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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Composite Industrie S.A., a French
corporation,

No. CV-13-01984-PHX-JAT

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Plaintiff,

ORDER

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v.

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Vision Air America, Inc.; Artur
Niewiadowski,

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Defendants.

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Pending before the Court is Plaintiff Composite Industrie S.A.’s Motion for Authorization of Alternative Service of Process on Defendant Artur Niewiadowski (“Niewiadowski”), pursuant to Federal Rule of Civil Procedure 4(e)(1) and Arizona Rule of Civil Procedure 4.1(k).¹ (Doc. 11). Plaintiff requests that the Court authorize Plaintiff to serve Niewiadowski with the Summons and Complaint via “(1) posting a copy of the summons, complaint, and related papers on his residence along with a copy of this Court’s Order allowing for substitute or alternative method of service on [Niewiadowski] last known residence address and (2) mailing a copy of said papers to the same address.” (Doc. 11 at 2, 4). To date, no Defendant has appeared in this action.

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Rule 4(e)(1), Fed. R. Civ. P., allows a summons to be served on an individual in a manner that follows “state law for serving a summons in an action brought in courts of

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¹ The Court notes that, by using all capital letters for party names, the Motion’s caption violates LRCiv 7(a)(3) (“[P]arty names must be capitalized using proper upper and lower case type.”).

1 general jurisdiction in the state where the district court is located or where service is
 2 made.” Under Arizona law, when personal service has become impracticable, Rule
 3 4.1(k), Ariz. R. Civ. P., formerly Rule 4.1(m), authorizes service by alternative means as
 4 follows:

5 **Alternative or Substituted Service.** If service by one of the
 6 means set forth in the preceding paragraphs of this Rule 4.1
 7 proves *impracticable*, then service may be accomplished in
 8 such manner, other than by publication, as the court, upon
 9 motion and without notice, may direct. Whenever the court
 10 allows an alternate or substitute form of service pursuant to
 11 this subpart, reasonable efforts shall be undertaken by the
 12 party making service to assure that actual notice of the
 commencement of the action is provided to the person to be
 served and, in any event, *the summons and the pleading to be
 served, as well as an order of the court authorizing an
 alternative method of service, shall be mailed to the last
 known business or residence address of the person to be
 served.*

13 Rule 4.1(k), Ariz. R. Civ. P. (emphasis added).

14 Arizona law does not expressly define the standard for
 15 impracticability, but in 2010, the Arizona Court of Appeals in
 16 *Blair v. Burgener* approvingly cited the language from a New
 17 York case on a similar service issue. 245 P.3d 898, 903–04
 18 ¶¶ 15–17 (Ariz. Ct. App. 2010). “[T]he standard of
 19 impracticability [i]s ‘different from the more stringent one of
 20 ‘due diligence’ That is, to meet the standard on
 21 impracticability does not require satisfying due diligence, or
 22 even showing that actual prior attempts to serve a party under
 23 each and every method provided in the statute have been
 24 undertaken[.]’ ” [*Id.* at 903 ¶ 15] (quoting *Kelly v. Lewis*, 220
 25 A.D.2d 485, 486, 632 N.Y.S.2d 186, 186 (App. Div. 1995)).
 26 Applying this standard of impracticability, the New York
 27 court concluded that three attempts at service on three
 28 different days constituted sufficient efforts to warrant
 alternative means of service. Adopting the same standard, the
Blair court found that *Blair’s* efforts at service without
 success met the definition of impracticability justifying
 alternative service. *Blair’s* process server attempted service at
 both defendants’ place of business and the individual
 defendant’s residence on five different days at various times.
 In addition to these physical attempts, the process server
 attempted to ascertain over an additional seven days whether
 the individual defendant was present in the office so that
 service could be made. Each time he was told this defendant
 was not in the office. These facts and circumstances, the
 Arizona court concluded, “demonstrate that service of process
 through the usual means would have been ‘extremely difficult
 or inconvenient[.]’ ” and was impractical which justified the
 trial court’s authorization of alternative service under Arizona

1 law. [*Id.* at 904 ¶ 18].

2 *BMO Harris Bank, N.A. v. D.R.C. Invs., L.L.C.*, No. CV-13-1692-PHX-LOA, 2013 WL
3 4804482, at *4 (D. Ariz. Sept. 9, 2013).

4 Here, at various times of the day and over the course of eight days, Plaintiff's
5 process server attempted service at Niewiadowski's residence three times and at his
6 business twice. (Certificate of Non-Service, Doc. 10). Additionally, the process server
7 questioned Niewiadowski's executive assistant, who vaguely explained Niewiadowski's
8 absences as business trips and would not specify return dates. (*Id.*). Despite the claim that
9 Niewiadowski was travelling, after the process server exited Niewiadowski's business for
10 the second time, the process server observed an occupant quickly close the business'
11 previously open door. (*Id.*). Moreover, the process server observed a Mercedes vehicle
12 registered to Vision Air America, Inc. parked near the business. (*Id.*). The Mercedes'
13 presence is significant because Niewiadowski's neighbor had previously advised the
14 process server that Niewiadowski regularly drove a Mercedes. (*Id.*).

15 After consideration of the Motion, the evidence presented, and in view of
16 Niewiadowski's apparent evasion of service of process and the futility of further attempts
17 to personally serve Niewiadowski, the Court finds service of process on Niewiadowski
18 by traditional means is impracticable under Rule 4.1(k), Ariz. R. Civ. P. Accordingly, the
19 Court grants Plaintiff's request for alternative service.

20 For the foregoing reasons,

21 **IT IS ORDERED** that Plaintiff Composite Industrie S.A.'s Motion for
22 Authorization of Alternative Service of Process on Defendant Artur Niewiadowski (Doc.
23 11) is GRANTED.

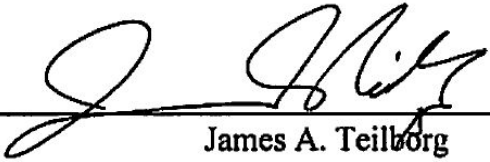
24 **IT IS FURTHER ORDERED** that Plaintiff may serve Niewiadowski by (1) First
25 Class U.S. mail, and (2) affixing a copy of the Summons, Complaint, and the Order
26 Authorizing Alternative Service to the front door of Niewiadowski's residence located at
27 13734 W. Roanoke Avenue, Goodyear, Arizona 85395.

28 **IT IS FURTHER ORDERED** that, within 14 days of this Order, Plaintiff must

1 file with the Court satisfactory evidence of mailing and that a copy of the Summons,
2 Complaint, and this Order were mailed to, and affixed to the front door of,
3 Niewiadowski's last known residence located at 13734 W. Roanoke Avenue, Goodyear,
4 Arizona 85395. The provision of this evidence shall be deemed proof of sufficient
5 evidence that Niewiadowski has been appropriately served with process in this action
6 pursuant to the applicable procedural rules and the law.

7 **IT IS FINALLY ORDERED** that counsel and any party, if unrepresented, must
8 hereinafter comply with the Rules of Practice for the United States District Court for the
9 District of Arizona, including LRCiv 7.1(a)(3) (“[P]arty names must be capitalized using
10 proper upper and lower case type.”) (citing footnote 3 citing a sample of proper
11 capitalization in Appendix C). The District Court's Rules of Practice may be found on the
12 District Court's internet web page at www.azd.uscourts.gov/.

13 Dated this 25th day of March, 2014.

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18 James A. Teilborg
19 Senior United States District Judge
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