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7 **UNITED STATES DISTRICT COURT**

8 EASTERN DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA, Case No. 1:17-CV-01144-DAD-SKO

11 Petitioner,

12 v.

**ORDER GRANTING IN PART AND
DENYING IN PART PETITIONER'S
MOTION TO PERMIT ALTERNATE
PROCESS SERVICE**

13 MICHAEL A. JERKOVICH, dba SUPER (Doc. 7)
14 SUDS LAUNDRY,

15 Respondent.

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18 **INTRODUCTION**

19 Before the Court is a Notice and Motion to Permit Alternate Process Service filed by
20 Petitioner United States of America (the "Government"), requesting the Court's permission to
21 serve process upon Respondent Michael A. Jerkovich, dba Super Suds Laundry ("Respondent")
22 by means other than those allowed by Fed. R. Civ. P. 4(e). (Doc. 7.) For the reasons set forth
23 below, Respondent's Motion is GRANTED.

24
25 **BACKGROUND**

26 On December 6, 2016, the Internal Revenue Service ("IRS") issued a summons to
27 Respondent directing him to appear before a Revenue Officer on December 20, 2016. (Doc. 1, ¶¶
28 6-7.) Respondent did not comply with the summons and failed to appear on December 20, 2016,

1 or otherwise respond to the summons by phone or in writing. (Doc. 1, ¶ 8.) On August 24, 2017,
2 the Government filed a petition seeking a court order directing Respondent to show cause why he
3 should not be compelled to comply with and obey the summons. (Doc. 1.)

4 On August 29, 2017, pursuant to the Government's request, the Court ordered Respondent
5 to appear on October 18, 2017, and show cause why he should not be compelled to obey the IRS
6 summons issued on December 6, 2017. (Doc. 4.) The Court required that the Order to Show
7 Cause ("OSC"), along with other relevant documents, be served on Respondent pursuant Federal
8 Rule of Civil Procedure 4 ("Rule 4"). (Doc. 4, ¶ 3.) The Government was unable to serve the
9 OSC and other documents on Respondent pursuant to Rule 4 and requested a continuance of the
10 OSC hearing to accomplish service of the Court's Order. (Docs. 5, 6.)

11 On November 3, 2017, Petitioner filed the instant Motion to Permit Alternate Process
12 Service because all attempts at service upon Respondent at his residence pursuant to Rule 4 were
13 unsuccessful. (Doc. 7.)

14 **DISCUSSION**

15 The Government moves the Court to permit alternate process service through the October
16 26, 2017, posting to the door of Respondent's residence, and the October 27, 2017, mailing to
17 Respondent's residence via both U.S. Mail and Certified Mail Return Receipt Requested. (Doc. 7,
18 5:2-5.) Petitioner also moves the Court to deem the service completed based on the posting and
19 mailing. (Doc. 7.) Respondent did not file an opposition to this Motion.

20 **A. Legal Standard**

21 Under Federal Rule of Civil Procedure 4(e)(1), service upon an individual may be effected
22 in any judicial district of the United States:

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24 (1) pursuant to the law of the state in which the district court is located, or in which
25 service is effected, for the service of a summons upon the defendant in an
action brought in the courts of general jurisdiction of the State; or

26 (2) by delivering a copy of the summons and of the complaint to the individual
27 personally or by leaving copies thereof at the individual's dwelling house or
usual place of abode with some person of suitable age and discretion then
residing therein or by delivering a copy of the summons and of the complaint to
an agent authorized by appointment or by law to receive service of process.

1 Fed. R. Civ. P. 4(e). The goal of Rule 4 is “to provide maximum freedom and flexibility in the
2 procedures for giving all defendants ... notice of commencement of the action and to eliminate
3 unnecessary technicality in connection with service of process.” *Elec. Specialty Co. v. Rd. &*
4 *Ranch Supply, Inc.*, 967 F.2d 309, 314 (9th Cir. 1992) (citation omitted). Due Process requires
5 that any service of notice be “reasonably calculated, under all circumstances, to apprise interested
6 parties of the pendency of the action and afford them an opportunity to present their
7 objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

8 While the Federal Rules “have an application to a summons proceeding,” they “are not
9 inflexible.” *U.S. v. Donaldson*, 400 U.S. 517, 528–29 (1971). A district court “may limit their
10 application in a proceeding to enforce a summons, which is intended to be a summary proceeding,
11 so long as the rights of the party summoned are protected and an adversary hearing, if requested, is
12 made available.” *U.S. v. Church of Scientology of Cal.*, 520 F.2d 818, 821 (9th Cir.
13 1975) (quoting *Donaldson*, 400 U.S. at 529).

14 Federal Rule of Civil Procedure 81(a)(5) gives district courts the discretion in subpoena
15 enforcement proceedings “to tailor the Federal Rules to the particular need and purposes of the
16 proceeding.” *U.S. v. McCoy*, 954 F.2d 1000, 1004 (5th Cir. 1992). Courts have held that Rule
17 81 provides the Court the authority to allow a less formal service of process than that required
18 under Rule 4. *FTC v. Carter*, 636 F.2d 781, 791 (D.C. Cir. 1980). Rule 81(a)(5) “make[s]
19 application of the rules of civil procedure in subpoena enforcement proceedings discretionary with
20 the district court.” *U.S. v. S.E. First Nat'l Bank of Miami Springs*, 655 F.2d 661, 663 (5th Cir.
21 1981). “Although the court may resort to the rules whenever it deems them helpful, it need not
22 apply the rules when to do so may conflict with the summary determination
23 desired.” *Id.* (quotation and citation omitted).

24 **B. Analysis**

25 The OSC issued by the Court on August 29, 2017, provides as follows:

26 To afford Respondent an opportunity to respond to the petition and Petitioner
27 an opportunity to reply, a copy of this order, the Petition and its Exhibit, and the
28 Points and Authorities, shall be served by delivering a copy to Respondent
personally, or by leaving a copy at Respondent’s dwelling house or usual place

1 of abode with some person of suitable age and discretion then residing therein,
2 or by any other means of service permitted by Fed. R. Civ. P. 4(e), at least 30
3 days before the show cause hearing date including any continued date, unless
4 such service cannot be made despite reasonable efforts.

5 (Doc. 4, ¶ 3.) Paragraph 5 elaborates:
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7 If the federal employee assigned to serve these documents is not reasonably
8 able to serve the papers as provided in paragraph 3, Petitioner may request a
9 court order granting leave to serve by other means. *See* Fed. R. Civ. P.
10 81(a)(5). The request shall detail the efforts made to serve Respondent.
11

12 (Doc. 4, ¶ 5.)

13 After the Court issued the OSC, Revenue Officer (“RO”) David M. Lopez attempted to
14 serve Respondent personally at his residence on August 31, 2017, and twice on September 7,
15 2017. (Doc. 7-2, ¶¶ 5(a)-(b).) Respondent contacted RO Lopez by phone on September 7, 2017,
16 agreed to meet with RO Lopez on September 11, 2017, but failed to meet with RO Lopez
17 September 11, 2017. (Doc. 7-2, ¶¶ 5(c)-(d).) On September 19, 2017, to allow further attempts to
18 serve Respondent, Petitioner requested a continuance of the OSC hearing, which the Court reset to
19 November 29, 2017. (Docs. 5, 6.)

20 RO Lopez again attempted to serve Respondent personally at his residence on September
21 27, 2017, and October 16, 2017, without success, despite hearing voices inside the residence and
22 observing Respondent’s vehicle in the driveway. (Doc. 7-2, ¶¶ 5(e), (g).) On October 26, 2017,
23 RO Lopez left Respondent a voicemail message, and Respondent never returned the call. (Doc. 7-
24 2, ¶ 5(h).)

25 Finally, on October 26, 2017, Pamela Beauvais, a Legal Assistant with the U.S. Attorney’s
26 Office in Sacramento, California, mailed a copy of the OSC and supporting documents to
27 Respondent’s residence by ordinary U.S. Mail and Certified Mail Return Receipt Requested.
28 (Doc. 7-4, ¶ 2.) On October 27, 2016, another RO, Evan D. Moses, attempted to serve the OSC on
Respondent at his residence. (Doc. 7-3, ¶ 3; *see also* Doc. 7-2 ¶ 7.) After receiving no answer at
the door, RO Moses posted to the front door of the residence a sealed envelope containing the
OSC and supporting documents. (Doc. 7-3, ¶ 4.)

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1 The Government has demonstrated through its declarations that it has diligently attempted
2 to serve Respondent pursuant to Rule 4(e). ROs Lopez and Moses attempted to effect personal
3 service upon Respondent at his residence at least six times—at various times throughout the day—
4 between August 31 and October 27, 2017. (See Docs. 7-2, ¶ 5; 7-3, ¶ 4.) On several of those
5 occasions, the ROs heard voices inside the residence and observed vehicles on the property, yet no
6 one answered the door. *See, e.g., U.S. v. Wildes*, 1:11-cv-01971, 2012 WL 1193360, at *1 (E.D.
7 Cal. Mar. 15, 2012) (granting motion for alternate service where, among other things, the
8 occupants present at respondent’s residence would not answer the door for service).

9 Further, the phone conversations Respondent had with RO Lopez where RO Lopez
10 informed Respondent that he needed to give him IRS documents demonstrate that Respondent was
11 likely aware of this proceeding. *See U.S. v. Franks*, 1:14-cv-00259-LJO-SKO, 2014 WL
12 3615567, at *4 (E.D. Cal. Jul. 21, 2014) (finding that the respondent’s written response and
13 production of some documents to the IRS officers demonstrated the respondent’s actual
14 knowledge of the proceedings); *see also, e.g., Traveler’s Ins. Cas. & Sur. Co. of Am. v. Brenneke*,
15 551 F.3d 1132, 1136-37 (9th Cir. 2009) (finding service attempts to be diligent, and granting
16 motion for alternate service, where service was prevented by defendant’s knowing and intentional
17 actions to evade service); *U.S. v. Halajian*, 1:15-cv-00632-LJO-EPG, 2015 WL 74655535, at *1
18 (E.D. Cal. Nov. 24, 2015) (granting the motion on the basis of the respondent’s apparent evasion
19 of service).

20 Finally, the Government’s mailing of a copy of the OSC and the supporting documents to
21 Respondent’s residence on October 26, 2017—at least 28 days in advance of the OSC hearing—is
22 reasonably calculated to afford Respondent timely actual notice of the OSC proceedings.
23 Additionally, it satisfies the Due Process requirement that service be reasonably calculated, under
24 all circumstances, to apprise interested parties of the pendency of the action, and to afford them an
25 opportunity to present their objections. *Franks*, 2014 WL 3615567, at *4.

26 For the reasons set forth above, the Government’s Motion for Alternate Process Service is
27 GRANTED. To comply with Local Rule 230, the Government must serve a copy of the OSC
28 upon Respondent, including notice of the new OSC hearing date, at least 28 days in advance of the

1 hearing. *See* Local Rule 230. Accordingly, the Court DENIES Petitioner's request that service of
2 the OSC and supporting documents be deemed complete based on the October 26, 2017, posting
3 to the door of Respondent's residence, and October 27, 2017, mailings to Respondent.

4 **CONCLUSION AND ORDER**

5 For the reasons set forth above, IT IS HEREBY ORDERED that:

6 (1) Plaintiff's Motion is GRANTED to the extent it seeks leave for alternate process
7 service;

8 (2) Plaintiff's Motion is DENIED to the extent it requests that service of the Order to
9 Show Cause and supporting documents be deemed complete based on the October 26,
10 2017, posting to the door of Respondent's residence, and the October 27, 2017,
11 mailings to Respondent's residence;

12 (3) The Order to Show Cause Hearing is RESET to January 10, 2018, at 9:30 a.m. in
13 Courtroom 7;

14 (4) Within two (2) days of this Order, Petitioner shall serve Respondent by mail with the
15 following documents:

16 a. A copy of the original Order to Show Cause issued on August 29, 2017 (Doc.
17 4);

18 b. A notice of the new January 10, 2018, Order to Show Cause hearing date;

19 c. A copy of this Order;

20 d. The Petition, its Exhibits, and supporting Points and Authorities (Doc. 1); and

21 (5) A Certificate of Service establishing service of these documents shall be filed by
22 Petitioner no later than November 16, 2018.

23
24 IT IS SO ORDERED.

25 Dated: November 8, 2017

26 /s/ Sheila K. Oberlo
27 UNITED STATES MAGISTRATE JUDGE