

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

VERIZON TRADEMARK SERVICES LLC;
and VERIZON LICENSING COMPANY,

Plaintiffs,

v.

Case No. 8:10-cv-00665-VMC-EAJ

THE PRODUCERS, INC.; INTERCOSMOS
MEDIA GROUP INC. d/b/a DIRECTNIC.COM;
DIRECTNIC, L.L.C.; DIRECTNIC LTD.;
DOMAIN CONTENDER, L.L.C.; SIGMUND J.
SOLARES; MICHAEL H. GARDNER;
NOAH S. LIESKE; and DOES 1-10,

Defendants.

**MOTION TO DISMISS THE AMENDED COMPLAINT FOR INSUFFICIENT
SERVICE OF PROCESS OR TO QUASH SERVICE OF PROCESS**

J. Carter Andersen, Esq.
BUSH ROSS, P.A.
P.O. Box 3913
Tampa, Florida 33601
Tel. (813) 224-9255
Fax. (813) 223-9620
Counsel for Defendant,
Sigmund J. Solares

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INTRODUCTION

In their Amended Complaint, Verizon Trademark Services, LLC and Verizon Licensing Co. (collectively, the “Plaintiffs”) assert that substituted service of process is proper on Defendant Sigmund J. Solares (“Mr. Solares”) under Florida Statute Section 48.161 (“Section 48.161”) because Mr. Solares “appears to be evading service.” *See* Amd. Comp. at ¶ 20. In support of this assertion, Plaintiffs assert that they “have made several attempts to serve the original complaint on Mr. Solares at his residence in Tampa, Florida for which he claims a homestead exemption, as well as at other locations in Louisiana where Solares does business.” *See* Amd. Comp. at ¶¶ 19-20. Plaintiffs conclude without presenting any evidence that they “have been unable to serve Solares because Solares is concealing his whereabouts and evading service.” *See* Amd. Comp. at ¶ 19. The affidavits incorporated into the Amended Complaint assert, among other things: that the Plaintiffs made multiple attempts to serve Mr. Solares at his Tampa home during the period from March 2010 to August 2010; that a process server hired by the Plaintiffs conducted periodic surveillance of Mr. Solares’ Tampa home during an eighteen-day period from May 21, 2010 to June 7, 2010 to attempt service on Mr. Solares; that a process server conducted “around the clock surveillance of Solares’ home” during a two-day period from August 27-28, 2010 to attempt service on Mr. Solares; and that Plaintiffs attempted to serve Mr. Solares at two addresses in Louisiana at which the Plaintiffs assert Mr. Solares owns property or conducts business. *See* Dec. of T. Santarlas, dated Sept. 22, 2010; Dec. of A. Bradley.

The Plaintiffs recounting of their failed efforts to effect service of process on Mr. Solares cannot establish that substituted service is proper under Section 48.161. Section

48.161 provides that “substituted service” may be made on a nonresident or a person who conceals his whereabouts by serving the Secretary of State of Florida. FLA. STAT. 48.161. *See Jennings v. Montenegro*, 792 So. 2d 1258, 1261 (Fla. 4th DCA 2001) (stating that in order to effect service under Section 48.161, a plaintiff must serve the Secretary of State of Florida). Because Section 48.161 creates an exception to the general rule that a defendant must be personally served, the statute must be strictly construed. *Chapman v. Sheffield*, 750 So. 2d 140, 142 (Fla. 1st DCA 2000). *See also Chao v. Reid*, No. 6:07-cv-620-Orl-28KRS, 2007 WL 4146298 *1, *2 (M.D. Fla. Nov. 19, 2007). Accordingly, a plaintiff seeking to use substituted service of process on the ground that a defendant is concealing his whereabouts “has the burden of presenting facts which clearly justify the applicability of the statute.” *Bird v. Int. Graphics, Inc.*, 362 So. 2d 316, 317 (Fla. 3d DCA 1978) (holding that failure of the sheriff and a process server to locate the defendant at three different addresses was not sufficient to establish concealment). *See also Fleischman v. Morris*, 260 So. 2d 278, 279 (Fla. 3d DCA 1972) (holding that the affidavits presented by the plaintiff and the record did not show that “sufficient search and inquiry was actually made to ascertain that [the defendants] were concealing their whereabouts”).

In this case, the Plaintiffs’ affidavits contain no facts that indicate Mr. Solares is concealing his whereabouts, much less facts that *clearly* show that Mr. Solares is concealing his whereabouts or evading service. Indeed, nowhere in the Plaintiffs’ affidavits do the Plaintiffs allege *any actions whatsoever* on the part of Mr. Solares. The Plaintiffs’ complaint and affidavits merely recount their efforts to serve Mr. Solares. Such allegations cannot clearly show that Mr. Solares is evading process because they

allege no actions on his part at all. Plaintiffs' assertions only show Mr. Solares' absence from Tampa during the periods when the Plaintiffs attempted to effect service of process. Absence from Tampa does not establish that a defendant is "concealing his whereabouts" or "evading service of process." *See* FLA. STAT. § 48.161. Because the Plaintiffs have not met their burden to present facts which "clearly" show that Mr. Solares is concealing his whereabouts, the Plaintiffs have not established that substituted service of process is proper on Mr. Solares. *Bird*, 362 So. 2d at 317.

The Plaintiffs have not presented any facts that clearly show that Mr. Solares is concealing his whereabouts or evading service because Mr. Solares has not taken any actions to conceal his whereabouts or evade service.¹ On the contrary, since this lawsuit was filed on March 17, 2010, Mr. Solares has continued to conduct his life in the same manner that he conducted it prior to the filing of this lawsuit. *See* Dec. of S. Solares at ¶ 18, attached as Ex. A. Since July of 2009, Mr. Solares' "business and personal affairs have caused [him] to travel extensively throughout the world." *See* Dec. of S. Solares at ¶ 4. As a result, he has spent very little time in Tampa during this period. *See* Dec. of S. Solares at ¶ 4. However, as noted above, absence from Tampa does not establish that Mr. Solares is concealing his whereabouts. As well, a defendant is under no obligation to halt his business and personal affairs when a lawsuit is filed against him in order to facilitate service of process.

Since July of 2009, Mr. Solares has operated a company based in Grand Cayman, Cayman Islands. *See* Dec. of S. Solares at ¶ 5. The Company business website is accessible world-wide and Mr. Solares frequently travels "throughout the world to meet

¹ Mr. Solares' Declaration accounts for his whereabouts during each of the periods the Plaintiffs assert they attempted to serve him. *See* Dec. of S. Solares at ¶¶ 10-17. In each case, he was traveling away from Tampa solely to conduct his business and personal affairs.

with clients, potential clients, and business associates, and to attend business conferences in [his] role with the company.” *See* Dec. of S. Solares at ¶ 5. Mr. Solares’ role with the Company causes him “to spend substantial time in the Cayman Islands and Europe.” *See* Dec. of S. Solares at ¶ 6. However, the fact that Mr. Solares conducts international business and travels frequently in order to conduct such business does not establish that Mr. Solares is concealing his whereabouts. It only establishes that his occupation requires him to travel frequently in order to conduct his business. There is no requirement for a defendant to cease his business travel when a lawsuit is filed against him, nor is a defendant required to seek out those who may be attempting to serve him with process. Service of process is the responsibility of the plaintiff, not the defendant.

Even if the Plaintiffs have established that substituted service is proper on Mr. Solares, the Plaintiffs have not properly effectuated substituted service because the Plaintiffs have not complied with the procedural requirements of Section 48.161. If a plaintiff can establish that substituted service is proper on a defendant, Section 48.161 sets forth three procedural requirements for a plaintiff to successfully effect such substituted service of process: “(1) the plaintiff must send notice of service and a copy of the process by registered or certified mail to the defendant; (2) the plaintiff must file the defendant’s return receipt; and (3) the plaintiff must file an affidavit of compliance.” *Smith v. Leaman*, 826 So. 2d 1077, 1078 (Fla. 2d DCA 2002). “Because the lack of personal service of process implicates due process concerns, the plaintiff must strictly comply with the statutory requirements.” *Id.*

In order to satisfy Section 48.161, the return receipt filed by the plaintiff *must be signed by the defendant*. *Hernandez v. State Farm Mut. Auto. Ins. Co.*, 32 So. 3d 695, 699

(Fla. 4th DCA 2010). The courts have created an exception to this requirement for those situations in which the defendant is actively refusing or rejecting the substituted service of process. *Smith*, 826 So. 2d at 1078. However, a plaintiff can only satisfy this exception by showing that the defendant took affirmative action to avoid acceptance of delivery of the process. *Turcotte v. Graves*, 374 So. 2d 641, 643 (Fla. 4th DCA 1979). This requires a showing that the defendant actively refused delivery of the substituted process. *Smith*, 826 So. 2d at 1078.

Here, the Plaintiffs have not complied with the requirements to effect service of process under Section 48.161 because the Plaintiffs have not filed a signed return receipt with the Court relating to their mailing of the notice of service and a copy of the process to Mr. Solares. Additionally, the Plaintiffs have not shown that Mr. Solares actively refused delivery of the substituted process. Indeed, the Plaintiffs have not even made an allegation that Mr. Solares has taken action to avoid acceptance of delivery of process. The Plaintiffs cannot present such facts because Mr. Solares has never taken any action to avoid delivery of the substituted process that the Plaintiffs assert they mailed to him. *See* Dec. of S. Solares at ¶ 8. Because the Plaintiffs have not shown that Mr. Solares has actively refused delivery of service of process, or even made such an allegation, the Plaintiffs cannot satisfy the exception to the requirement to file a signed return receipt with the Court. Because the Plaintiffs have not filed a signed return receipt with the Court as required by Section 48.161, and have not even alleged the facts required to satisfy the exception to this requirement, the Plaintiffs have not properly effected substituted service of process on Mr. Solares under Section 48.161. *Hernandez*, 32 So. 3d at 700. Accordingly, the Court should dismiss the Amended Complaint as to Mr.

Solares without prejudice for insufficient service of process, or, in the alternative, quash service of process on Mr. Solares.

The Plaintiffs did not effectuate service of process on Mr. Solares within the original 120 day time period mandated by Federal Rule of Civil Procedure 4(m) (“Rule 4(m)”). After the Plaintiffs failed to file a motion for extension of time before the period expired, the Court ordered the Plaintiffs to show cause why this action should not be dismissed as to Mr. Solares. *See* Court’s Order, Dated Aug. 24, 2010, Docket No. 54. In response to the Court’s order, the Plaintiffs requested sixty more days to serve Mr. Solares. *See* Court’s Order, Dated Aug. 24, 2010. The Court found that this request was “not reasonable and appropriate under the circumstances” and noted that the Plaintiffs had already enjoyed a “de facto thirty-six day extension” by virtue of the fact that the original deadline had already expired thirty-six days earlier. *See* Court’s Order, Dated Aug. 24, 2010. Instead, the Court granted the Plaintiffs an extension of time to serve Mr. Solares up to and including September 24, 2010. *See* Court’s Order, Dated Aug. 24, 2010. After the Plaintiffs requested yet another extension of time, the Court again extended the time to serve Mr. Solares until October 22, 2010. *See* Court’s Endorsed Order, Dated Sept. 23, 2010, Docket No. 64. On October 7, 2010, the Plaintiffs filed an Amended Complaint asserting that substituted service on Mr. Solares is proper under Section 48.161. *See* Amd. Comp. at ¶ 20.

As noted above, substituted service on Mr. Solares is not proper under Section 48.161. Additionally, even if substituted service is proper, the Plaintiffs have failed to effectuate substituted service on Mr. Solares because the Plaintiffs have failed to comply with the procedural requirements of Section 48.161. In sum, after the original 120 day

time period allowed by Rule 4(m), a thirty-six day “de facto” extension of time, and two extensions of time ordered by the Court, the Plaintiffs have still failed to effectuate service of process on Mr. Solares. For this reason, Mr. Solares respectfully requests that the Court dismiss the Amended Complaint as to Mr. Solares without prejudice due to insufficient service of process. In the alternative, if the Court declines to dismiss the Amended Complaint as to Mr. Solares, Mr. Solares respectfully requests that the Court quash service of process on Mr. Solares.²

ARGUMENT

I. LEGAL STANDARD FOR A MOTION TO DISMISS FOR INSUFFICIENT SERVICE OF PROCESS

Rule 4(m) mandates that if a plaintiff does not effect service of process on a defendant within 120 days after filing a complaint, a district court must dismiss the action without prejudice against the defendant or order that service be made within a specified period of time. FED. R. CIV. PRO. 4(m).³ Whether to dismiss the action without prejudice or quash service of process but preserve the action is within the broad discretion of the district court. *Adams v. AlliedSignal General Aviation Avionics*, 74 F.3d 882, 886 (8th Cir. 1996). *See also Gordon v. John Deere Co.*, 320 F. Supp. 293, 296 (N.D. Fla. 1970), *aff'd*, 466 F.2d 1200 (5th Cir. 1972) (“In cases in which a movant requests both a dismissal of the action and in the alternative quashing of service of process, or asks for

² Mr. Solares makes a special appearance before the Court only to contest the insufficient service of process in this case. Mr. Solares does not make a general appearance before the Court, nor submit to the Court’s jurisdiction. *See Roden v. Diah*, No. 7:07CV00252, 2008 WL 5334309 *1, *7 (W.D. Va. Dec. 19, 2008) *aff'd*, 325 F. App’x. 253 (4th Cir. 2009) *cert. denied*, 130 S. Ct. 161, 175 L. Ed. 2d 102 (U.S. 2009) (stating that a defendant is entitled to make a special appearance to challenge insufficient service of process).

³ Notwithstanding this mandate, the court must extend the time for service for an appropriate period if the plaintiff shows good cause for the failure to serve the defendant. Absent a showing of good cause for the failure to serve the defendant, a district court has the discretion to extend the time for service of process, but is not required to do so. *Lepone-Dempsey v. Carroll County Comm’rs*, 476 F.3d 1277, 1281 (11th Cir. 2007). However, even in the absence of good cause, a court must consider whether, under the facts of the case, the circumstances warrant an extension of time. *Id.* at 1282.

both forms of relief, the courts have broad discretion either to dismiss the case or to retain it but quash the service.”).

When a defendant files a motion to dismiss for insufficient service of process, the burden of proof to establish proper service of process is on the plaintiff. *Lazaro v. U.S. Dept. of Agr.*, 186 F. Supp. 2d 1203, 1217 (M.D. Fla. 2001). *See also Supreme Fuels Trading FZE v. Sargeant*, No. 08-81215-CIV, 2009 WL 5128504 *1, *3 (S.D. Fla. Dec. 18, 2009); *Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d 819, 821 (1st Cir. 1986). To meet its burden, the plaintiff must establish a prima facie case that service of process on the defendant was proper. *Supreme Fuels*, 2009 WL 5128504 at *3. *See also Northrup King Co. v. Compania Productora Semillas Algodoneras, S.A.*, 51 F.3d 1383, 1387 (8th Cir. 1995). If the plaintiff establishes a prima facie case of proper service, the burden then shifts to the defendant to demonstrate that service was insufficient. *Supreme Fuels*, 2009 WL 5128504 at *3. Because service of process is a jurisdictional issue, a court may decide whether service was proper by reference to affidavits, after a pretrial evidentiary hearing, or at trial if the issues are intertwined with the merits of the suit. *Brand v. Mazda Motor of America, Inc.*, 920 F. Supp. 1169, 1171 (D. Kan. 1996) (citing *Fed. Deposit Ins. Corp. v. Oaklawn Apts.*, 959 F.2d 170, 174 (10th Cir. 1992)). *See also Hollander v. Wolf*, No. 09-80587-CIV, 2009 WL 3336012 (S.D. Fla. Oct. 14, 2009) (“The Court may look to affidavits, depositions, and oral testimony to resolve disputed questions of fact.”). Importantly, if a defendant is not properly served, the court may not exercise personal jurisdiction over the defendant.⁴ *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526

⁴ Service of process is not merely a procedural formality meant to ensure a defendant has notice of the case. Indeed, “[a]ctual notice of a suit does not dispose of the requirements of service of process.” *Boston v. Potter*, 185 F. App’x. 853, 854 (11th Cir. 2006); *Jackson v. Warden, FCC Coleman-USP*, 259 F. App’x. 181, 183 (11th Cir. 2007). Instead, “[s]ervice of process, under longstanding tradition in our system of

U.S. 344, 350 (1999); *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Investments*, 553 F.3d 1351, 1360 (11th Cir. 2008).

II. REQUIREMENTS TO EFFECT SUBSTITUTED SERVICE OF PROCESS UNDER FLORIDA LAW

Federal Rule of Civil Procedure 4(e) allows a Plaintiff to serve a defendant within “a judicial district of the United States by...following the state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.” FED. R. CIV. PRO. 4(e). In this case, Plaintiffs assert that they have made proper service of process on Mr. Solares in accordance with Florida law. However, under Section 48.161, a plaintiff seeking to serve a defendant by substituted service of process on the ground that a defendant is concealing his whereabouts must present facts which clearly show that defendant is concealing his whereabouts. *Bird*, 362 So. 2d at 317. *See also Chao*, 2007 WL 4146298 at *2. As well, if the plaintiff can establish that substituted service on the defendant is proper, a plaintiff, in order to successfully effect substituted service, must send a copy of the process by registered or certified mail to the defendant and file with the court a return receipt *signed by the defendant*. *Hernandez*, 32 So. 3d at 699. If the plaintiff does not obtain a signed return receipt from the defendant, then the plaintiff has not successfully effectuated substituted service of process and the court has not obtained valid personal jurisdiction over the defendant. *Id.* at 700. A plaintiff may only avoid the requirement to file a signed return receipt by showing that the defendant *actively refused delivery* of the substituted justice, is fundamental to any procedural imposition on a named defendant.” *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). For this reason, a court may not exercise jurisdiction over a defendant in the absence of proper service of process. *Id.*

service of process. *Smith*, 826 So. 2d at 1078. If a plaintiff does not obtain a signed return receipt from the defendant, and cannot show that the defendant actively refused delivery of the substituted service of process, then the plaintiff has not successfully served substituted service of process on the defendant.

A. UNDER FLORIDA LAW, A PLAINTIFF SEEKING TO USE SUBSTITUTED SERVICE OF PROCESS MUST PRESENT FACTS WHICH CLEARLY SHOW THAT A DEFENDANT IS CONCEALING ITS WHEREABOUTS

Under Florida law, service of process “is made by delivering [the process] to the person to be served with a copy of the complaint...or by leaving the [process] at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.” FLA. STAT. 48.031. Section 48.161 creates an exception to the general rule that the defendant must be personally served. *Chapman*, 750 So. 2d at 142. Section 48.161 provides that “substituted service” may be made on a nonresident or a person who conceals his whereabouts by serving the Secretary of State of Florida. FLA. STAT. 48.161.

Because Section 48.161 creates an exception to the general rule that a defendant must be personally served, the statute must be strictly construed. *Chapman*, 750 So. 2d at 142. *See also Chao*, 2007 WL 4146298 at *2 (“The courts have consistently observed that statutes relating to substituted service of process (in lieu of personal service of process) must be strictly construed; and the burden of proof to sustain the validity of substituted service of process rests upon the person seeking to invoke the provisions of such statutes.”) (quoting *Elmex Corp. v. Atlantic Fed. Sav. & Loan Ass’n*, 325 So. 2d 58, 61 (Fla. 4th DCA 1976)). Accordingly, a plaintiff seeking to use substituted service of process on the ground that a defendant is concealing his whereabouts “has the burden of

presenting facts which clearly justify the applicability of the statute.” *Bird*, 362 So. 2d at 317 (holding that failure of the sheriff and a process service to locate the defendant at three different addresses was not sufficient to establish concealment). *See also Chao*, 2007 WL 4146298 at *2; *Fleischman*, 260 So. 2d at 279 (holding that the affidavits presented by the plaintiff and the record did not show that “sufficient search and inquiry was actually made to ascertain that [the defendants] were concealing their whereabouts”).

B. TO SUCCESSFULLY EFFECT SUBSTITUTED SERVICE OF PROCESS UNDER SECTION 48.161, A PLAINTIFF MUST MAIL A COPY OF THE PROCESS TO THE DEFENDANT AND OBTAIN A RETURN RECEIPT SIGNED BY THE DEFENDANT

If a plaintiff can establish that substituted service is proper on a defendant, Section 48.161 sets forth three procedural requirements for a plaintiff to successfully effect substituted service of process: “(1) the plaintiff must send notice of service and a copy of the process by registered or certified mail to the defendant; (2) the plaintiff must file the defendant’s return receipt; and (3) the plaintiff must file an affidavit of compliance.” *Smith*, 826 So. 2d at 1078. “Because the lack of personal service of process implicates due process concerns, the plaintiff must strictly comply with the statutory requirements.” *Id.* Such strict compliance “is essential to obtaining valid personal jurisdiction over the” defendant. *Hernandez*, 32 So. 3d at 700. “Without such compliance, the trial court does not acquire jurisdiction over the defendant.” *Id.* *See also Hughes v. Am. Tripoli, Inc.*, No. 2:04-cv-485-FtM-29DNF, 2007 WL 2071529 *1, *2 (M.D. Fla. July 17, 2007) (“Unless plaintiff strictly complies with Fla. Stat. § 48.161, the Court does not have jurisdiction.”).

In order to satisfy Section 48.161, the return receipt filed by the plaintiff *must be signed by the defendant*. *Hernandez*, 32 So. 3d at 699. However, “[d]espite the need for strict compliance with the statutory requirements, the courts have created an exception to the requirement that the plaintiff file the defendant’s return receipt for those situations in which the defendant is actively refusing or rejecting the substituted service of process.” *Smith*, 826 So. 2d at 1078. “[W]here the defendant takes affirmative action to avoid acceptance of [delivery of process], the requirement [to file a return receipt] will be deemed to be satisfied.” *Turcotte*, 374 So. 2d at 643.

Importantly, even if a plaintiff has sufficiently established that the defendant is actively concealing his whereabouts such that substituted service is proper, that does not imply the defendant has actively refused delivery of the process. *Smith*, 826 So. 2d at 1078. In order to meet the requirements of the exception, a plaintiff must make a separate, additional showing that a defendant actively refused delivery of the substituted process. *See id.* “[W]here the failure of delivery of process was not caused by the defendant’s rejection of the mail and where such failure *might* have resulted from a cause not chargeable to the defendant, then the statutory requirements have not been met and service of process is insufficient.” *Hernandez*, 32 So. 3d at 699 (citing *Turcotte*, 374 So. 2d at 643) (emphasis added). Additionally, the mere fact that a defendant is not located at the address where the plaintiff sent the certified mail does not give rise to an inference that the defendant intentionally failed or refused to claim the substituted process. *Hernandez*, 32 So. 3d at 699. *See also Wyatt v. Haese*, 649 So. 2d 905, 907 (Fla. 4th DCA 1995) (stating that a certified letter returned “UNCLAIMED” and a second notice sent by regular mail and returned “NOT AT THIS ADDRESS” did not imply that a

defendant intentionally failed or refused to claim the notices and, therefore, that no conclusion could “be drawn that the failure to deliver process was caused by the defendant rejecting the mail”).

III. PLAINTIFFS HAVE NOT COMPLIED WITH THE REQUIREMENTS TO EFFECT SUBSTITUTED SERVICE OF PROCESS UNDER FLORIDA LAW

A. PLAINTIFFS HAVE NOT PRESENTED ANY FACTS WHICH ESTABLISH THAT DEFENDANT SIGMUND J. SOLARES IS CONCEALING HIS WHEREABOUTS

The Plaintiffs have not shown that substituted service of process is proper on Mr. Solares because the Plaintiffs have not presented any facts that show that Mr. Solares is concealing his whereabouts, much less facts that *clearly* show that Mr. Solares is concealing his whereabouts. *See Bird*, 362 So. 2d at 317. In their affidavits, Plaintiffs asserted that vehicle registration records from the Florida Department of Motor Vehicles indicate that Mr. Solares resides in Tampa. *See Dec. of A. Bradley* at ¶ 2. Public records indicate that Mr. Solares owns a home in Tampa, on which he claims a homestead exemption. *See Dec. of A. Bradley* at ¶ 2. Plaintiffs assert that they mailed to Mr. Solares at his Tampa home a “Notice of Lawsuit and Request to Waive Service of Summons,” which the U.S. Postal Service has confirmed was delivered. *See Dec. of A. Bradley* at ¶ 5. Mr. Solares has not signed or returned the waiver. *See Dec. of A. Bradley* at ¶ 5. Plaintiffs also assert that Mr. Solares owns property and conducts business in Louisiana and that Plaintiffs have attempted to serve process on Mr. Solares at two addresses in Louisiana. *See Dec. of A. Bradley* at ¶ 6.

Plaintiffs additionally assert that a process server made numerous attempts to serve Mr. Solares at his Tampa home over a period of several months. *See Dec. of T.*

Santarlas. For a period of seventeen days the process server conducted periodic surveillance of Mr. Solares' home to attempt service. *See* Dec. of T. Santarlas at ¶ 3. For a period of two days, the process server conducted around the clock surveillance. *See* Dec. of T. Santarlas at ¶ 8. Additionally, the process server contacted the United States Postal Service and confirmed that mail was still being delivered to Mr. Solares' Tampa home. *See* Dec. of T. Santarlas at ¶ 8. The process server asserted in his affidavit that during his surveillance of Mr. Solares' home, he noticed "a business card and pizza flyer ad" attached to the front door on May 22, 2010. *See* Dec. of T. Santarlas at ¶ 4. On May 25, 2010, the process server went again to the house and noticed the business card and pizza flyer were no longer there. *See* Dec. of T. Santarlas at ¶ 4. On this basis, the process server believes "somebody" was at the house between May 22 and May 25, 2010. *See* Dec. of T. Santarlas at ¶ 4. When the process server spoke to one of Mr. Solares' neighbors, the neighbor informed the process server that Mr. Solares travels to the Cayman Islands and Amsterdam on a periodic basis. *See* Dec. of T. Santarlas at ¶ 4.

The Plaintiffs' affidavits contain no facts that show that Mr. Solares is concealing his whereabouts or evading service, much less facts that clearly show that Mr. Solares is concealing his whereabouts or evading service. Indeed, nowhere in the Plaintiffs' affidavits do the Plaintiffs allege *any actions whatsoever* on the part of Mr. Solares. The Plaintiffs' complaint and affidavits merely recount their failed efforts to serve Mr. Solares, which included attempts to serve Mr. Solares at his home in Tampa and one attempt at each of two addresses in Louisiana where the Plaintiffs assert Mr. Solares owns property and does business. Such allegations cannot clearly show that Mr. Solares is evading process because they allege no actions on his part whatsoever. Plaintiffs' assertions only

show Mr. Solares' absence from Tampa during the periods when the Plaintiffs attempted to effect service of process. Absence from Tampa does not establish that a defendant is "concealing his whereabouts" or "evading service of process." *See* FLA. STAT. § 48.161. Florida courts have held that failure to serve defendant at multiple addresses furnished by a plaintiff is not enough to establish concealment. *Bird*, 362 So. 2d at 317. Additionally, undelivered mail does not establish concealment. *Hernandez*, 32 So. 3d at 700. Nothing the Plaintiffs have presented describes any actions whatsoever on the part of Mr. Solares, much less actions that *clearly* show Mr. Solares is concealing his whereabouts.

The Plaintiffs cannot present any facts that clearly show that Mr. Solares is concealing his whereabouts or evading service because Mr. Solares has not taken any actions to conceal his whereabouts or evade service.⁵ On the contrary, since this lawsuit was filed on March 17, 2010, Mr. Solares has continued to conduct his life in the same manner that he conducted it prior to the filing of this lawsuit. *See* Dec. of S. Solares at ¶ 18. Since July of 2009, in his role with the Company, Mr. Solares has frequently traveled "throughout the world to meet with clients, potential clients, and business associates, and to attend business conferences in [his] role with the company." *See* Dec. of S. Solares at ¶ 5. As a result, he has spent very little time in Tampa during this period. *See* Dec. of S. Solares at ¶ 4. However, absence from Tampa does not establish that Mr. Solares is concealing his whereabouts. As well, there is no requirement for a defendant to cease his business travel when a lawsuit is filed against him in order to facilitate service of process, nor is a defendant required to seek out those who may be attempting to serve him with

⁵ Mr. Solares has not attempted to evade service of process, nor has he attempted to conceal his whereabouts. *See* Dec. of S. Solares at ¶ 18. Mr. Solares' Declaration accounts for his whereabouts during each of the periods the Plaintiffs assert they attempted to serve him. *See* Dec. of S. Solares at ¶¶ 10-17. In each case, he was traveling away from Tampa solely to conduct his business and personal affairs.

process. Service of process is the responsibility of the plaintiff, not the defendant.

Because the Plaintiffs have not met their burden to present facts which “clearly” show that Mr. Solares is concealing his whereabouts, the Plaintiffs have not established that substituted service of process is proper on Mr. Solares. *Bird*, 362 So. 2d at 317. Accordingly, the Court should dismiss the Amended Complaint without prejudice as to Mr. Solares for insufficient service of process, or, in the alternative, quash service of process on Mr. Solares.

B. PLAINTIFFS HAVE NOT COMPLIED WITH FLORIDA LAW TO EFFECT SUBSTITUTED SERVICE OF PROCESS ON DEFENDANT SIGMUND J. SOLARES

Even if the Court determines that the Plaintiffs have established that substituted service is proper on Mr. Solares, the Court should find that the Plaintiffs have not served process on Mr. Solares because the plaintiffs have not complied with the procedural requirements to successfully effectuate such process under Section 48.161. Section 48.161 requires the Plaintiffs to send notice of service and a copy of the substituted process by registered or certified mail to Mr. Solares and file with the Court a copy of the return receipt *signed by Mr. Solares*. *Hernandez*, 32 So. 3d at 699. If the Plaintiffs did not obtain a signed return receipt, the Plaintiffs have not successfully affected substituted service of process on Mr. Solares.

If the Plaintiffs did not obtain a return receipt signed by Mr. Solares, they can only satisfy the requirements of Section 48.161 by showing that Mr. Solares took affirmative action to avoid acceptance of delivery of the process. *Turcotte*, 374 So. 2d at 643. This requires a showing that Mr. Solares actively refused delivery of the substituted process. *Smith*, 826 So. 2d at 1078. If the Plaintiffs cannot establish that Mr. Solares

actively refused delivery of the substituted process and there is a possibility that the failure of delivery could have resulted from a cause not chargeable to Mr. Soares, then the Plaintiffs have not satisfied the exception to the requirement to file a signed return receipt. *Hernandez*, 32 So. 3d at 699. Accordingly, service of process would be insufficient. *Id.*

The Plaintiffs have not met the requirements to effectuate substituted service of process under Section 48.161 because the Plaintiffs have not filed a signed return receipt with the Court relating to their mailing of the notice of service and a copy of the process to Mr. Soares. *Id.* Additionally, the Plaintiffs have not shown that Mr. Soares actively refused delivery of the substituted process. Indeed, the Plaintiffs have not even made an allegation that Mr. Soares has taken any action to avoid acceptance of delivery of process. The Plaintiffs cannot present facts which show that Mr. Soares actively refused delivery of the substituted process because Mr. Soares has never taken any action to avoid delivery of the substituted process that the Plaintiffs assert they mailed to him. *See* Dec. of S. Soares at ¶ 8. Because the Plaintiffs have not shown that Mr. Soares has actively refused delivery of service of process, or even made such an allegation, the Plaintiffs cannot satisfy the exception to the requirement to file a signed return receipt with the Court.

Because the Plaintiffs have not filed a signed return receipt with the Court as required by Section 48.161, nor even alleged the facts necessary to satisfy the exception to this requirement, the Plaintiffs have not properly affected substituted service of process on Mr. Soares under Section 48.161. *Hernandez*, 32 So. 3d at 700. Therefore, the Court has not obtained personal jurisdiction over Mr. Soares. *Id.* Accordingly, the Court

should dismiss the Amended Complaint without prejudice as to Mr. Solares for insufficient service of process, or, in the alternative, quash service of process on Mr. Solares.⁶

CONCLUSION

For the foregoing reasons, Defendant Sigmund J. Solares respectfully requests that the Court dismiss the Amended Complaint as to Mr. Solares without prejudice due to insufficient service of process. In the alternative, if the Court declines to dismiss the Amended Complaint as to Mr. Solares, Mr. Solares respectfully requests that the Court quash service of process on Mr. Solares.

⁶ Mr. Solares asserts that the Plaintiffs have not met their burden to establish a prima facie case that service of process on Mr. Solares was proper. *See Supreme Fuels*, 2009 WL 5128504 at *3 (stating that a Plaintiff must establish a prima facie case that service of process was proper). Plaintiffs have not presented facts which *clearly* justify the applicability of Section 48.161 because the Plaintiffs have failed to present *any* facts that indicate Mr. Solares is concealing his whereabouts. *Bird*, 362 So. 2d at 317 (stating that to use substituted service of process, a plaintiff “has the burden of presenting facts which clearly justify the applicability of the statute”). As well, the Plaintiffs have not complied with the procedural requirements of Section 48.161 because the Plaintiffs have not sent a notice of service and a copy of the process to Mr. Solares and filed a return receipt with the Court, nor have they made any allegation that Mr. Solares has actively refused delivery of the substituted process. However, if the Court finds that the Plaintiffs have presented a prima facie case of proper service of process, Mr. Solares requests that the Court conduct an evidentiary hearing to allow cross-examination of the testimony presented by the Plaintiffs and to determine whether service of process on Mr. Solares was proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2010, I electronically filed a true and correct copy of the foregoing Motion to Dismiss the Amended Complaint for Insufficient Service of Process or to Quash Service of Process with the Clerk of the United States District Court for the Middle District of Florida by using the CM/ECF system and I furnished a copy of the foregoing document to the following parties in the manner of service indicated below:

/s/ J. Carter Andersen
ATTORNEY

Via the CM/ECF system which will send a Notice of Electronic Filing to:

Joseph T. King
Jason H. Korn
Howard A. Kroll
David Todd Lupo
John Nicholas Muratides
Mimi L. Sall
William J. Schifino, Jr.
David J. Steele
Frederick L. Tolhurst