



1 On August 27, 2020, the Court issued a summons as to Defendants Aloudi and Refai. (Doc. 3.)  
2 On October 21, 2020, the summons was returned executed as to Defendant Aloudi.<sup>1</sup> (Doc. 5.) Plaintiff  
3 made two unsuccessful attempts to serve Defendant Refai with the summons and complaint and  
4 contends that he cannot be located with reasonable diligence. (Doc. 11 at 2, Doc. 11-1 at 2–3.) Plaintiff  
5 thus seeks to serve Defendant Refai by publication in a newspaper of general circulation in Fresno,  
6 California. (Doc. 11.)

7 Plaintiff filed his motion for service by publication on January 11, 2021. Opposition to the  
8 motion was due on February 10, 2021. Neither defendant has filed an opposition. The Court finds it  
9 appropriate for Plaintiff’s motion to be submitted on the record and brief on file without the need for  
10 oral argument. *See* E.D. Cal. Local Rule 230(g). Accordingly, the Court will vacate the hearing  
11 scheduled for February 24, 2021.

12 As Plaintiff has not filed a sworn affidavit demonstrating that he has a claim against Defendant  
13 Refai as required by California Code of Civil Procedure § 415.50(a), the court denies without prejudice  
14 his motion to serve Defendant Refai by publication.

## 15 II. BACKGROUND

16 Plaintiff identified Defendant Refai as the owner of the lot by reviewing the Deed Record for  
17 425 West Shields Avenue, Fresno, California (the location of Shields Food Market). (Moore Decl.,  
18 Doc. 11-2 ¶ 2.) Plaintiff also confirmed Defendant Refai’s ownership of the lot by reviewing the  
19 Assessment Record using Shield Food Market’s address. (*Id.*)

20 From the “available public records,” Plaintiff identified Defendant Refai’s residence as 5770  
21 West Millbrae Avenue, Fresno, California. (Moore Decl., Doc. 11-2 ¶ 3.) Plaintiff sought to effect  
22 service on Defendant Refai beginning on September 3, 2020. (*Id.*) He hired a process server, County  
23 Process Services, Inc., which attempted to effect service of documents on Defendant Refai at his  
24 residence on September 8, 2020. (Declaration of Albert Moles (“Moles Decl.”), Doc. 11-3 at ¶ 3; Moore  
25 Decl., Doc. 11-2 at ¶¶ 3–4.) The current occupant stated Defendant Refai was not known that that  
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27 <sup>1</sup> Defendant Aloudi is now in default. (*See* Doc. 7.)

1 address. (*Id.*) On October 11, 2020, County Process Services, Inc. again attempted to effect service on  
2 Defendant Refai at a second address provided by Plaintiff of 5714 West Magill Avenue, Fresno,  
3 California. (Moles Decl., Doc. 11-3 at ¶ 4; Moore Decl., Doc. 11-2 at ¶ 5.) County Process Services,  
4 Inc. was not able to effect service, as the current occupant stated Defendant Refai was not known to that  
5 address. (*Id.*)

### 6 III. LEGAL STANDARD

7 Rule 4 of the Federal Rules of Civil Procedure provides that proper service can be made by  
8 “following state law for serving a summons in an action brought in courts of general jurisdiction in the  
9 state where the district court is located or where service is made.” Fed. R. Civ. P. 4(e)(1). Therefore,  
10 California’s statute for service by publication will govern whether such service is proper in this action.

11 California Code of Civil Procedure § 415.50(a)(1) provides, in pertinent part, that “[a] summons  
12 may be served by publication if upon affidavit it appears to the satisfaction of the court in which the  
13 action is pending that the party to be served cannot with reasonable diligence be served in another  
14 manner specified in this article and that . . . [a] cause of action exists against the party upon whom  
15 service is to be made or he or she is a necessary or proper party to the action.” In determining whether  
16 a plaintiff has exercised “reasonable diligence,” the court examines the affidavit to see whether the  
17 plaintiff “took those steps a reasonable person who truly desired to give notice would have taken under  
18 the circumstances.” *Donel, Inc. v. Badalian*, 87 Cal. App. 3d 327, 333 (1978). The “reasonable  
19 diligence” requirement “denotes a thorough, systematic investigation and inquiry conducted in good  
20 faith by the party or his agent or attorney.” *Kott v. Super. Ct.*, 45 Cal. App. 4th 1126, 1137 (1996).  
21 “Before allowing a plaintiff to resort to service by publication, the courts necessarily require him to  
22 show exhaustive attempts to locate the defendant, for it is generally recognized that service by  
23 publication rarely results in actual notice.” *Watts v. Crawford*, 10 Cal. 4th 743, 749 n.5 (1995) (internal  
24 quotations and citations omitted). And, because of due process concerns, service by publication should  
25 be allowed only “as a last resort.” *Donel, Inc.*, 87 Cal. App. 3d at 333.

26 Taking a few reasonable steps to serve a defendant does not necessarily mean that all “myriad  
27 of other avenues” have been properly exhausted to warrant service by publication. *Id.* A plaintiff will  
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1 generally satisfy his burden through “[a] number of honest attempts to learn [a] defendant’s whereabouts  
2 or his address” by asking his relatives, friends, acquaintances, or employers, and by investigating  
3 “appropriate city and telephone directories, the voters' register, and the real and personal property index  
4 in the assessor’s office, near the defendant’s last known location.” *Kott*, 45 Cal. App. 4th at 1137  
5 (internal quotations omitted). “These are likely sources of information, and consequently must be  
6 searched before resorting to service by publication.” *Id.* The reasonable-diligence inquiry is fact and  
7 case specific. *Id.* at 1137–38 (“[T]he showing of diligence in a given case must rest on its own facts  
8 and no single formula or mode of search can be said to constitute due diligence in every case.”).

9 In addition to the reasonable-diligence requirement, a plaintiff seeking to serve a summons by  
10 publication must demonstrate “upon affidavit” that “[a] cause of action exists against the party upon  
11 whom service is to be made or he or she is a necessary or proper party to the action.” Cal. Civ. Proc.  
12 Code § 415.50(a)(1). For the purpose of service by publication, the existence of a cause of action is a  
13 jurisdictional fact.” *Harris v. Cavasso*, 68 Cal. App. 3d 723, 726 (1977). The requesting party must  
14 submit an affidavit containing a statement of some fact that would be legal evidence that the cause of  
15 action exists for the court to have jurisdiction to order service by publication. *Id.* “When jurisdiction is  
16 sought to be established by constructive service, the statutory conditions for such service must be strictly  
17 complied with or the judgment is subject to collateral attack.” *Donel, Inc.*, 87 Cal. App. 3d at 334. The  
18 affidavit filed in support of the motion for substitute service “must contain independent evidentiary  
19 support in the form of a sworn statement of facts to support a cause of action against the defendant, and  
20 if it does not, the Court does not have jurisdiction to order service by publication.” *Wileman Bros. &*  
21 *Elliott v. Y Farms, LLC*, Case No. 1:19-cv-00909-NONE-BAM, 2020 WL 3127934, at \*2 (E.D. Cal.  
22 June 12, 2020) (citing *Harris*, 68 Cal. App. 3d at 726–27). The affidavit must be signed by someone  
23 with personal knowledge of the essential facts. *See Sananikone v. United States*, No. 2:07-cv-01434-  
24 MCE-EFB, 2008 WL 5381690, at \*1 (E.D. Cal. Dec. 16, 2008) (“[T]he affidavit . . . must include  
25 allegations, based on personal knowledge of the underlying facts, that a cause of action exists against  
26 this defendant, or that he is a necessary party to this action.”).

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#### IV. DISCUSSION

1  
2 Plaintiff has not filed an affidavit demonstrating that he has a claim against Defendant Refai.  
3 Although he includes affidavits indicating Defendant Refai's ownership of the lot on which Shields  
4 Food Market is located and describing the lengths to which County Process Services, Inc. and Plaintiff's  
5 attorney went to serve Defendant Refai, none provide "independent evidentiary support . . . for the  
6 existence of a cause of action against the defendant." The Court thus denies without prejudice Plaintiff's  
7 motion to serve Defendant Refai by publication. *Cf. Wileman Bros. & Elliott*, 2020 WL 3127934, at  
8 \*2; *Hernandez v. Srija, Inc.*, No. 19-CV-01813-LB, 2019 WL 4417589, at \*2 (N.D. Cal. Sept. 16, 2019).

9 Moreover, while the Court does not decide the issue here, Plaintiff's motion and supporting  
10 papers raise a question whether he has demonstrated sufficiently that he cannot with reasonable  
11 diligence serve Defendant Refai in another manner. Defendant Refai allegedly owns the lot on which  
12 Shields Food Market is located, and thus presumably his co-defendant, Defendant Aloudi, leases its  
13 storefront from Defendant Refai and must pay him rent. Plaintiff does not indicate if he inquired whether  
14 Defendant Aloudi (who has been served in this case but not appeared) has contact information for  
15 Defendant Refai, such as an email address, which might provide an alternative means for service. *Cf.*  
16 *Castillo-Antonio v. Azurdia*, No. C-13-05709 DMR, 2014 WL 4060219, at \*3 (N.D. Cal. Aug. 14, 2014)  
17 (denying motion to serve summons and complaint by publication where plaintiff did not contact  
18 defendant's co-defendant for defendant's contact information); *see also, e.g., Gray v. Extended Stay*  
19 *Am., Inc.*, No. 2:19-cv-01269-MCE-EFB, 2020 WL 1274265, at \*4 (E.D. Cal. Mar. 17, 2020) ("Courts  
20 have construed [the California Code of Civil Procedure] as authorizing service by email if it is  
21 reasonably calculated to give actual notice to the party to be served.").

22 Plaintiff's papers also do not indicate whether he tried to contact Defendant Refai by other  
23 means, such as calling him by phone or mailing him a copy of the summons and complaint, which may  
24 be relevant to whether (1) Plaintiff has shown reasonable diligence, *cf. Burlington Ins. Co. v. Diamond*  
25 *Partners, Inc.*, No. 1:10-cv-0100-LJO-SKO, 2010 WL 2555169, at \*2 (E.D. Cal. June 18, 2010) (finding  
26 that plaintiff exercised reasonable diligence where, among other things, it called the phone numbers  
27 attached to defendant's known addresses) and (2) Plaintiff has actual notice of the lawsuit and is evading  
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1 service, thus bolstering the case for service by publication, *cf. Lucero v. IRA Servs., Inc.*, No. 18-cv-  
2 05395-LB, 2019 WL 2123576, at \*3 (N.D. Cal. May 15, 2019) (observing that whether a defendant has  
3 actual knowledge of the lawsuit may be relevant to a motion to serve by publication).

4 Finally, there is no indication that any efforts have been made to locate Defendant Refai during  
5 the last three months, as the last service attempt occurred in October 2020. *See Integon Preferred Ins.*  
6 *Co. v. Camacho*, No. 1:16-cv-01496-AWI-SAB, 2017 WL 1351704, at \*3 (E.D. Cal. Mar. 24, 2017)  
7 (citing Judicial Council Comment to Cal. Civ. Proc. Code § 415.50(a) (“[A]ttempts at personal service,  
8 search, affidavits, and the court's order for publication must, however, follow in reasonably quick  
9 succession so that they would relate to the conditions at the time of publication.”)). Should Plaintiff  
10 renew his motion to serve the summons and complaint by publication (as opposed to in another manner),  
11 he may wish to address these issues more thoroughly.

12 **V. ORDER**

13 Based on the forgoing, IT IS HEREBY ORDERED that Plaintiff’s motion for service by  
14 publication (Doc. 11) is DENIED WITHOUT PREJUDICE and the hearing set for February 24, 2021,  
15 is VACATED.

16  
17 IT IS SO ORDERED.

18 Dated: **February 16, 2021**

19 */s/ Sheila K. Oberto*  
20 UNITED STATES MAGISTRATE JUDGE