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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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BMO Harris Bank, N.A., a national banking association,

No. CV-13-1692-PHX-LOA

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Plaintiff,

ORDER

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vs.

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D.R.C. Investments, L.L.C., an Arizona limited liability company; Longo Custom Homes, LLC, an Arizona limited liability company; Russell J. Longo and Patricia Longo, husband and wife,

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Defendants.

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This action arises on Plaintiff BMO Harris Bank’s (“Bank”) Motion for Alternative Service, pursuant to Rules 4(h)(1)(A) and (e)(1), Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), and Rule 4.1(k), Arizona Rules of Civil Procedure (“Ariz.R.Civ.P.”).¹ (Doc. 7) The Bank requests an order authorizing alternative service of the Summons, Complaint, and this Order by (1) First Class U.S. mail, and (2) affixing a copy of each of these documents to the front door of the residence of Russell and Patricia Longo (“Longos”) located on Trapanotto Road in Phoenix due to the Longos’ apparent refusal to answer the door of their residence in an effort to avoid service of process. (*Id.* at 1) To date, no Defendant has appeared in this action.

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¹ The Court notes that, by using all capital letters for party names, the Motion’s caption violates LRCiv.7.1(a)(3) (“[P]arty names must be capitalized using proper upper and lower case type.”) and bolding of the District Court’s name is not authorized.

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1 **I. Jurisdiction**

2 Congress has empowered federal district courts to adjudicate civil actions between
3 “citizens of different States” where the amount in controversy exceeds \$75,000, exclusive
4 of interest and costs. 28 U.S.C. § 1332(a)(1). For diversity jurisdiction purposes, national
5 banks “shall . . . be deemed citizens of the States in which they are respectively located.” 28
6 U.S.C. § 1348; *Wachovia Bank v. Schmidt*, 546 U.S. 303, 307 (2006) (holding that “a
7 national bank, for § 1348 purposes, is a citizen of the State in which its main office, as set
8 forth in its articles of association, is located”). The Bank predicates subject-matter
9 jurisdiction on 28 U.S.C. § 1332(a)(1) based upon complete diversity of citizenship and the
10 amount in controversy exceeds \$75,000.00, exclusive of interest and costs, as the Bank is
11 a citizen of Illinois where its main office is located and Defendants are citizens and residents
12 of Arizona where they are domiciled. (Doc. 1, ¶¶ 1-7) Limited liability companies, unlike
13 corporations, are analogized to partnerships, take the citizenship of every general and limited
14 partner. *See Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006)
15 (“[E]very circuit that has addressed the question treats [LLCs] like partnerships for the
16 purposes of diversity jurisdiction.”) (citations omitted)

17 “[F]ederal courts sitting in diversity jurisdiction apply state substantive law and
18 federal procedural law.” *Zamani v. Carnes*, 491 F.3d 990, 995 (9th Cir. 2007) (citation
19 omitted); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

20 **II. Background**

21 This breach-of-contract action was instituted by the Bank, successor-by-merger to
22 M&I Bank, on August 16, 2013, against the Longos and two limited liability companies,
23 D.R.C. Investments, L.L.C. (“DRC”) and Longo Custom Homes, LLC (“LCH”) controlled
24 by Russell Longo, as a result of the Defendants’ alleged collective default on certain
25 mortgage and promissory notes, secured by a deed of trust, assignment of rents and security
26 agreement, and personally guaranteed by the Longos. (Doc. 1, ¶¶ 10-13) The Complaint
27 alleges that, as of August 14, 2013, the total indebtedness that DRC, LCH, and the Longos
28 owe the Bank under the various notes and guaranties exceeds \$1,500,000, excluding pre-

1 judgment interest, attorneys fees, costs, and litigation expenses. (*Id.*, ¶¶ 10, 17, 27, 31, 50)

2 According to the Bank, and independently confirmed by the Court, the Arizona
3 Corporation Commission’s public records indicate that DRC’s statutory agent is Bernard M.
4 Rethore, and both its domestic and statutory agent’s address is 20325 N. 51st Avenue,
5 Building 10, Suite 176, Glendale, Arizona 85308. (Doc. 7 at 1) The Corporation
6 Commission’s public records also reflect that LCH’s statutory agent is Russell James Longo,
7 and both its domestic and statutory agent’s address is 20325 N. 51st Avenue, Building 10,
8 Suite 176, Glendale, Arizona 85308. The same public records identify Russell Longo as
9 DRC’s and LCH’s sole member. (*Id.* at 1-2)

10 The Bank provides the Court with credible information from different sources that,
11 prior to June 4, 2013, the Longos resided at 1207 E. Magellan Drive, in New River, Arizona,
12 and, according to certified copies of Arizona’s Motor Vehicle Division records and Lorie
13 Anderson, who lives in the Longos’ former New River residence, the Longos currently
14 reside at 3017 W. Trapanotto Road, Phoenix, Arizona. (Doc. 7-1, Exhibits (“Exh.”) A at 2-3
15 and B at 13)

16 The Bank claims its “[e]fforts to secure service upon Defendants have proven
17 impracticable, and it is likely that Defendants are evading service.” (Doc. 7 at 2) (citing Exh.
18 B) “Attempts to serve DRC and LCH at their listed addresses were unsuccessful as the listed
19 address is currently a different unrelated new business, and is no longer the office for either
20 DRC or LCH.” (*Id.*) An attempt to serve the Longos at their former New River residence
21 was unsuccessful because when service was attempted, the process server discovered the
22 Longos had moved when that residence was sold to Lorie Anderson and Wade Anderson.
23 (*Id.*) Lorie Anderson, one of the current owners of the New River residence, provided the
24 Bank’s process server with the Longos’ new Phoenix address as 3017 W. Trapanotto Road.
25 (*Id.*) The Bank informs the Court it has attempted personal service upon all Defendants on
26 five (5) separate occasions at varying times of the day and night. (*Id.*) (citing Exh. B) At
27 every service attempt at the Phoenix residence, there were two vehicles present at the
28 Longos’ residence, one was registered to Russell Longo. (*Id.*) Based on its numerous service

1 attempts, the Bank concludes that no one at the W. Trapanotto Road residence will answer
2 the door to accept service of process. (*Id.*)

3 The Bank argues that service of process by traditional means upon all Defendants has
4 proven “impracticable.” (*Id.*²) Citing *Blair v. Burgener*, 226 Ariz. 213, 218-19, 245 P.3d
5 898, 903-04 (Az. Ct. App. 2010), the Bank represents that “it is not necessary to show ‘due
6 diligence’; instead, it is only necessary to show ‘that service of process through the usual
7 means would have been ‘extremely difficult or inconvenient.’” (*Id.* at 2-3) The Bank claims
8 its requested method of service is “[r]easonably calculated to apprise Defendants Russell J.
9 Longo individually, and as authorized member of both DRC and LCH, and Patricia Longo
10 individually, of the pendency of this action, and to afford them an opportunity to present
11 their objections.” (*Id.* at 3) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
12 306, 314-15 (1950)). In view of its five failed attempts, the Bank requests an order pursuant
13 to Rule 4.1(k), Ariz.R.Civ.P., via Rules 4 (h)(1)(A) and 4(e)(1), Fed.R.Civ.P., permitting
14 service of the complaint and summons by alternative means.

15 **III. Alternative Service**

16 Before a federal court may exercise personal jurisdiction over a defendant, the
17 procedural requirement of service of the summons and complaint must be satisfied. *Omni*
18 *Capital Int’l., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987), *superseded by statute on*
19 *other grounds*; *S.E.C. v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007). Because service of
20 process is the means by which a trial court obtains jurisdiction over a person, “[a] person is
21 not bound by a judgment in a litigation to which he or she has not been made a party by
22 service of process.” *Mason v. Genisco Technology Corp.*, 960 F.2d 849, 851 (9th Cir. 1992).
23 Rule 4, Fed.R.Civ.P., governs the service of process in federal courts. “A federal court is
24 without personal jurisdiction over a defendant unless the defendant has been served in
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26 ²The Bank’s Motion mistakenly cites “Ariz. R. Civ. P. 4.1(m),” which currently deals
27 with service of process by publication. (Doc. 7 at 2, line 24) While it seeks an order of
28 alternative service under Rule 4.1(k), a fair reading of the Bank’s Motion indicates it is not
requesting service of process by publication.

1 accordance with Fed.R.Civ.P. 4.” *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986). Unless
2 extended by the district court, “[a] plaintiff must serve all defendants with a copy of the
3 summons and complaint within 120 days of filing a complaint.” *Robinson v. Heritage*
4 *Elementary School*, 2009 WL 1578313, *2 (D. Ariz. June 3, 2009) (citing Rule 4(m),
5 Fed.R.Civ.P.).

6 Federal Rule of Civil Procedure 4(h) addresses service of process on an individual or
7 a legal entity, such as a corporation, partnership, or limited liability company, within or
8 outside a judicial district of the United States. It provides that unless otherwise provided by
9 federal law or a defendant’s waiver of service under Rule 4(d) has been filed, a person or
10 legal entity may be served in any judicial district of the United States. Rule 4(h) provides,
11 in relevant part, as follows:

12 (1) in a judicial district of the United States:

13 (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

14 (B) by delivering a copy of the summons and of the complaint to an officer, a
15 managing or general agent, or any other agent authorized by appointment or by
16 law to receive service of process and - if the agent is one authorized by statute and
the statute so requires - by also mailing a copy of each to the defendant

17 Rule 4(h)(1)(A)-(B), Fed.R.Civ.P.

18 Federal Rule of Civil Procedure 4(e)(1) provides, in part, that “[u]nless federal law
19 provides otherwise, an individual . . . may be served in a judicial district of the United States
20 by: (1) following state law for serving a summons in an action brought in courts of general
21 jurisdiction in the state where the district court is located or where service is made”

22 Rule 4(e)(1), Fed.R.Civ.P. Rule 4(e)(2)(C), Fed.R.Civ.P., authorizes service on a limited
23 liability company by “delivering a copy of each to an agent authorized by appointment or
24 by law to receive service of process.”

25 Under Arizona law, when personal service has become impracticable, Rule 4.1(k),
26 Ariz.R.Civ.P., formerly Rule 4.1(m), authorizes service by alternative means as follows:

27 **Alternative or Substituted Service.** If service by one of the means set forth
28 in the preceding paragraphs of this Rule 4.1 proves *impracticable*, then service

1 may be accomplished in such manner, other than by publication, as the court,
2 upon motion and without notice, may direct. Whenever the court allows an
3 alternate or substitute form of service pursuant to this subpart, reasonable
4 efforts shall be undertaken by the party making service to assure that actual
5 notice of the commencement of the action is provided to the person to be
6 served and, in any event, *the summons and the pleading to be served, as well*
7 *as any order of the court authorizing an alternative method of service, shall*
8 *be mailed to the last known business or residence address of the person to be*
9 *served*

6 Rule 4.1(k), Ariz.R.Civ.P. (emphasis added).

7 Arizona law does not expressly define the standard for impracticability, but in 2010,
8 the Arizona Court of Appeals in *Blair* approvingly cited the language from a New York case
9 on a similar service issue. “[T]he standard of impracticability [i]s “different from the more
10 stringent one of ‘due diligence’ . . . That is, to meet the standard on impracticability does not
11 require satisfying due diligence, or even showing that actual prior attempts to serve a party
12 under each and every method provided in the statute have been undertaken[.]” 226 Ariz. at
13 218, 245 P.3d at 903 (quoting *Kelly v. Lewis*, 220 A.D.2d 485, 486, 632 N.Y.S.2d 186, 186
14 (App.Div.1995)). Applying this standard of impracticability, the New York court concluded
15 that three attempts at service on three different days constituted sufficient efforts to warrant
16 alternative means of service. Adopting the same standard, the *Blair* court found that Blair’s
17 efforts at service without success met the definition of impracticability justifying alternative
18 service. Blair’s process server attempted service at both defendants’ place of business and
19 the individual defendant’s residence on five different days at various times. In addition to
20 these physical attempts, the process server attempted to ascertain over an additional seven
21 days whether the individual defendant was present in the office so that service could be
22 made. Each time he was told this defendant was not in the office. These facts and
23 circumstances, the Arizona court concluded, “demonstrate that service of process through
24 the usual means would have been ‘extremely difficult or inconvenient[.]’” and was
25 impractical which justified the trial court’s authorization of alternative service under Arizona
26 law. Because the trial court did not abuse its discretion in permitting alternative service by
27 the means employed, it had jurisdiction over the defendants. The *Blair* court affirmed the
28 default judgment against the defendants. 226 Ariz. at 221, 245 P.3d at 906.

1 **IV. Discussion**

2 After commencing this suit, the Bank made five unsuccessful attempts to personally
3 serve the Defendants either at the former offices of the limited liability companies or the
4 Longos' former and current residence. The Bank has demonstrated that continued efforts to
5 serve the Defendants by traditional means are impracticable under Rule 4.1(k), Ariz.R.Civ.P.
6 After consideration of the Motion, the evidence presented, and in view of Defendants'
7 apparent evasion of service of process and the futility of further attempts to personally serve
8 the Defendants, the Court finds service of process on Defendants by traditional means is
9 impracticable. The Court will grant the Bank's request for alternative service.

10 Accordingly,

11 **IT IS ORDERED** that Plaintiff's Motion's for Alternative Service, doc. 7, is
12 **GRANTED.**

13 **IT IS FURTHER ORDERED** that Plaintiff may serve the Defendants, and each of
14 them, by (1) First Class U.S. mail, and (2) affixing a copy of the Summons, Complaint, and
15 the Order Authorizing Alternative Service to the front door of Russell J. Longo and Patricia
16 Longo's residence located at 3017 W. Trapanotto Road, Phoenix, Arizona 85086.

17 **IT IS FURTHER ORDERED** that Plaintiff must file with the Court satisfactory
18 evidence of mailing and that a copy of the Summons, Complaint, and this Order were mailed
19 to, and affixed to the front door of, Defendants' last known residence located at 3017 W.
20 Trapanotto Road, Phoenix, Arizona 85086. The provision of this evidence shall be deemed
21 proof of sufficient evidence that Defendants, and each of them, have been appropriately
22 served with process in this action pursuant to the applicable procedural rules and the law.

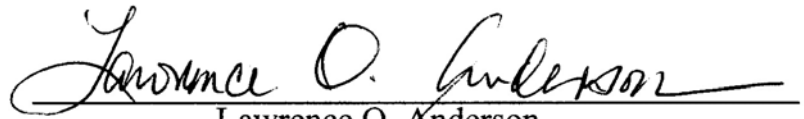
23 **IT IS FURTHER ORDERED** that counsel and any party, if unrepresented, must
24 hereinafter comply with the Rules of Practice for the United States District Court for the
25 District of Arizona, including LRCiv.7.1(a)(3) ("[P]arty names must be capitalized using
26 proper upper and lower case type.") (citing footnote 3 citing a sample of proper capitalization

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1 in Appendix C). The District's Rules of Practice may be found on the District Court's
2 internet web page at www.azd.uscourts.gov/.

3 Dated this 9th day of September, 2013.

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6 Lawrence O. Anderson
7 United States Magistrate Judge
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