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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 vs.
15 **DISTRIBUIDORA BATIZ CGH, S.A.**
16 **DE C.V.; et al.,**
17 Defendants.

CASE NO. 07cv370-WQH-JMA
ORDER

HAYES, Judge:

17 The matters before the Court are the Motion for Specially Authorized Service (ECF No.
18 93), and the Motion for Issuance of an Amended Summons (ECF No. 94).

19 **BACKGROUND**

20 On February 27, 2007, Plaintiff United States of America filed the Complaint against
21 Distribuidora Batiz, S.A. De C.V. (hereinafter "Distribuidora Batiz"), and Silvia Del Carmen
22 Batiz Esquer, Rodolfo Batiz Guillen, Raul Batiz Echavarria, Raul Guillermo Batiz Guillen,
23 Raul Guillermo Batiz Gamboa, Ricardo Batiz Gamboa, Olga Elena Batiz Esquer, Jorge
24 Guillermo Batiz Guillen, Jorge Guillermo Batiz Esquer, Gabriela Maria Batiz Gamboa, Angela
25 Maria Batiz Gamboa, Gerardo Batiz Esquer, Grupo Batiz CGH, S.A. de C.V., Greenver, S.A.
26 de C.V., Invernaderos La Pequena Joya, S.A. De C.V., and Pedro Batiz Guillen (collectively,
27 "Guarantor Defendants"). (ECF No. 1). The Complaint alleges that the United States,
28 through its agency, the Export-Import Bank of the United States, holds a promissory note on

1 which Distribuidora Batiz defaulted. The Complaint alleges that the Guarantor Defendants
2 unconditionally guaranteed repayment of the full amount of Distribuidora Batiz's indebtedness
3 on the note, but Defendants failed to pay the amount due. The Complaint seeks payment of
4 principal in the amount of \$2,641,574.61, plus accrued interest.

5 Between approximately April 2008 and July 2008, Plaintiff attempted to serve seven
6 of the Defendants in Mexico pursuant to the Inter-American Convention on Letters Rogatory,
7 but the efforts were unsuccessful. (ECF No. 65-9, 65-10). For five of the Defendants, the
8 Mexican authorities stated that they could not locate the Defendants at the given addresses.
9 (ECF No. 65-9).

10 On November 7, 2008, the Court issued a Judgment against Defendant Raul Batiz
11 Echavarría pursuant to Federal Rule of Civil Procedure 54(b). (ECF No. 46). On December
12 5, 2008, the Court issued a Judgment against Defendant Rodolfo Batiz Guillen pursuant to
13 Rule 54(b). (ECF No. 51).

14 On May 12, 2009, based upon service of process at the San Diego, California offices
15 of Wilson Batiz LLC, "a Batiz family business," the United States moved for default judgment
16 against the following fourteen defendants: Distribuidora Batiz; Grupo Batiz CGH, S.A. de
17 C.V.; Greenver, S.A. de C.V.; Invernaderos la Pequeña Jolla, S.A. de C.V.; Pedro Batiz
18 Guillen; Silvia del Carmen Batiz Esquer; Raul Guillermo Batiz Guillen; Raul Guillermo Batiz
19 Gamboa; Olga Elena Batiz Esquer; Jorge Guillermo Batiz Guillen; Jorge Guillermo Batiz
20 Esquer; Gabriela Maria Batiz Gamboa; Angela Maria Batiz Gamboa; and Gerardo Batiz
21 Esquer. (ECF No. 59-2 at 5).

22 On May 22, 2009, thirteen of the fourteen Defendants who were the subject of the May
23 12, 2009 Motion for Default Judgment,¹ as well as Defendant Ricardo Batiz Gamboa ("Moving
24 Defendants"), through counsel Robert Ted Parker, filed an Opposition to Plaintiff's Motion
25 for Default Judgment (ECF No. 60) and a Motion to Set Aside Clerk's Default and Dismiss
26 Action as to Moving Defendants (ECF No. 61). The Moving Defendants contended that

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28 ¹ Of the fourteen Defendants who are the subject of the May 12, 2009 Motion for
Default Judgment, Defendant Pedro Batiz Guillen is the only Defendant who did not file an
opposition to the Motion.

1 Plaintiff had failed to effectuate service against them, and therefore the action against them
2 should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5). In support, the
3 Moving Defendants submitted a declaration from Defendant Jorge Guillermo Batiz Guillen
4 stating that “[e]ach of the Moving Defendants is of Mexican citizenship and domicile, and each
5 of them resides in Mexico.” (Jorge Guillermo Batiz Guillen Decl., ECF No. 61-3, ¶ 6). He
6 stated that “I first learned of the lawsuit when I received a copy of the letter [dated] February
7 26, 2009 that was signed by [Plaintiff’s counsel] and addressed to me and numerous other
8 members of the Batiz family at addresses which are not the residences or usual places of abode
9 or business of any of the Moving Defendants.” *Id.* ¶ 3.

10 On June 8, 2009, Plaintiff filed a Motion to Withdraw the Motion for Default Judgment
11 as to the Moving Defendants. (ECF No. 66). On June 9, 2009, Plaintiff filed a Motion for
12 Limited Early Discovery, seeking discovery “to obtain addresses it needs to effect
13 undisputedly proper service upon fourteen defendants and to move this litigation expeditiously
14 towards an adjudication on the merits.” (ECF No. 67-1 at 2). Plaintiff attached an email
15 exchange wherein attorney Parker refused to answer the following two questions posed by
16 Plaintiff’s counsel: “1) Will you provide me with addresses at which each of your 14 clients
17 may be served with process in this case? 2) Will you accept service of process on behalf of
18 your 14 clients?” (ECF No. 67-2 at 1).

19 On June 18, 2009, the Moving Defendants filed an opposition to the Motion for Limited
20 Early Discovery. (ECF No. 71). The Moving Defendants contended that any discovery taken
21 on the Moving Defendants prior to service would violate their right to Due Process.

22 On August 10, 2009, the Court issued an Order (1) granting the Motion to Withdraw
23 the Motion for Default Judgment as to the Moving Defendants; (2) granting the Motion to Set
24 Aside Clerk’s Default as to the Moving Defendants; (3) denying the Motion to Dismiss Action
25 as to the Moving Defendants; (4) denying without prejudice the Motion for Limited Early
26 Discovery; and (5) granting the Motion for Default Judgment as to Defendant Pedro Batiz
27 Guillen. (ECF No. 75). The Court stated that “there exists a reasonable prospect that service
28 may be obtained as to the Moving Defendants. Plaintiff may discover the Moving Defendants’

1 Mexican addresses through discovery on the served Defendants or non-parties. Additionally,
2 Plaintiff may move for an order allowing service via Federal Rule of Civil Procedure
3 4(f)(3)...” *Id.* at 14 (citation omitted).

4 On October 14, 2009, the Magistrate Judge issued an Order granting Plaintiff’s motion
5 for limited early discovery seeking to take early discovery from non-party First National Bank
6 and Judgment Debtors Raul Batiz Echavarria, Pedro Batiz Guillen and Rodolfo Batiz Guillen
7 “to obtain information reasonably necessary to effect service of process upon the fourteen
8 Defendants who reside in Mexico and have not yet been served.” (ECF No. 78 at 1). On
9 December 16, 2009, the Magistrate Judge issued a Protective Order which had been agreed
10 upon by Plaintiff and the Judgment Debtors. (ECF Nos. 80, 81).

11 On July 22, 2010, the Court issued an Order stating:

12 The docket reflects that, since the Magistrate Judge authorized limited discovery
13 and issued the Protective Order, no proof of service has been filed as to any of
14 the Unserved Defendants and no proceedings have been taken against any
15 Unserved Defendant. ... It appearing to the Court that dismissal for want of
prosecution may be appropriate in this case, Plaintiff is hereby ORDERED TO
SHOW CAUSE as to why this case should not be dismissed without prejudice
for failure to prosecute as to the Unserved Defendants.

16 (ECF No. 90 at 2).

17 On August 20, 2010, Plaintiff filed a response to the Court’s July 22, 2010 Order; the
18 Motion for Specially Authorized Service; the Motion for Issuance of an Amended Summons;
19 and a certificate of service indicating that Defendant Olga Elena Batiz Esquer was served with
20 the Summons and Complaint pursuant to the Hague Convention on November 12, 2009. (ECF
21 Nos. 91-94). Plaintiff’s response outlined Plaintiff’s “tedious and time consuming” attempts
22 “to effect service in Mexico under the Hague Convention.” (ECF No. 92 at 5). “Because
23 service under the Hague Convention is the best way to ensure the international enforceability
24 of an eventual judgment, the United States respectfully requests that the Court permit a further
25 attempt to serve the defendants in Mexico.” *Id.* The Motion for Issuance of an Amended
26 Summons requests that the Court direct the Clerk to issue a revised summons to comply with
27 the Mexican Central Authority’s “newly disclosed additional requirements” that the summons
28 specify whether the twenty day period for answering the complaint is measured in calendar

1 days or business days. *Id.* Because “the United States appreciates that there are practical
2 limitations on how long the Court can wait for a plaintiff to complete service,” *id.* at 6, Plaintiff
3 also filed the Motion for Specially Authorized Service which “requests that the Court enter an
4 order authorizing Rule 4(f)(3) service of the thirteen unserved defendants by delivering the
5 summons and complaint via certified mail to their attorney of record, Mr. Parker.” (ECF No.
6 93-1 at 10).

7 The Motion for Specially Authorized Service and Motion for Issuance of an Amended
8 Summons contain certificates of service indicating that Parker, counsel of record for the
9 thirteen unserved Defendants, and Jeffrey D. Cawdrey, counsel of record for the three
10 Judgment Debtors, each received electronic service of the pending motions. The docket
11 reflects that no opposition to either motion has been filed.

12 DISCUSSION

13 *Motion for Specially Authorized Service*

14 Federal Rule of Civil Procedure 4(f) provides, in pertinent part:

15 [S]ervice upon an individual ... may be effected in a place not within any judicial
16 district of the United States:

17 (1) by any internationally agreed means reasonably calculated to give
18 notice, such as those means authorized by the Hague Convention ...; or
19 ...

(3) by other means not prohibited by international agreement as may be
directed by the court.

20 Fed. R. Civ. P. 4(f). Service under Rule 4(f)(3) must be (1) directed by the court; (2) not
21 prohibited by international agreement; and (3) comport with constitutional notions of due
22 process. *See Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1014-16 (9th Cir. 2002).

23 To meet the due process requirement, “the method of service crafted by the district court must
24 be reasonably calculated, under all the circumstances, to apprise interested parties of the
25 pendency of the action and afford them an opportunity to present their objections.” *Id.* at
26 1016-17 (quotation omitted). “[A]s long as court-directed and not prohibited by an
27 international agreement, service of process ordered under Rule 4(f)(3) may be accomplished
28 in contravention of the laws of the foreign country.” *Id.* at 1014 (citation omitted). “[S]ervice

1 of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief. It is merely one
2 means among several which enables service of process on an international defendant.” *Id.* at
3 1015 (quotation omitted). In *Rio Properties*, the Court of Appeals for the Ninth Circuit held
4 that “when [plaintiff] presented the district court with its inability to serve an elusive
5 international defendant, striving to evade service of process, the district court properly
6 exercised its discretionary powers” to authorize service upon defendant’s attorney. *Id.* at 1016;
7 *see also id* at 1017 (“Service upon [defendant’s attorney] was ... appropriate because he had
8 been specifically consulted by [defendant] regarding this lawsuit. He knew of [defendant]’s
9 legal positions, and it seems clear that he was in contact with [defendant] in Costa Rica.
10 Accordingly, service to [defendant’s attorney] was ... reasonably calculated in these
11 circumstances to apprise [defendant] of the pendency of the present action.”).

12 After review of the Motion and the record, the Court finds that Plaintiff has been
13 reasonably diligent in seeking to serve the thirteen unserved Defendants. The facts and
14 circumstances of this case warrant the Court’s intervention pursuant to Rule 4(f). Plaintiff has
15 demonstrated that service of the thirteen unserved Defendants by delivering the Summons and
16 Complaint via certified mail to Parker, their attorney of record, is not prohibited by
17 international agreement and is “reasonably calculated, under all the circumstances, to apprise
18 [Defendants] of the pendency of the action and afford them an opportunity to present their
19 objections.” *Rio Props.*, 284 F.3d at 1016-17. The Motion for Specially Authorized Service
20 is granted.

21 *Motion for Issuance of an Amended Summons*

22 Currently, the Summons in this case states that the Defendant must file an answer to the
23 Complaint “within 20 days after service of this summons upon you, exclusive of the day of
24 service,” without specifying whether the twenty-day period is counted in business days or
25 calendar days. (ECF No. 2 at 1). “So that the United States may comply with the Mexican
26 authorities’ requirements and complete service of process in Mexico,” Plaintiff moves the
27 Court for an order requiring the Clerk to issue an amended summons to state, in pertinent part:

28 You are hereby summoned and required to file with the Clerk of this Court and
serve upon Plaintiff’s attorney, Kyle A. Forsyth, whose address is P.O. Box 875,

1 Ben Franklin Station, Washington, DC 20044, an answer to the complaint which
2 is herewith served upon you, no later than the first business day occurring at
3 least 21 calendar days (including Saturdays, Sundays, and legal holidays) after
4 service of this summons upon you, exclusive of the day of service. If you fail
5 to do so, judgment by default will be taken against you for the relief demanded
6 in the complaint.

7 (ECF No. 94-1 at 2-3). The requested language reflects the 2009 amendment to Rule 12 that
8 provides twenty-one days for a defendant to answer a complaint. *See* Fed. R. Civ. P.
9 12(a)(1)(A)(i); *see also* Fed. R. Civ. P. 6(a)(1) (“When the period is stated in days or a longer
10 unit of time: (A) exclude the day of the event that triggers the period; (B) count every day,
11 including intermediate Saturdays, Sundays, and legal holidays; and (C) include the last day of
12 the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to
13 run until the end of the next day that is not a Saturday, Sunday, or legal holiday.”).

14 Federal Rule of Civil Procedure 4(a) provides that “[t]he court may permit the summons
15 to be amended.” Fed. R. Civ. P. 4(a)(2). After review of the Motion and the record, the Court
16 concludes that, pursuant to Rule 4(a), the Motion for Issuance of an Amended Summons
17 should be granted.

18 CONCLUSION

19 IT IS HEREBY ORDERED that Plaintiff has shown cause why this action should not
20 be dismissed for failure to prosecute as to the unserved Defendants.

21 IT IS FURTHERED ORDERED that the Motion for Specially Authorized Service is
22 GRANTED. (ECF No. 93). Pursuant to Federal Rule of Civil Procedure 4(f)(3), Plaintiff is
23 authorized to serve the thirteen unserved Defendants via certified mail directed to their counsel
24 of record, Robert Ted Parker, at his office located at: Parker Law Firm, 7 Mira Loma, Orinda,
25 California 94563.²

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28 ² The thirteen unserved Defendants are: Distribuidora Batiz, S.A. de C.V.; Grupo Batiz
CGH, S.A. de C.V.; Greenver, S.A. de C.V.; Invernaderos la Pequena Jolla, S.A. de C.V., a/k/a
Invernaderos la Pequena Joya, S.A. de C.V.; Ricardo Batiz Gamboa; Silvia del Carmen Batiz
Esquer; Raul Guillermo Batiz Guillen; Raul Guillermo Batiz Gamboa; Jorge Guillermo Batiz
Guillen; Jorge Guillermo Batiz Esquer; Gabriela Maria Batiz Gamboa; Angela Maria Batiz
Gamboa; and Gerardo Batiz Esquer.

1 IT IS FURTHER ORDERED that the Motion for Issuance of an Amended Summons
2 is GRANTED. (ECF No. 94). Pursuant to Federal Rule of Civil Procedure 4(a)(2), the Clerk
3 of the Court shall issue an amended summons in the form requested in Exhibit B to the Motion
4 for Issuance of an Amended Summons, ECF No. 94-3 at 1.

5 No later than ninety (90) days from the date this Order is filed, Plaintiff shall file a
6 status report regarding Plaintiff's efforts to serve the unserved Defendants.

7 DATED: November 3, 2010

8 
9 **WILLIAM Q. HAYES**
United States District Judge

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