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5 UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
7

8 KENNETH J. MOSER,
9 individually and on behalf of all
10 others similarly situated,

Plaintiff,

11 v.

12 HEALTH INSURANCE
13 INNOVATIONS, INC., a
14 Delaware corporation;
15 NATIONAL CONGRESS OF
16 EMPLOYERS, INC., a
17 Delaware corporation;
18 UNIFIED LIFE
19 INSURANCE COMPANY,
20 INC., a Texas corporation;
21 COMPANION LIFE
22 INSURANCE COMPANY, a
23 South Carolina corporation;
24 DONISI JAX, INC., a Florida
25 corporation; CHARLES
26 DONISI, an individual; EVAN
27 JAXTHEIMER, an individual;
28 HELPING HAND HEALTH
GROUP, INC., a Florida
corporation; ANTHONY
MARESCA, an individual;
and MATTHEW HERMAN,
an individual;

Defendants.

Case No.: 17-cv-1127-WQH-KSC

ORDER

1 HAYES, Judge:

2 The matter before the Court is the Ex Parte Application to Serve Defendants
3 Anthony Maresca and Matthew Herman by Publication filed by Plaintiff Kenneth J. Moser.
4 (ECF No. 44).

5 **I. Background**

6 On June 5, 2017, Plaintiff Kenneth J. Moser initiated this action by filing a
7 Complaint against Anthony Maresca, Matthew Herman, and eight other Defendants. (ECF
8 No. 1). On June 6, 2017, a summons was issued. (ECF No. 2). On June 7, 2017, Moser
9 filed a First Amended Complaint (ECF No. 3). The First Amended Complaint is the
10 operative complaint in this matter. The First Amended Complaint brings claims under the
11 Telephone Consumer Protection Act of 1991 against Maresca, Herman, and the eight other
12 Defendants.

13 On December 14, 2017, Moser filed an Ex Parte Application to Serve Maresca and
14 Herman by Publication. (ECF No. 44). Moser asserts that he has attempted to serve
15 Maresca and Herman numerous times, but has been unable to do so. *Id.*

16 **II. Discussion**

17 Rule 4(e)(1) of the Federal Rules of Civil Procedure allows service of a defendant
18 by any means permitted by the law of the state in which the case is pending or the law of
19 the state in which the defendant resides. *See* Fed. R. Civ. P. 4(e)(1). Under California law,

20 [a] summons may be served by publication if upon affidavit it appears . . . that
21 the party to be served cannot with reasonable diligence be served in another
22 manner specified in this article and that either:

23 (1) A cause of action exists against the party upon whom service is to
24 be made or he or she is a necessary or proper party to the action.

25 (2) The party to be served has or claims an interest in real or personal
26 property in this state that is subject to the jurisdiction of the court or the
27 relief demanded in the action consists wholly or in part in excluding the
28 party from any interest in the property.

Cal. Civ. Proc. Code § 415.50(a).

1 California courts impose a high standard of diligence before approving service by
2 publication. *See Olvera v. Olvera*, 232 Cal. App. 3d 32, 41 (1991) (“When substituted or
3 constructive service is attempted, strict compliance with the letter and spirit of the statutes
4 is required.”). “Before allowing a plaintiff to resort to service by publication, the courts
5 necessarily require him to show exhaustive attempts to locate the defendant, for it is
6 generally recognized that service by publication rarely results in actual notice.” *Watts v.*
7 *Crawford*, 896 P.2d 807, 811 n.5 (Cal. 1995). “The term ‘reasonable diligence’ . . . denotes
8 a thorough, systematic investigation and inquiry conducted in good faith by the party or
9 his agent or attorney.” *Kott v. Superior Court*, 45 Cal. App. 4th 1126, 1137 (1996).
10 Because of due process concerns, service by publication is permissible “only as a last
11 resort.” *Donel, Inc. v. Badalian*, 87 Cal. App. 3d 327, 332 (1978) (emphasis added).

12 Christopher Reichman, Moser’s counsel, submitted a Declaration in Support of the
13 Application to Serve by Publication. (ECF No. 3-1). In the Declaration, Reichman states

14 Helping Hand’s Florida Department of Corporations listing, both then and
15 now, lists their corporate address as 110 E. Broward Blvd, Suite 1700, Fort
16 Lauderdale, FL, 33301, and lists Mr. Maresca as its registered agent giving
17 the same address. The same listing shows an amendment to these corporate
18 filings was made on January 4, 2017 which removed Matthew Herman as
19 President and Registered Agent and replaced him with Mr. Maresca. Matthew
Herman’s former address for the company and himself was 3800 Inverrary
Blvd., Suite 203, Lauderhill, FL 33319.

20 *Id.* at ¶¶ 4-6.

21 Service attempts on Helping Hand and Mr. Maresca were made jointly at the
22 110 E. Broward Blvd, Suite 1700, Fort Lauderdale, FL, 33301 address on June
23 27, 2017, however the [sic] were unsuccessful because it was a virtual office
24 and the person in charge informed the process server that Helping Hand and
Mr. Maresca no longer held an office at that location.

25 *Id.* at ¶ 11.

26 Four service attempts were made on Mr. Herman at his 3800 Inverrary Blvd.,
27 Suite 203, Lauderhill, FL 33319 address between June 26, 2017 and July 8,
28 2017, however all were unsuccessful since the office was never open during

1 business hours and a maintenance worker there stated that no one ever goes
2 in to this office, and though there was a light one [sic] one time nobody every
3 answered the door.

4 *Id.* at ¶ 13.

5 After these service attempts failed, Reichman “hired California Licensed Private
6 Investigator Greg Long,” “discovered Mr. Maresca’s social security number[,] and
7 obtained a comprehensive skip trace report on Mr. Maresca.” *Id.* at ¶¶ 15, 23. “The report
8 gave a most recent California address as 5717 Laurel Canyon Blvd, Apt. 315, Valley
9 Village, CA 91607 for Helping Hands, Mr. Maresca[,] and Mr. Herman.” *Id.* at ¶ 26.

10 Jo Ann Garner made a service attempt on October 13, 2017 but received no
11 answer to the call box and was unable to gain entry. She made a further
12 attempt on October 17, 2017 which also went unanswered, however she spoke
13 with the office manager who confirmed that Mr. Maresca and Mr. Herman
14 still occupied the apartment but indicated they were out of town for a few
15 weeks. To accommodate the delay, she waited to make a third attempt on
16 November 7, 2017 but it also went unanswered.

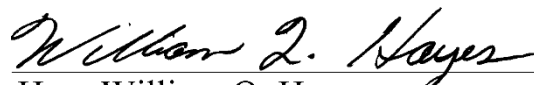
17 *Id.* at ¶ 28.

18 The Court concludes that Moser has not exhausted the avenues by which he could
19 further attempt service of process. *See Donel*, 87 Cal. App. 3d. at 333. The Court finds
20 that Moser has not demonstrated that Maresca and Herman cannot be served at 5717 Laurel
21 Canyon Blvd, Apt. 315, Valley Village, CA 91607. *Id.* The Court finds that Moser has
22 not satisfied the high standard of diligence required for service by publication.

23 **III. Conclusion**

24 IT IS HEREBY ORDERED that Plaintiff’s Ex Parte Application to Serve
25 Defendants Anthony Maresca and Matthew Herman by Publication (ECF No. 44) is denied
26 without prejudice.

27 Dated: January 10, 2018

28 
Hon. William Q. Hayes
United States District Court