7 basis. The property was at that time subject to a bankruptcy proceeding, and court approval  
8 was required to lift the protections of the bankruptcy stay and proceed with the sale. The  
9 Bankruptcy Judge held a hearing at which Ms. Hartman-Altenbernd’s attorney represented  
10 to the bankruptcy court that the Defendants were going to perform as promised and purchase  
11 the property. On the basis of this assertion, the bankruptcy court lifted the stay to allow the  
12 negotiated sale that Plaintiffs and Plaintiffs’ creditors relied upon.

13 Plaintiffs claim to have later learned that the representations made at the bankruptcy  
14 hearing were fraudulent. They further state that “[i]t has become clear that Defendants did  
15 not intend to close and were concealing the facts that they: [1] did not have the requisite  
16 financing in place; [2] did not intend to proceed with the sale if the property appraised at a  
17 lower value than the sale price; and [3] had instead planned, and had engaged in discussions  
18 regarding, purchase of the property from the mortgage holder after foreclosure once the stay  
19 was lifted, at a price substantially below the contract sale price.” (Dkt.#42 at 3)

20 After learning that the property did not sell, the Bankruptcy Judge ordered the parties’  
21 attorneys to appear for a hearing to determine whether Defendants’ “knew it [the sale] wasn’t  
22 [going forward] or the lawyers for Global are still representing clients who lied to them.”  
23 (Dkt.#34 at 4) The Bankruptcy Judge appears to have stated that he believed Defendants  
24 committed a fraud on the Court.

25 **B. Attempts to Serve the Altenbernds**

26 Defendants Toscana and Global (the LLCs through which the Altenbernds operated)  
27 were served via their statutory agents. After diligent but unsuccessful efforts were made to  
28 serve the Altenbernds within the 120 day deadline, Plaintiffs filed a motion for an extension

1 of time to serve the Altenbernds. The Court granted this motion on May 21, 2009, giving  
2 Plaintiffs 20 additional days from the date of the Order.

3 On June 8, 2009, Plaintiffs filed an affidavit of service stating that Caroline Hartman-  
4 Altenbernd and Kelly Altenbernd had been served on June 5, 2009 by leaving the process  
5 with Kelly Altenbernd at the 33<sup>rd</sup> Avenue Residence that apparently belonged to Mr.  
6 Altenbernd's sister, Jamie Lowe.

7 Plaintiffs explain that after the Court's May 21 Order, they contacted an investigator  
8 and process server who was informed of the previous efforts<sup>1</sup> to locate and serve the  
9 Altenbernds and instructed to do whatever was necessary to locate the Altenbernds and serve  
10 them. Plaintiff's process server discovered two addresses the Altenbernds held in common,  
11 the 48<sup>th</sup> Street Residence and the 33<sup>rd</sup> Avenue Residence. He also conducted a driver's  
12 license search on the Altenbernds in Arizona, Nevada and Florida and obtained a current  
13 license with a photo for Mr. Altenbernd. That license listed the current residence of the  
14 Altenbernds as the 48<sup>th</sup> Street Residence. He was unable to obtain a current driver's license  
15 for Ms. Altenbernd; however, her expired 2007 license also listed the 48<sup>th</sup> Street Residence  
16 as her current residence.

17 Plaintiffs had previously attempted to serve the Altenbernds at the 48<sup>th</sup> Street  
18 Residence on November 10, 2008, but they found the home vacant. They also had attempted  
19 to locate and serve the Altenbernds via their LLCs. They also had conducted a skip trace to  
20 locate the Altenbernds and sent process servers to Nevada. Upon doing a public records  
21 search, the private investigator discovered that the 48<sup>th</sup> Street Residence had been either  
22 foreclosed on or deeded back to the bank on September 24, 2008.

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26 <sup>1</sup> These efforts are explained at length in Plaintiffs' Motion for an Extension of Time  
27 to Serve (Dkt.#21); briefly, they included attempting to serve the Altenbernds at the 48<sup>th</sup>  
28 Street Residence on November 10, 2008, attempting to locate and serve the Altenbernds via  
their LLCs, conducting a skip trace to locate the Altenbernds, and sending process servers  
to Nevada.

1 A further public records search showed the 33<sup>rd</sup> Avenue Residence belonged to Mr.  
2 Altenbernd's sister, Jamie Lowe. The investigator discovered that both Mr. and Ms.  
3 Altenbernd had been personally served at the 33<sup>rd</sup> Avenue Residence (in an unrelated Justice  
4 Court case) on March 22, 2009. The investigator also located and interviewed Mr.  
5 Altenbernd's ex-wife, who stated that she had seen him approximately eight months earlier  
6 at a supermarket in the company of his older sister, Jamie Lowe. Based on this information,  
7 the investigator decided to focus on serving the Altenbernds at the 33<sup>rd</sup> Avenue Residence.

8 On June 3 and June 4, the investigator and his associate "staked out" the 33<sup>rd</sup> Avenue  
9 Residence. They spoke to a neighbor who confirmed that Ms. Lowe's brother lived in the  
10 33<sup>rd</sup> Avenue home and went on to say that Kelly Altenbernd had left the 33<sup>rd</sup> Avenue  
11 Residence earlier that morning to take his wife to the hospital because she was having  
12 stomach cramps. The investigator and his associate waited several hours for their return, but  
13 were unsuccessful. They decided to return the next day.

14 On June 5, the investigator and his associate approached the door of the 33<sup>rd</sup> Avenue  
15 Residence. The door was answered by a man who the investigator identified as Kelly  
16 Altenbernd based on his driver's license photo. The investigator asked if the man was Kelly  
17 Altenbernd. The man responded, "Who wants to know?" The investigator told the man that  
18 he had service for Kelly Altenbernd and Caroline Hartman-Altenbernd. The man then said,  
19 "They don't live here," and began to shut the door. The investigator showed the man a copy  
20 of the driver's license photo and stated that he clearly was Mr. Altenbernd and that he looked  
21 exactly like the photo. The investigator stated under oath that he believes that the man at the  
22 door was the man in Kelly Altenbernd's driver's license photo. As the man attempted to  
23 close the door, the investigator dropped the service at the man's feet.

24 After serving the man at the 33<sup>rd</sup> Avenue Residence, the investigator and his associate  
25 immediately went to another neighbor's home and asked the neighbor, Alice Estes, if she  
26 knew whether Jamie Lowe's brother, Kelly Altenbernd, lived next door. The neighbor  
27 confirmed that they did.

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1           The Altenbernd Defendants challenge this service and move to dismiss this case based  
2 on insufficient service of process. (Dkt.#33)

3           The Altenbernds claim that the June 5, 2009 service was invalid because it was not  
4 Kelly Altenbernd but a friend of the Lowe's, Mike Gooler, who answered the door. (Dkt.#33  
5 at 5) According to the Altenbernds, Kelly Altenbernd lived at the Lowe's 33<sup>rd</sup> Avenue  
6 Residence only from November 2007 until March 2008 and Caroline Hartman-Altenbernd,  
7 apart from occasional overnight houseguest visits, has never resided at the 33<sup>rd</sup> Avenue  
8 Residence. (Dkt. #33) They further affirm that neither has any intention of owning, renting,  
9 or maintaining a home in Arizona and that they have purchased real property in Los Angeles  
10 County, California (although Plaintiffs' search of real property was unable to locate any such  
11 property). (Dkt.#33) They further state that they sold the 48<sup>th</sup> Street Residence "in  
12 November 2008," although as mentioned above, the private investigator discovered that the  
13 48<sup>th</sup> Street Residence had been either foreclosed on or deeded back to the bank on September  
14 24, 2008.

15           Plaintiffs outline a number of other attempts to locate and serve process on the  
16 Altenbernd Defendants, including contacting the former counsel for their LLCs, the  
17 Altenbernd's bankruptcy attorneys, and former counsel for the Altenbernds in this action.  
18 (Dkt.#34) However, all counsel refused to identify the Altenbernds' present address, citing  
19 concerns about client confidentiality and ethical rules. (Dkt.#34) However, Mr. Ward, the  
20 former counsel for Toscana, LLC, stated that he had forwarded on the service of process to  
21 "Caroline" as a courtesy before immediately withdrawing as a statutory agent because he no  
22 longer had any relationship with Toscana. (Dkt.#34) Moreover, given that the Altenbernds'  
23 counsel in the present action filed the Motion to Dismiss for insufficient service of process  
24 on June 25, 2009, before withdrawing from the case, it is clear that the Altenbernds  
25 necessarily have received actual notice of this action. (Dkt.#34)

1 **II. Motion to Dismiss (Dkt. #33)**

2 The Altenbernd Defendants move to dismiss the complaint, arguing that alleged June  
3 5, 2009 service of process was insufficient. Defendants also argue that dismissal is proper  
4 because they contend that Plaintiffs failed to effectuate service upon them by June 9, 2009  
5 (the deadline for service according to the Court’s prior Order). Specifically, they argue that  
6 (1) the Lowe 33<sup>rd</sup> Avenue Residence is not the Altenbrands’ dwelling house or usual place  
7 of abode and (2) that the summons and complaint were not left with a person who resides at  
8 the Lowe 33<sup>rd</sup> Avenue Residence.

9 Plaintiffs respond that the June 5, 2009 service was valid and point to their  
10 investigator’s affidavit to refute Defendants’ claims that the June 5 service was accomplished  
11 on Mike Gooler, not Kelly Altenbernd. Moreover, they argue in the alternative, that because  
12 the Altenbernds received actual notice of the lawsuit (as evidenced by their motion to  
13 dismiss), the “broad and flexible” requirements of Rule 4 are met. In the alternative,  
14 Plaintiffs request an evidentiary hearing so that the Court may better evaluate the credibility  
15 of the conflicting accounts. Finally, they request that the Court allow them to effectuate  
16 service by publication as provided for in Arizona Rule of Civil Procedure 4(n), citing Federal  
17 Rule of Civil Procedure 4(e)(1), which permits service by any method set forth in the rules  
18 of the state of the District Court’s location).

19 However, an evidentiary hearing appears unnecessary. Assuming without deciding  
20 that the Altenbernds are correct, and the attempted service on June 5 did not, in fact,  
21 effectuate service upon Kelly Altenbernd, the Court is nonetheless convinced that based on  
22 Plaintiffs’ extraordinary efforts to serve the Altenbernds, service by publication appears  
23 appropriate, particularly given that the Altenbernds have necessarily received actual notice  
24 of the pending matter, as evidenced by their motion to dismiss. A number of Federal courts  
25 have noted that “[t]he rules governing service of process are not designed to create an  
26 obstacle course for plaintiffs to navigate, or a cat-and-mouse game for defendants who are  
27 otherwise subject to the court’s jurisdiction.” TRW, Inc. v. Derbyshire, 157 F.R.D. 59, 60  
28 (D. Colo. 1994); see also Direct Mall Specialists, Inc. v. Eclat Computerized Technologies,

1 Inc., 840 F.2d 685, 688 (9<sup>th</sup> Cir. 1988) (explaining that “Rule 4 is a flexible rule that should  
2 be liberally construed so long as a party receives sufficient notice of the complaint”).  
3 Accordingly, Plaintiffs will have 45 days from the date of this Order to effectuate service by  
4 publication according to the Arizona Rules of Civil Procedure upon the Altenbernd  
5 defendants. The Altenbernd Defendants’ motion to dismiss is denied.

6 **III. Motion for Leave to Serve by Publication on Defendant Estes (Dkt.#42)**

7 On October 8, 2009, Plaintiffs filed an amended complaint<sup>2</sup> adding Cynthia Estes and  
8 Estes Development Corporation as Defendants. Plaintiffs have cited a similar history of  
9 attempting to serve Defendant Cynthia Estes. Specifically, they tracked Ms. Estes to a  
10 residence in West Virginia. The door was answered by Ms. Estes’ mother, who stated that  
11 Ms. Estes did not live in West Virginia, but South Carolina, and that the process server  
12 should return later. However, when the process server returned, the mother refused to accept  
13 process or to give the process server Ms. Estes’ address. Instead, the mother stated that Ms.  
14 Estes had asked her to give the process server the name and address of her Florida attorney,  
15 Greg Ward, and stated that he would accept service of the subpoenas on Ms. Estes’ behalf.<sup>3</sup>

16 However, voice mail messages to Mr. Ward were not returned. A number of emails  
17 were also sent, but went unanswered for over a week until Mr. Ward responded that he could  
18 not accept service of process at that time, but that he would check with his client and let  
19 Plaintiffs know. Plaintiffs’ counsel then spoke on the telephone with Mr. Ward several  
20 times. Ultimately, Mr. Ward responded that he could not accept service and that Plaintiffs  
21 should try to contact Ms. Estes directly. However, he gave Plaintiffs a telephone number that  
22 he identified as belonging to Ms. Estes. When Plaintiffs’ counsel called, the answering  
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24 <sup>2</sup> This amended complaint was filed as of right under Federal Rule of Civil Procedure  
25 15(a)(1)(A) because no responsive pleading had been served. A Motion to Dismiss is not a  
26 responsive pleading for purposes of this rule. Mayes v. Leipziger, 729 F.2d 605, 607-08 (9<sup>th</sup>  
27 Cir. 1984).

28 <sup>3</sup> Plaintiffs initially tried to serve a subpoena on Ms. Estes and a subpoena duces  
tecum on Estes corporation..

1 machine identified the number as belonging to Ms. Estes; however, she never responded to  
2 the messages that were left.

3 Plaintiffs attempted to serve Ms. Estes at a Florida Residence; however the man who  
4 answered the door explained that he had purchased the residence from Ms. Estes in 2008 and  
5 that she no longer resided there. They also attempted to serve Ms. Estes at here South  
6 Carolina residence; however, their process server found that she no longer resided at this  
7 address either.

8 Plaintiffs also attempted to serve Ms. Estes as the statutory agent for Estes  
9 Development, a West Virginia Corporation; however, the address listed for Ms. Estes as the  
10 agent for Estes Development is a postal office box, making personal delivery to the agent  
11 impossible. The Estes corporate filings also identify the West Virginia Residence as Estes  
12 Development's Principal Office Address. However, as explained above, this residence  
13 apparently belongs to Ms. Estes' mother, and attempts to reach her there were unsuccessful.  
14 As provided by West Virginia Code § 31D-5-504(c), Plaintiff served the subpoena on the  
15 West Virginia Secretary of State, which accepted service on behalf of Estes Development on  
16 October 16, 2009. Having determined that attempts to serve the Amended Complaint and  
17 Summons would be futile, Plaintiffs served Estes Development by delivering a copy of the  
18 Summons and Amended Complaint to the West Virginia Secretary of State, which accepted  
19 service on October 28, 2009.

20 Plaintiffs request leave to serve Ms. Estes by publication pursuant to Fed. R. Civ. P.  
21 4(e)(1) and Ariz. R. Civ. P. 4.2(f). They point out that they have attempted to serve her in  
22 three different states, have attempted to contact her via her mother and her attorney, and have  
23 left multiple messages on her cell phone. It appears that Plaintiff has been diligent in  
24 attempting to serve Ms. Estes; moreover, it appears that Ms. Estes is aware that an action has  
25 been filed against her based on the cell phone messages and the messages left with her  
26 mother. As such, Plaintiffs' request to effectuate service upon Ms. Estes through publication  
27 is granted (Dkt.#42).

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1           It appears that Plaintiffs have complied with West Virginia law regarding service upon  
2 Estes Corporation and that service has been effectuated by serving West Virginia’s Secretary  
3 of State. According to the West Virginia Code, service will be “deemed sufficient if return  
4 receipt is signed by an agent or employee of the corporation, or the registered or certified  
5 mail sent by the secretary of state is refused by the addressee and the registered or certified  
6 mail is returned to the secretary of state, or to his or her office, showing the stamp of the  
7 United States postal service that delivery has been refused . . . .” W. Va. Code § 31D-5-  
8 504(c). Accordingly, Plaintiffs’ Motion to Deem Service on Defendant Estes Development  
9 Corporation Valid or in the Alternative to Serve Estes Development Corporation by  
10 Publication (Dkt.#42) is granted to the extent that it deems service valid and denied to the  
11 extent that it seeks leave to serve Estes Corporation by publication.

12 **IV. Other Pending Motions**

13           Given the above rulings, Plaintiffs’ subsequent Motion for an Expedited Hearing on  
14 Motion for Leave to Serve by Publication and on Motion to Deem Service on Defendant  
15 Estes Development Corporation Valid or in the Alternative to Serve Estes Development  
16 Corporation by Publication (Dkt.#43) now appears to be moot; accordingly, it is denied as  
17 moot.

18           Similarly, Plaintiffs’ Motion for a Status Hearing (Dkt.#44), filed the same day as the  
19 prior motion, to resolve any outstanding procedural issues, also appears to be mooted by the  
20 above-mentioned determinations. Accordingly, it is similarly denied as moot.

21           **Accordingly,**

22           **IT IS HEREBY ORDERED** denying Defendants’ Motion to Dismiss (Dkt.#33)

23           **IT IS FURTHER ORDERED** permitting Plaintiffs to serve the Altenbernds by  
24 publication in accordance with the Arizona Rules of Civil Procedure no later than 45 days  
25 from the date of this Order.

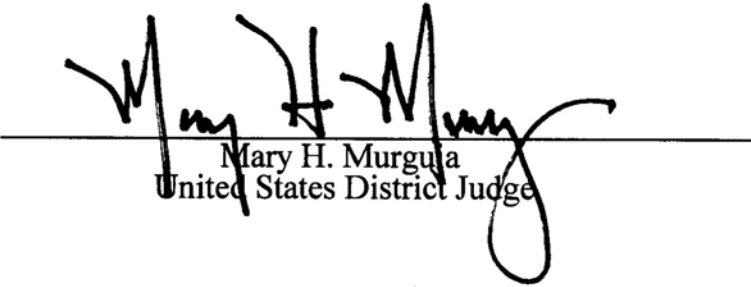
26           **IT IS FURTHER ORDERED** granting Plaintiffs’ Motion for Leave to Serve  
27 Defendant Cynthia Estes by Publication (Dkt.#42) no later than 45 days from the date of this  
28 Order in accordance with the Arizona Rules of Civil Procedure.

1 **IT IS FURTHER ORDERED** granting Plaintiffs’ Motion to Deem Service on Estes  
2 Development Corporation Valid (Dkt.#42).

3 **IT IS FURTHER ORDERED** denying as moot Plaintiffs’ Motion for Hearing on the  
4 aforementioned motion (Dkt.#43).

5 **IT IS FURTHER ORDERED** denying as moot Plaintiffs’ Motion for Status Hearing  
6 (Dkt.#44).

7 DATED this 21<sup>st</sup> day of December, 2009.

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11 Mary H. Murgula  
12 United States District Judge  
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