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United States District Court
Central District of California

ALLA ANATOLYEVNA ZORIKOVA,

Plaintiff,

v.

KINETICFLIX, LLC,

Defendants.

Case № 2:19-CV-04214-ODW (GJSx)

**ORDER DENYING DEFENDANT
KINETICFLIX, LLC'S MOTION TO
DISMISS [30, 33, 38, 44, 48]**

I. INTRODUCTION

Presently before the Court is Defendant Kineticflix, LLC's ("Kineticflix") Motion to Dismiss for insufficient process and insufficient service of process. (Mot. to Dismiss ("Mot."), ECF Nos. 30.) For the reasons below, the Court **DENIES** Kineticflix's Motion.¹

II. FACTUAL BACKGROUND

This action arises from allegations by Plaintiff Alla Anatolyevna Zorikova ("Zorikova") that Kineticflix reproduced, distributed, and publicly displayed

¹ Having carefully considered the papers filed in connection to the instant Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. The Court construes Zorikova's Motion to Strike as its opposition to Kineticflix's Motion.

1 Zorikova’s copyrighted audiovisual work titled “Ballet Class Victor Kabaniaev DVD”
2 (“Subject Video”). (Compl. ¶ 1.) Zorikova alleges Kineticflix published the Subject
3 Video on Kineticflix’s website without her authorization. (Compl. ¶ 15.) On October
4 21, 2016, Zorikova mailed a cease and desist letter to Kineticflix’s address at 43250
5 Shoshoni Loop, Fall River Mills, California but did not receive a response. (Compl.
6 ¶¶ 16–17.) On May 15, 2019, Zorikova filed this action as a pro se plaintiff in the
7 Central District of California. (*See* Compl. 1–10.)

8 Zorikova alleges Olivia Jeong (“Jeong”), not a party to this lawsuit, properly
9 served Kineticflix through Jack Einwechter (“Einwechter”), Kineticflix’s appointed
10 service of process agent, on July 25, 2019. (Proof of Service, ECF No. 16; Pl.’s
11 Opp’n Ex. 2, ECF No. 33-2.) An affidavit states Jeong went to the address listed
12 through the California Secretary of State website and encountered a man with gray
13 hair. (Decl. of Olivia Jeong II (“Jeong Decl. II”) ¶¶ 4–5, ECF No. 49.) When Jeong
14 inquired as to the whereabouts of the law office of Mr. Einwechter, the man responded
15 he was Mr. Einwechter. Jeong, then, handed Einwechter full copies of Summons and
16 Complaint. (Jeong Decl. II ¶¶ 4–5.)

17 On September 6, 2019, Kineticflix filed a Motion to Dismiss for defective
18 process and insufficient service of process. (Mot. to Dismiss 1,6 (“Mot.”), ECF No.
19 30.) Kineticflix alleges the attempted service of process was defective and
20 insufficient because it was served by Zorikova herself, was not properly addressed to
21 the Defendant and did not include a complete copy of the complaint. (Mot. 2.) On
22 September 9, 2019, Zorikova filed a Motion to Strike. (Pl.’s Opp’n (“Opp’n”), ECF
23 No. 33.)

24 III. DISCUSSION

25 At issue is whether Zorikova provided adequate service and service of process.
26 Court now determines whether Zorikova’s complaint should be dismissed pursuant to
27 12(b)(4) or (5).

1 **A. Adequacy of Service Under 12(b)(4)**

2 Kineticflix seeks dismissal of Zorikova’s complaint because Zorikova failed to
3 provide Kinectiflix a complete copy of the Complaint with the Summons. (Mot. 3-4.)

4 Under Federal Rule of Civil Procedure (“Rule”) 12(b)(4), a party may seek
5 dismissal of a complaint for insufficient process. Fed. R. Civ. P. 12(b)(4). The
6 sufficiency of process is governed by Rule 4, which requires, among other things, that
7 a summons must “name the court and the parties” and “be directed to the defendant.”
8 Fed. R. Civ. P. 4(a)(1)(A)–(B). Rule 4 states that service of process on a corporation
9 can be affected in several ways, including “delivering a copy of the summons and
10 complaint to an officer, a managing or general agent, or any other agent authorized by
11 appointment or by law to receive service of process.” Fed. R. Civ. P. 4(h)(1)(B). The
12 Ninth Circuit has held that “Rule 4 is a flexible rule that should be liberally construed
13 so long as a party receives sufficient notice of the complaint.” *United Food &*
14 *Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984).
15 Thus, “dismissal is generally not justified absent a showing of prejudice.” *Id.*
16 (citations omitted). If service of process is insufficient, the district court has
17 discretion to dismiss an action or quash service. *S.J. v. Issaquah Sch. Dist. No. 411*,
18 470 F.3d 1288, 1293 (9th Cir. 2006).

19 Here, the Court determines that Kineticflix received sufficient notice of the
20 complaint. For example, Kineticflix’s counsel, John Hyatt (“Hyatt”), states that
21 Kineticflix had lawfully purchased a CD of the subject ballet class video, that
22 Kineticflix lawfully rented the Subject Video, and that Kineticflix did not infringe on
23 Zorikova’s intellectual property rights. (Decl. of John Hyatt ¶ 2, ECF No. 30-3.)
24 Based on the correspondence between the parties regarding the matter, Kineticflix
25 appears to have adequate notice of the Complaint.

26 Furthermore, Kineticflix does not argue that the lack of service is prejudicial;
27 instead, it argues only that the first page of the Complaint was delivered to Mr.
28 Einwechter with the summons. (Mot. 3.) Kineticflix alleges that the service of a

1 partial complaint is insufficient, citing *Cherry v. Spence*, 249 F.R.D. 226, 229
2 (E.D.N.C. 2008). The use of *Cherry* is misplaced. In *Cherry*, plaintiff attempted to
3 complete service by faxing only the first page of his complaint, without a summons,
4 and thus failed to provide complete service. *Id.* at 227. Here, Kineticflix alleges that
5 Zorikova delivered only the first page of the Complaint to Einwechter with a one-page
6 summons. (Def.’s Mem. 2–3, ECF No. 30-5.) Furthermore, Zorikova opposes
7 Kineticflix’s assertion by submitting the Jeong’s affidavit, which states that Jeong
8 served Einwechter “true and correct copies of full complaint, summon[s], and
9 exhibits.” (Jeong Decl. II ¶ 6.)

10 Also, in *Cherry*, plaintiff attempted to serve multiple defendants by faxing the
11 documents to the Henderson Police Department. *Cherry*, 249 F.R.D. at 229. Here,
12 unlike in *Cherry*, Zorikova did not attempt to fax the service to Kineticflix, but rather
13 hired Jeong to personally serve Einwechter. (Proof of Service, ECF No. 16.) As the
14 Ninth Circuit has held that the court is to liberally construe Rule 4, the Court finds that
15 Kineticflix received sufficient notice of the Complaint. *United Food & Commercial*
16 *Workers Union*, 736 F.2d at 1382.

17 In the absence of prejudice, dismissal is not warranted. *See Alcatel-Lucent*
18 *USA, Inc. v. Dugdale Commc’ns, Inc.*, No. 09-cv-2140 PSG (JCx), 2009 WL
19 3346784, at *3 (C.D. Cal. Oct. 13, 2009) (finding that dismissal was not warranted in
20 the absence of prejudice). Here, Kineticflix has not mentioned how the alleged
21 insufficient process has resulted in prejudice against it and only requests that the Court
22 dismiss the case pursuant to Rule 12(b)(4). Thus, Defendants’ Motion to Dismiss
23 under Federal Rule of Civil Procedure 12(b)(4) is **DENIED**.

24 **B. Whether Service was Proper Under 12(b)(5)**

25 Under Rule 12(b)(5), a party may seek dismissal of a complaint for insufficient
26 service of process. Fed. R. Civ. P. 12(b)(5). “Once service is challenged, [the]
27 plaintiff[] bear[s] the burden of establishing that service was valid under Rule 4.”
28 *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). The process server’s return of

1 service is generally accepted as prima facie evidence of valid service. *SEC v. Internet*
2 *Solutions for Business, Inc.*, 509 F3d 1161, 1166 (9th Cir. 2007); see *Sikhs for Justice*
3 *v. Badal*, 736 F3d 743, 746 (7th Cir. 2013) (process server’s “affidavit of service is
4 entitled to a presumption of correctness.”)

5 A presumption of valid service “can be overcome only by strong and
6 convincing evidence.” *SEC*, 509 F3d at 1166 (citing *O’Brien v. R.J. O’Brien &*
7 *Assocs., Inc.*, 998 F.2d 1394, 1398 (7th Cir. 1993)). Thus, a defendant must do more
8 than just merely allege that service was defective. *Perciballi v. Ng*, No.
9 SACV0801168JVSANX, 2010 WL 11595731, at *3 (C.D. Cal. Mar. 8, 2010)
10 (quoting *FROF, Inc. v. Harris*, 695 F.Supp. 827, 829 (E.D.Pa.1988) (“a bare
11 allegation by a defendant that he was improperly served cannot be allowed to bely the
12 private process server’s return”)). “Unless the defect in service is established on the
13 face of the return, defendant’s motion to dismiss (or ‘quash service’) must be
14 supported by declaration or other form of admissible evidence establishing the lack of
15 proper service.” *Sarafyan v. Elson*, No. CV 18-9574-GW(KSX), 2019 WL 3308770,
16 at *3 (C.D. Cal. Feb. 21, 2019) (quoting O’Connell & Stevenson, *Rutter Group*
17 *Practice Guide: Federal Civil Procedure Before Trial* ¶ 5:350 (2018)).

18 Once service is challenged the plaintiff bears the burden of establishing that
19 service was valid under Rule 4. *United Med. Devices, LLC v. Blue Rock Capital, Ltd.*,
20 No. 16-cv-1255 PSG (SSX), 2016 WL 9047123, at *1 (C.D. Cal. Aug. 5, 2016)
21 (citing *Brockmeyer*, 383 F.3d at 801). “In determining whether the plaintiff has met
22 its burden under Rule 4, the Court is permitted to ‘weigh and determine disputed
23 issues of fact.’” *United Med. Devices, LLC*, 2016 WL 9047123, at *1 (citing
24 Schwarzer, Tashima & Wagstaffe, *Cal. Rutter Group Practice Guide: Fed. Civ. Pro.*
25 *Before Trial* ¶ 9:152 (2010)).

26 Kineticflix makes two arguments why service was not proper under Rule
27 12(b)(5). The Court now addresses each argument in turn.

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1 **i. Plaintiff Attempted to Personally Serve the Summons**

2 Rule 4(c)(2) states that “[a]ny person who is at least 18 years old and not a
3 party may serve a summons and complaint.” Fed. R. Civ. P. 4(c)(2). Kineticflix
4 alleges that “the Plaintiff personally delivered the defective summons to Mr.
5 Einwechter.” (Mot. 4.) Kineticflix solely relies on the affidavit of Einwechter as
6 proof that Zorikova served the complaint and summons herself. *See Lerma v.*
7 *Stylistics Los Angeles Car Club, Inc.*, No. CV 12-06704 DDP JEMX, 2015 WL
8 349310, at *3 (C.D. Cal. Jan. 23, 2015) (finding that only an affidavit of the defendant
9 stating he was never personally handed papers did not constitute strong and
10 convincing evidence to establish that service was not affected.)

11 On the other hand, as discussed above, Jeong filed an affidavit describing that
12 she personally served Einwechter. (Declaration of Olivia Jeong (“Jeong Decl. I”) 1,
13 ECF. No. 40.) In Jeong’s second affidavit, she further alleges that she ran into a man
14 with grey hair and asked where the law office of Jack Einwechter is, and he
15 responded, “I am Mr. Einwechter.” (Jeong Decl. II ¶¶ 4–5.) Accordingly, Jeong’s
16 sworn affidavit on its face demonstrates sufficient service on Kineticflix. *SEC*, 509
17 F3d at 1166 (process server’s sworn affidavit on its face proves sufficient service on a
18 defendant). Kineticflix only alleges that Zorikova herself served the summons and
19 complaint in Einwechter’s declaration. (Decl. of John P. Einwechter (“Einwechter
20 Decl.”) ¶ 4, ECF No. 30-2.) Accordingly, the return process filed and Jeong’s
21 supplemental affidavits are sufficient to hold that Jeong, not Zorikova, served the
22 process on Einwechter. *SEC*, 509 F3d at 1166. Therefore, Kineticflix has not
23 presented strong and convincing evidence to overcome the evidence presented by
24 Zorikova.

25 **ii. The Summons was not Addressed to the Defendant**

26 Under Rule 4(h)(1)(B) a plaintiff may serve a defendant “by delivering a copy
27 of the summons and of the complaint to an officer, a managing or general agent, or
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1 any other agent authorized by appointment or by law to receive service of process.”
2 Fed. R. Civ. P. 4(h)(1)(B).

3 Here, Kineticflix first argues that “there is no entity named ‘KineticFlix, LLC.’
4 Rather, Elles, LLC, a California limited liability company, does business as
5 ‘KineticFlix.com.’ Mr. Einwechter is the designated agent for service of process for
6 Elles, LLC and KineticFlix.com.” (Mot. 3.)

7 In opposition, Zorikova requests that the Court take judicial notice of an LLC-
8 12 Form. (Opp’n, Ex. 2 LLC-12 Form (“LLC Form”), ECF No. 33-2.) Federal Rule
9 of Evidence 201 provides: “[t]he court may judicially notice a fact that is not subject
10 to reasonable dispute because it . . . can be accurately and readily determined from
11 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).
12 Courts may take judicial notice of government documents and public records. *See*
13 *Peruta v. Cty. of San Diego*, 678 F. Supp. 2d 1046, 1054 n.8 (S.D. Cal. 2010) (stating
14 that courts may properly take judicial notice of undisputed documents appearing on
15 governmental websites). Here, the LLC Form is a document appearing on the
16 California Secretary of State website. (LLC Form.) The LLC Form lists “Kineticflix
17 LLC” and entity number “201900110201,” and includes Einwechter & Hyatt, LLP
18 (“E&H”) office address as the service of process agent address. (LLC Form;
19 Einwechter Decl. ¶ 1.) Accordingly, the Court **GRANTS** Zorikova’s request for
20 judicial notice of the LLC Form.

21 Zorikova asserts that Einwechter is listed as the service of process agent for
22 Kineticflix, LLC and that Jeong served Einwechter at the E&H office, located on 172
23 N. Tustin Street, Orange, California. (Jeong Decl. I 1; Jeong Decl II ¶¶ 2–3.)
24 Additionally, Einwechter has stated that he is the service of process agent for Elles,
25 LLC dba Kineticflix.com but did not produce supporting documentation to
26 corroborate his statement in his affidavit. (Einwechter Decl. ¶ 3.) Therefore, the
27 Court finds that Einwechter is the proper service of process agent for Defendant
28 Kineticflix.

1 Kineticflix uses *Ledonne* to argue that “[a]lthough plaintiffs are permitted to
2 effectuate service on an agent of a defendant, the summons must nevertheless be
3 addressed to the defendant.” *Ledonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1413 (E.D.
4 Va. 1988). The Court finds the argument is misplaced. *Ledonne* discusses that, “[t]he
5 FSIA establishes its own special set of rules for serving process and default judgments
6 on foreign states and their instrumentalities.” *Id.* at 1411. Here, Kineticflix has not
7 established that it is a foreign state or an instrumentality, thus Zorikova does not have
8 to follow the FSIA’s special rules for serving process. 28 U.S.C.A. § 1608(b).

9 Further Kineticflix does not bring forth any support that the summons must be
10 “addressed to the defendant.” *Ledonne* is not explicit with discussing the Summons
11 being “addressed” and Rule 4 states that a summons must, “be directed to the
12 defendant.” Fed. R. Civ. P. 4(a)(1)(B). Here, based on the LLC Form, Einwechter is
13 listed as the agent of service for Kineticflix, LLC. (LLC Form.) The Summons is
14 directed to, “Kineticflix LLC, Jack Einwechter, 172 N. Tustin St., #305, Orange, CA
15 92867.” (Compl., Ex. 2 Summons, ECF No. 1-2.) Kineticflix and Einwechter are
16 named in the Summons, thus the Court finds that the Summons was directed to
17 Kineticflix and Einwechter. Moreover, Kineticflix has not presented any case law
18 stating that the address of the defendant must be listed, along with the address of the
19 agent upon which the summons is being served. Therefore, Kineticflix’s Motion to
20 Dismiss for insufficient service of process is **DENIED**.

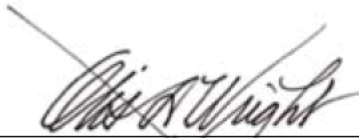
21 **IV. CONCLUSION**

22 For the reasons discussed above, the Court **DENIES** Kineticflix’s motion to
23 dismiss for insufficient process and insufficient service of process. (ECF Nos. 30.)
24 Based on the Court’s determination of Kineticflix’s Motion (ECF No. 30), the Court
25 renders the parties’ remaining motions moot. (ECF Nos. 33, 38, 44, and 48.)
26 Accordingly, Kineticflix has fourteen days, from the date of this order, to file an
27 answer to Zorikova’s Complaint.

1 Zorikova is advised that the Federal Pro Se Clinic offers free information and
2 guidance to individuals who are representing themselves in federal civil actions. The
3 Los Angeles Clinic operates by appointment only. Appointments are available either
4 by calling the Clinic or by using an internet portal. The Clinic can be reached at (213)
5 385-2977, ext. 270 or through an internet request at the following site:
6 <http://prose.cacd.uscourts.gov/los-angeles>. Clinic staff can respond to many questions
7 with a telephonic appointment or through an email account. It may be more
8 convenient to email questions or schedule a telephonic appointment. Staff can also
9 schedule an in-person appointment at their location in the Roybal Federal Building
10 and Courthouse, 255 East Temple Street, Suite 170, Los Angeles, California 90012.
11 Zorikova is encouraged to visit the Clinic or otherwise consult with an attorney prior
12 proceeding in this matter.

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15 **IT IS SO ORDERED.**

16
17 October 10, 2019

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20 **OTIS D. WRIGHT, II**
21 **UNITED STATES DISTRICT JUDGE**