

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
9

10 **JOE HAND PROMOTIONS, INC.,**

11 **Plaintiff,**

12 **v.**

13 **ADNAN MOHAMMED SADDELDIN, et al.,**

14 **Defendants.**
15

Case No. 1:09-cv-02197-AWI-GSA

**FINDING AND RECOMMENDATIONS
REGARDING DEFENDANT’S MOTION TO
VACATE DEFAULT JUDGMENT**

(Doc. 31)

OBJECTIONS DUE: 14 DAYS

16
17 **I.**

18 **INTRODUCTION**

19 On December 18, 2009, Plaintiff Joe Hand Promotions, Inc. (“Plaintiff”) brought this
20 action against Adnan Mohammed Saddeldin, Jay P. Ghazal, and Allen Martin Ormonde,
21 individually and doing business as Samba Brazilian Steak House, also known as Samba Brazilian
22 BBQ, and against Samba Brazilian BBQ, Inc., a business entity doing business as Samba Brazilian
23 Steak House, also known as Samba Brazilian BBQ. The District Court entered default judgment
24 against all defendants on June 16, 2010. (Docs. 21, 22).
25

26 Pending before the Court is a motion by Defendant Allen Martin Ormonde (“Defendant”
27 or “Defendant Ormonde”) pursuant to Federal Rule of Civil Procedure 60(b)(4), to vacate the
28

1 default judgment entered against him. Doc. 31. The motion was referred to the undersigned by
2 District Judge Anthony W. Ishii for Findings and Recommendations. (Doc. 34). For the reasons
3 discussed below, the Court finds that the default judgment entered against Defendant Ormonde is
4 void for lack of personal jurisdiction on account of ineffective service of process. Accordingly,
5 the Court RECOMMENDS that the Defendant’s motion be GRANTED and the default judgment
6 entered against him be VACATED.
7

8 **II.**

9 **FACTUAL AND PROCEDURAL BACKGROUND**

10 As stated above, Plaintiff brought this action against Adnan Mohammed Saddeldin, Jay
11 P. Ghazal, and Allen Martin Ormonde, individually and doing business as Samba Brazilian Steak
12 House, and against Samba Brazilian BBQ, Inc., a business entity doing business as Samba Brazilian
13 Steak House. The complaint alleges, on information and belief, that each individual defendant,
14 as well as the corporate defendant, was an “owner, and/or operator, and/or licensee, and/or
15 permittee, and/or person in charge, and/or an individual with dominion, control, oversight and
16 management of the commercial establishment doing business as Samba Brazilian Steak House
17 a/k/a Samba Brazilian BBQ operating at 6731-37 N. Palm Avenue, Fresno, California 93704.”
18 Doc 1, Cmpl., ¶¶ 7-10.
19

20 Plaintiff’s complaint alleges that the defendants violated the Communications Act of
21 1934, 47 U.S.C. § 605, *et seq.*, the Cable and Television Consumer Protection and Competition
22 Act of 1992, 47 U.S.C. § 553, *et seq.*, and various provisions of California law, based on an
23 alleged unlicensed broadcast of sports programming at the Samba Brazilian Steak House, located
24 at 6731-37 N. Palm Avenue in Fresno, California. Plaintiff owned exclusive nationwide
25 commercial distribution rights to “Ultimate Fighting Championship 92: The Ultimate 2008”
26 (“the Program”), which was telecast nationwide on December 27, 2008. Plaintiff had previously
27
28

1 marketed and promoted the Program to various entities, which purchased limited sublicensing
2 rights to publicly exhibit the Program at their respective hospitality establishments. The
3 complaint alleges that the defendants named in the complaint unlawfully intercepted the Program
4 at the time of its transmission and exhibited it at their commercial establishment, the Samba
5 Brazilian Steak House. *See* Doc. 1, Cmpl., ¶¶ 11-18.

7 Plaintiff filed returns of proof of service as to all defendants, including Defendant
8 Ormonde. (Docs. 8-11). The proof of service as to Defendant Ormonde indicates that he was
9 served on January 25, 2010. Doc. 9. Specifically, the proof of service states that Defendant
10 Ormonde was served by substitute service pursuant to Federal Rule of Civil Procedure 4(e)(2) at
11 the Samba Brazilian Steak House at 6731-37 North Palm Avenue, Fresno, CA 93704. Doc. 9.¹
12 Plaintiff's proof of service further attests that substitute service was made on a "Tim Doe," the
13 "Person In Charge," who was instructed to deliver the documents to Defendant Ormonde.² Doc.
14 9. The process server's declaration, attached to the proof of service, states that the process server
15 was unable to verify that Defendant worked at the restaurant.³ Finally, the proof of service states
16 that Defendant Ormonde's "[r]esidence address was not known at the time of service" but does
17 not detail any steps taken to find a home address for Defendant. Doc. 9.

19 No defendant responded to the complaint, whereupon default was entered as to each.
20 Doc. 13. Plaintiff thereafter filed a motion for default judgment. Doc. 17. The undersigned
21 made findings and recommendations to the effect that default judgment be granted. The findings
22

23 ¹ Federal Rule of Civil Procedure 4(e)(2) does not authorize service at a place of business; it only authorizes
24 personal service, substitute service at an individual's dwelling or usual place of abode, or substitute service on a
specifically authorized agent.

25 ² The summons and complaint were also mailed to Samba Brazilian Steak House, to Defendant's attention, the day
26 after substitute service was made on Tim Doe. Doc. 9.

27 ³ The declaration states that the process server went to the business on January 13, 2010 but the business was locked.
28 The process server returned on January 15, 18, and 22 but was "unable to verify employment" as the "manager was
not in. Thereafter, on January 25, 2010, the process server went to the restaurant and effected substitute service on
Tim Doe.

1 and recommendations were adopted by the District Court and judgment was entered in favor of
2 Plaintiff and against each defendant. Docs. 21, 22.

3 Pending before the Court is Defendant Ormonde's motion to vacate the judgment,
4 asserting that service of process on him was ineffective, requiring the judgment against him to be
5 vacated as void pursuant to Federal Rule of Civil Procedure 60(b)(4). The motion to vacate the
6 judgment has been fully briefed by the parties and was submitted for decision without a hearing.
7 Doc. 35.

9 III.

10 THE PARTIES' POSITIONS

11 A. Defendant's Motion

12 In his motion, Defendant states that he was never served with the summons and
13 complaint in this action. Rather, he first heard of this action well after the District Court had
14 entered a default judgment against him, when an attorney for Plaintiff called him and informed
15 him of the default judgment. Doc. 31-4 at 1-2; 4.

17 Defendant argues that the substitute service effected on Tim Doe at Samba Brazilian
18 Steakhouse was insufficient and ineffective under Rule 4 of the Federal Rules of Civil
19 Procedure. Defendant states that he had liquidated his interest in Samba Brazilian Steak House
20 in April 2006. Therefore substitute service effected on a person in charge of that restaurant in
21 January 2010, years after his connection with the restaurant was terminated, was ineffective and
22 void. Doc. 31-4 at 2.

24 Defendant next argues that the substitute service at issue here is ineffective because
25 Plaintiff made no effort to serve him personally before resorting to substitute service. Doc. 31-4
26 at 2. Defendant states that his home address was a matter of public record and could have easily
27 been found through a simple check of property records maintained at the Fresno County
28

1 Recorder's Office.⁴ Doc. 31-4 at 2. Defendant provides the following specific facts in support
2 of this argument: (1) he "purchased his home in Fresno in 1995, and has lived in the same house
3 since;" (2) the deed to his house was recorded on October 27, 1995 as Document No. 95138261
4 in the Official Records of the Fresno County (CA) Recorder's Office; (3) the deed has been a
5 matter of public record since the day it was recorded; and (4) he is listed as the deed grantee
6 under the same name as appears in Plaintiff's complaint. Doc. 31-4 at 2. Defendant argues that
7 consequently "[w]ith a modest effort, he could have been located by plaintiff, had plaintiff so
8 desired." Doc. 31-4 at 2.

10 In sum, Defendant contends that the "substitute service" at Samba Brazilian Steak House
11 does not confer personal jurisdiction over him, and therefore the default judgment entered
12 against him should be vacated as void. Defendant concedes that under Federal Rule of Civil
13 Procedure 4(e)(1), an individual may be served under state law, here California law, and that
14 California law authorizes substitute service at a place of business. *See* Cal. Civ. Proc. Code §
15 415.20(b). Defendant argues however that such service is permitted only after "a good faith
16 effort at personal service has first been made," and that "[n]o such effort was undertaken by
17 plaintiff in this action." Doc. 31-4 at 5-6 (citing Cal. Civ. Proc. Code § 415.20(b)). Since
18 Plaintiff failed to make a good faith effort to personally serve him, the substitute service is
19 ineffective under California law, and in turn under Rule 4, thereby depriving the District Court of
20 personal jurisdiction. Doc. 31-4 at 6-7.

23 ///

24 ///

26 ⁴ Defendant Ormonde has submitted, in support of his motion, the grant deed to his home, located at 1603 E.
27 Waterford Avenue in Fresno, California. *See* Doc. 31-1, Exhibit A. The Court takes judicial notice of this grant
28 deed recorded with the Fresno County Recorder's Office, as it is a matter of public record. Fed. R. Evid. 201; *see also* *Sears, Roebuck & Co. v. Metro Engravers, Ltd.*, 245 F.2d 67, 70 (9th Cir. 1956); *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). The deed lists Defendant Ormonde as the grantee of the real property identified in the deed.

1 **B. Plaintiff’s Opposition**

2 Plaintiff responds to Defendant’s contentions by asserting that Defendant was properly
3 served pursuant to Federal Rule of Civil Procedure 4(e)(1). Doc. 32 at 2-3. Plaintiff argues that
4 Rule 4(e)(1) allows for the “borrowing” of a state service of process provision, and here service
5 was made in accordance with a provision of California law which authorizes substitute service
6 to be effected by delivering a copy of the summons and complaint to a person apparently in
7 charge of the defendant’s usual place of business. Doc. 32 at 3; *see* Cal. Civ. Proc. Code §
8 415.20(b).

9 Plaintiff argues that Plaintiff had “a reasonable belief that Samba Brazilian Steak House
10 was Defendant’s business enterprise.”⁵ Doc. 32 at 5. In support of this claim, Plaintiff points to
11 a liquor license issued by the California Department of Alcoholic Beverage Control on March
12 22, 2006 to Brazilian BBQ, Inc., 6737-37 N. Palm Ave., Fresno, California 93704. The liquor
13 license identifies Defendant Ormonde as a stock holder in and the “Secretary/Asst. Sec.” of
14 Brazilian BBQ, Inc. The liquor license was to expire on March 31, 2014 but was surrendered on
15 July 10, 2013, several years after the substitute service at issue here was made. Doc. 32 at 5; *see*
16 Doc. 36-2.

17 Plaintiff further argues that the fact that Defendant’s home address was a matter of public
18 record is irrelevant to the question of the validity of the substitute service effected here because
19 “nothing in C.C.P. § 415.20(b) [the California statute authorizing substitute service] requires an
20 attempt to serve at a residence before effectuating substitute service.” Doc. 32 at 8.

21 ///

22 ///

23

24
25
26
27 ⁵ Plaintiff argues that the term “usual place of business” as used in Cal. Civ. Proc. Code includes “a defendant’s
28 customary place of employment as well as his own business enterprise.” Doc. 32 at 5 (quoting Judicial Council
Comment to Cal. Civ. Proc. Code § 415.20).

1 **C. Defendant’s Reply**

2 Defendant responds that nothing in the return of proof of service filed with the Court
3 indicates that Plaintiff attempted to identify Defendant's principal residence or his primary place
4 of business. Doc. 33 at 2. Even if Plaintiff relied on the liquor license held by Brazilian BBQ,
5 Inc., the license shows only that Defendant was an officer and a stockholder of that corporation
6 in 2006. Doc. 32 at 2. The fact that Defendant was an officer or stockholder of Brazilian BBQ,
7 Inc. does not mean that Samba Brazilian Steak House was his usual place of business in 2006, let
8 alone in 2010 when the substitute service was effected there. Doc. 33 at 2.

9 In support of his argument Defendant cites *Zirbes v. Stratton*, 187 Cal.App.3d 1407, 1416
10 (1986), noting that there the defendant was served via substitute service at the address listed on
11 her driver’s license, which was actually her parents’ home address. The *Zirbes* court concluded
12 that the parent’s home was not a proper place to effect substitute service because the defendant
13 did not actually reside there. Defendant argues that if an address listed on a person’s driver’s
14 license is not a sufficient basis to infer that the person lives at that address, it is similarly not
15 reasonable to infer from the liquor license at issue here that the address listed thereon was the
16 Defendant’s principal place of business. Defendant further argues that he had no control over the
17 information listed on the liquor license, which fact makes his case even more compelling than in
18 *Zirbes*. Doc. 33 at 3.

19 Finally, Defendant notes that Plaintiff presented no documentation establishing that
20 Samba Brazilian Steak House was in fact Defendant’s usual place of business or that the process
21 server attempted to identify any other location to personally serve him. Doc. 33 at 4. Defendant
22 argues that, on the contrary, the proof of service specifically indicates that the process server
23 could not verify that the Defendant actually worked at the restaurant. Hence Plaintiff was
24 obligated to attempt to identify other ways to personally serve him. Plaintiff could have easily
25
26
27
28

1 found Defendant’s principal place of residence as well as principal work location (he worked as
2 an insurance agent) by employing standard searches on the internet. Doc. 33 at 3. Plaintiff’s
3 failure to do so indicates the lack of reasonable diligence to effect personal service. Doc. 33 at 4.

4 IV.

5 LEGAL STANDARDS

6 A. The Court must Vacate a Default Judgment if it lacks Personal Jurisdiction

7 Under Federal Rule of Civil Procedure 60(b)(4), a district court may set aside a default
8 judgment if the judgment is void. A final judgment is “void” for purposes of Rule 60(b)(4) when
9 the issuing court lacked jurisdiction, either as to the subject matter of the dispute or over the
10 parties to be bound. *United States v. Berke*, 170 F.3d 882, 883 (9th Cir. 1999); *also see S.E.C. v.*
11 *Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007) (“A final judgment is void,
12 and therefore must be set aside under Federal Rule of Civil Procedure 60(b)(4), “if the court that
13 considered it lacked jurisdiction ... over the parties to be bound.”); *Mason v. Genisco Technology*
14 *Corp.*, 960 F.2d 849, 851 (9th Cir.1992) (“A person is not bound by a judgment in a litigation to
15 which he or she has not been made a party by service of process.”); *Direct Mail Specialists, Inc.*
16 *v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (“A federal court
17 does not have jurisdiction over a defendant unless the defendant has been served properly under
18 Fed.R.Civ.P. 4.”).

19 A motion to vacate a default judgment for lack of jurisdiction may be made at any time.
20 *SEC v. Internet Solutions for Bus. Inc.*, 509 F.3d at 1165. When a court lacks personal
21 jurisdiction over a defendant, it has a “nondiscretionary duty” to grant relief from any default
22 judgment issued. *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa*
23 *Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980).

24 ///

1 **B. California Law Authorizes Substitute Service Only After the Exercise**
2 **of Reasonable Diligence to Effect Personal Service**

3 “[A] signed return of service of process constitutes prima facie evidence of valid service
4 which can be overcome only by strong and convincing evidence.” *SEC v. Internet Solutions for*
5 *Bus. Inc.*, 509 F.3d at 1163.

6 To determine whether service was proper, courts look to the requirements of Federal Rule
7 of Civil Procedure 4. Under Rule 4(e), service may be effected pursuant to either federal law or
8 the law of the state where the district court in which the action is filed is located or where service
9 is made. Here, Plaintiffs argue that service was proper under the applicable state law, i.e.
10 California law. California law provides for service of process upon an individual person “by
11 delivering a copy of the summons and of the complaint to such person or to a person authorized
12 by him to receive service of process.” Cal. Civ. Proc. Code §§ 416.90, 415.10. If, after
13 reasonable diligence, the summons and complaint cannot be personally delivered to the person to
14 be served, several methods of substitute service are permitted.⁶ Cal. Civ. Proc. Code §
15 415.20(b).
16

17 The statute authorizing substitute service expressly provides that such service is only
18 permitted after reasonably diligent efforts at personal service have been made. Cal. Civ. Proc.
19 Code § 415.20(b); *also see Evartt v. Superior Court*, 89 Cal.App.3d 795, 802 (1979) (“exercising
20

21 ⁶ Specifically, California Code of Civil Procedure § 415.20(b), which authorizes substitute service, provides as
22 follows:

23 If a copy of the summons and complaint cannot with reasonable diligence be personally delivered
24 to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons
25 may be served by leaving a copy of the summons and complaint at the person's dwelling house,
26 usual place of abode, usual place of business, or usual mailing address . . . in the presence of a
competent member of the household or a person apparently in charge of his or her office, place of
business, or usual mailing address . . . , at least 18 years of age, 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.

27 The Judicial Council's Comment to § 415.20 further emphasizes that substitute service is “made on a defendant by
28 delivering a copy of the summons and of the complaint to a person closely connected with him, usually at the
defendant's place of business, dwelling house, or usual place of abode.” (Emphasis added).

1 reasonable diligence to effect personal service” is a “mandatory prerequisite for [substitute]
2 service”); *Burchett v. City of Newport Beach*, 33 Cal.App.4th 1472, 1477 (1995) (“[p]ersonal
3 delivery must be attempted in all cases where [substitute] service is used”)(internal quotation
4 marks omitted). Thus, although California law permits substitute service, it espouses a clear
5 preference for personal service, as personal service is “the means which would more certainly
6 assure actual notice to the defendant.” *Evaritt*, 89 Cal.App.3d 795 at 799.

8 “[T]he burden is upon the plaintiff to show reasonable diligence to effect personal service
9 and each case must be judged upon its own facts.” *Id.* at 801. “Perfunctory efforts” to
10 personally serve the defendant do not satisfy the “reasonable diligence” prerequisite. *Id.* at 802;
11 *also see Bein v. Brechtel-Jochim Grp., Inc.*, 6 Cal.App.4th 1387, 1391-92 (1992) (“Ordinarily ...
12 two or three attempts at personal service at a proper place should fully satisfy the requirement of
13 reasonable diligence and allow substitute service to be made.”); *American Express Centurion*
14 *Bank v. Zara*, 199 Cal.App.4th 383, 389 (2011) (to qualify as reasonable diligence, two or three
15 attempts must first be made to personally serve the defendant).

17 Moreover, “[t]o be constitutionally sound the form of substitute service must be
18 reasonably calculated to give an interested party actual notice of the proceedings and an
19 opportunity to be heard ... [in order that] the traditional notions of fair play and substantial
20 justice implicit in due process are satisfied.” *Zirbes v. Stratton*, 187 Cal.App.3d 1407, 1416
21 (1986) (ellipses and parentheses in original; internal quotation marks and citation omitted).
22 Hence, substitute service “must be made upon a person whose relationship with the person to be
23 served makes it more likely than not that they will deliver process to the named party.” *Bein*, 6
24 Cal.App.4th at 1392 (internal quotation marks and citation omitted); *also see* the Judicial
25 Council’s Comment to Cal. Civ. Proc. Code § 415.20 (substitute service is “made on a defendant
26 by delivering a copy of the summons and of the complaint *to a person closely connected with*
27
28

1 *him*, usually at the defendant’s place of business, dwelling house, or usual place of abode.”
2 (Emphasis added).

3 Finally, the applicable statutory requirements “must be strictly complied with in order for
4 jurisdiction over the person to be established by substitute means.” *Evarrtt*, 89 Cal.App.3d at 799
5 (citation omitted); *also see Zirbes*, 187 Cal.App.3d at 1416 (“[i]n order to obtain in personam
6 jurisdiction through any form of constructive service there must be strict compliance with the
7 requisite statutory procedures”).

9 **III.**
10 **DISCUSSION**

11 **A. Substitute Service on Defendant was Invalid Because Plaintiff did not Exercise**
12 **Reasonable Diligence to Effect Personal Service**

13 “[A] signed return of service of process constitutes prima facie evidence of valid service
14 which can be overcome only by strong and convincing evidence.” *SEC v. Internet Solutions for*
15 *Bus. Inc.*, 509 F.3d 1161, 1163 (9th Cir. 2007). Here there is strong and convincing evidence
16 that the substitute service of process effected in this case was insufficient and ineffective under
17 California law, and, in turn, under Federal Rule of Civil Procedure 4.

18
19 As a preliminary matter, the Court notes that the return of service of process with regard
20 to Defendant Ormonde states that substitute service was “made pursuant to FRCP 4(e)(2)” on a
21 “Tim ‘Doe,’ Person In Charge” at “6731-37 North Palm Avenue, Fresno, CA 9370,” which is the
22 address for the Samba Brazilian Steak House restaurant. Doc. 9. However, Federal Rule of
23 Civil Procedure 4(e)(2) does not authorize service at a place of business; it only authorizes
24 personal service, substitute service at an individual’s dwelling or usual place of abode, or
25 substitute service on a specifically authorized agent. Therefore, although the return of proof of
26 service stated that “service [was] made pursuant to FRCP 4(e)(2),” this was clearly not the case.
27

28 Plaintiff now argues that service of process on Defendant Ormonde nonetheless

1 comported with Rule 4(e)(1) of the Federal Rules of Civil Procedure. Doc. 32 at 2-3. Rule
2 4(e)(1) authorizes service of process in compliance with applicable state rules, and Plaintiff
3 argues that the form of service made here complied with California Civil Procedure Code §
4 415.20(b) which permits substitute service on a person apparently in charge at the defendant's
5 usual place of business. Doc. 32 at 3.

6
7 California law allows for substitute service only if the plaintiff has exercised reasonable
8 diligence to personally serve the defendant and if the substitute service is reasonably calculated
9 to give the defendant actual notice of the lawsuit at issue. The question before the Court is
10 whether the Plaintiff exercised reasonable diligence to personally serve the Defendant before
11 resorting to substitute service at Samba Brazilian Steak House. The Court finds, in light of the
12 relevant facts and circumstances, that the Plaintiff did not exercise the requisite reasonable
13 diligence to personally serve the Defendant before relying on substitute service, and that,
14 moreover, the substitute service effected here was not reasonably calculated to give the
15 Defendant actual notice of the pending lawsuit.
16

17 The return of service of process indicates that Plaintiff's process server went to Samba
18 Brazilian Steak House on 4 occasions between January 13 and January 22, 2010 in order to
19 inquire whether the Defendant worked at the restaurant. However, the process server was
20 "unable to verify" that the Defendant worked at the restaurant either because the business was
21 "locked" or the manager was "not in." Doc. 9. Nonetheless, without obtaining verification that
22 the Defendant worked at or was otherwise connected to the restaurant, the process server
23 returned to the restaurant on January 25, 2010 and served the documents on a "Tim 'Doe,'
24 Person In Charge."⁷ The process server instructed Tim Doe "to deliver documents to defendant
25
26

27 ⁷ The return of service of process indicates that this time the process server determined that Defendant Ormonde was
28 "Not In (Business)." The notation "Not In (Business)" is ambiguous. It may imply that the process server
determined that the Defendant was not present at the business at the time. It does not indicate, however, that the

1 as named.” Doc. 9.

2 These facts suggest that the process server made the substitute service without ever
3 confirming that Defendant Ormonde actually worked at or was connected to the business.
4 Moreover, the process server did clarify what Tim Doe’s precise position at the restaurant was;
5 whether Tim Doe had any relationship or connection to the Defendant; and whether there was in
6 fact any way for Tim Doe to convey the documents to the Defendant. Doc. 9. The summons and
7 complaint were also subsequently mailed to the Samba Brazilian Steak House, but again this was
8 done without confirmation that Defendant was likely to receive mail sent to the Samba Brazilian
9 Steak House.
10

11 Plaintiff now points to a liquor license issued in March 2006 by the California
12 Department of Alcoholic Beverage Control to Brazilian BBQ, Inc., 6737-37 N. Palm Ave.,
13 Fresno, California 93704. The liquor license identifies Defendant Ormonde as a stock holder in
14 and the “Secretary/Asst. Sec.” of Brazilian BBQ, Inc. Plaintiff’s reliance on the liquor license is
15 misplaced as the liquor license was issued close to four years before the substitute service at
16 issue here was made. Plaintiff argues that the liquor license is probative because it was still in
17 effect at the time the substitute service was made. However, the license included information
18 that was current at the time of issuance, i.e., it indicates that in 2006 the Defendant was a
19 stockholder and officer of a corporation that owned the Samba Brazilian Steak House. Plaintiff
20 could not reasonably assume, without any additional verification, that the Defendant continued to
21 hold those positions in 2010.
22
23

24 Furthermore, Plaintiff resorted to substitute service at Samba Brazilian Steak House
25 without making any effort to personally serve the Defendant at his home address which, given
26 the deed recorded in Defendant’s name at the Fresno County Recorder’s Office, was a matter of
27

28 process server confirmed that the Defendant worked at the restaurant or was otherwise connected with it and was therefore likely to receive the documents left there for him.

1 public record. The return of service of process notes that Defendant Ormonde’s “[r]esidence
2 address was not known at the time of service,” but does not indicate what efforts, if any, were
3 undertaken to locate a home address for Defendant. Doc. 9. Plaintiff argues that the fact that
4 Defendant’s home address was a matter of public record is irrelevant to the question of the
5 validity of the substitute service effected here because “nothing in C.C.P. § 415.20(b) requires an
6 attempt to serve at a residence before effectuating substitute service.” Doc. 32 at 8. However, as
7 stated above, the proper inquiry is whether Plaintiff fulfilled the mandatory prerequisite to
8 effecting substitute service, i.e., whether Plaintiff exercised reasonable diligence to attempt to
9 personally serve the Defendant before resorting to substitute service. Here, Plaintiff went ahead
10 with the substitute service before first ascertaining whether the Defendant could even be
11 personally served at the restaurant. Given that the return of proof of service specifically states
12 “Unable to Verify Employment,” Plaintiff should clearly have made a diligent effort to locate a
13 residential address for the Defendant. Doc. 9. Indeed, service at Defendant’s residence would
14 be more likely to result in actual notice than substitute service at Samba Brazilian Steak House, a
15 business with only a suspected connection to the Defendant on the basis of information contained
16 in a liquor license. Plaintiff’s home address was readily available as the deed to his home was on
17 record at the Fresno County Recorder’s office.⁸ Plaintiff also could have attempted to serve
18 Defendant at his actual office, in light of Defendant’s clarification that he worked as an insurance
19 agent at the time.

20
21
22
23 In sum, here Plaintiff made no attempt to locate a residential address or alternative work
24 address for Plaintiff and instead relied on information contained in a liquor license to effect
25 substitute service at Samba Brazilian Steak House, without verifying whether Defendant actually
26 worked there or was otherwise connected to the restaurant. Plaintiff failed to investigate the
27

28 ⁸ See Note 4 above.

1 most logical place to effect personal service on the Defendant, i.e. his home, and instead chose to
2 effect substitute service at a restaurant with only a suspected and unverified connection to him,
3 thereby diminishing the likelihood that the Defendant would actually get notice of the lawsuit.
4 These facts compel the conclusion that Plaintiff did not make a reasonably diligent effort to
5 personally serve the Defendant, resorting instead to substitute service that was not reasonably
6 calculated to give actual notice of the instant lawsuit to Defendant. *See Evartt v. Super. Ct.*, 89
7 Cal.App.3d 795, 801 (1979) (reasonable diligence is evaluated on a case by case basis as “[n]o
8 single formula nor mode of search can be said to constitute due diligence in every case”).

9
10 The Defendant has sufficiently rebutted the presumption of valid service with strong and
11 convincing evidence that the substitute service effected here does not comply with California
12 Civil Procedure Code § 415.20(b) and, in turn, with Federal Rule of Civil Procedure 4(e)(1).
13 Accordingly, the Court finds that the substitute service made on Tim Doe at Samba Brazilian
14 Steak House was ineffective. Consequently, the Court did not have personal jurisdiction over
15 Defendant at the time that judgment was entered against him.⁹

17 **B. The Default Judgment Entered Against Defendant Must be Vacated as Void Since**
18 **the District Court Lacked Personal Jurisdiction Over the Defendant**

19 A court cannot exercise personal jurisdiction over a defendant without proper service of
20 process. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); *Direct*
21 *Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) ("A
22 federal court does not have jurisdiction over a defendant unless the defendant has been properly
23 served under Fed. R. Civ. P. 4"). Without effective service of process on a defendant, a
24

25 ⁹ The Court does not address the parties' other arguments—e.g., regarding whether Defendant liquidated his interest
26 in and dissociated from Samba Brazilian Steak House in 2006, and whether the Samba Brazilian Steak House
27 constituted Defendant's "usual place of business" for purposes of substitute service under California Code of Civil
28 Procedure § 415.20(b)—because these arguments are moot in light of the Court's finding that Plaintiff's failure to
exercise reasonable diligence to effect personal service on Defendant rendered the substitute service made here
ineffective and deprived the Court of personal jurisdiction. For the same reason, the Court does not address
Defendant's sur reply and the documents filed therewith. Doc. 36.

1 judgment against him is void. *See Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir.
2 1992) (“A person is not bound by a judgment in a litigation to which he or she has not been made
3 a party by service of process.”); *Veeck v. Commodity Enters., Inc.*, 487 F.2d 423, 426 (9th Cir.
4 1973). As the substitute service effected here was invalid, the Court lacked personal jurisdiction
5 over the Defendant, thereby rendering void the default judgment entered against him. The
6 judgment should thus be vacated pursuant to Federal Rule of Civil Procedure 60(b)(4).
7

8 **IV.**

9 **CONCLUSION AND RECOMMENDATION**

10 For the reasons set forth above, the undersigned RECOMMENDS that the Defendant’s
11 motion to vacate the default judgment entered against him be GRANTED.
12

13 These findings and recommendations are submitted to District Judge Anthony W. Ishii
14 pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Any party may file
15 written objections to these findings and recommendations within fourteen (14) days of service
16 thereof. Such a document shall be captioned "Objections to Magistrate Judge's Findings and
17 Recommendations." The District Judge will review these findings and recommendations
18 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections
19 within the specified time may waive the right to appeal the District Judge's forthcoming order.
20

21 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).
22

23 IT IS SO ORDERED.

24 Dated: May 9, 2014

/s/ Gary S. Austin
25 UNITED STATES MAGISTRATE JUDGE
26
27
28