

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FIONA HAVLISH, et al.,	:	
	:	
Plaintiffs,	:	
v.	:	
	:	CASE NUMBER 1:02CV00305
SHEIKH USAMAH BIN-MUHAMMAD	:	
BIN-LADEN, a/k/a OSAMA BIN-LADEN,	:	Judge James Robertson
et al.,	:	
	:	
Defendants.	:	

ORDER ON PLAINTIFFS' REQUEST FOR SERVICE BY PUBLICATION

The Plaintiffs, by counsel, having filed their Motion for Service by Publication, and the Court, being duly advised in the premises, NOW FINDS that Plaintiffs' proposed means of service is reasonably calculated to apprise Defendants listed on "Exhibit A" of the lawsuit and afford them an opportunity to present their objections.

Having reviewed the case law and the facts alleged in the Amended Complaint, the Court will permit service of the Amended Complaint to be made by publication. Plaintiffs may serve Defendants listed on "Exhibit A" by publishing the attached notice for six weeks in *The International Herald Tribune* (in English), and *Al-Quds Al-Arabi* (in Arabic), and placing the Notice on the Internet at <http://www.september11classaction.com/>.

ACCORDINGLY it is **ORDERED** this ____ day of _____, 2002

James Robertson
United States District Judge

/S/ Thomas E. Mellon, Jr.

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Attorneys for Plaintiffs

Dated: May 3, 2002

CERTIFICATE OF COUNSEL PURSUANT TO LCvR 7.1(M)

Because no counsel have yet entered their Appearance on behalf of any Defendants and because the relief sought is directed at, and affects only Defendants who are clearly not amenable to contact contemplated by LCvR 7.1(m), the requirements of LCvR 7.1(m) are not applicable to this motion.

/S/ Patrick A. Malone
Patrick A. Malone

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FIONA HAVLISH, et al.,

Plaintiffs,

v.

CASE NUMBER 1:02CV00305

**SHEIKH USAMAH BIN-MUHAMMAD
BIN-LADEN, a/k/a OSAMA BIN-LADEN,
et al.,**

Judge James Robertson

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO SERVE DEFENDANTS BY PUBLICATION**

Preliminary Statement

This action arises out of the 3,029 deaths in the terrorist attacks on September 11, 2001. Plaintiffs seek class certification to recover damages against those individuals, foreign States, and other entities responsible for the deaths of American and foreign citizens at the World Trade Center Towers, the Pentagon, and at Shanksville, Pennsylvania. The unique circumstances of the attacks and the fact that certain named Defendants have intentionally made themselves unavailable to service of process, justifies a request to serve the Defendants, the names of whom are set forth in the attached "Exhibit A," by publication, pursuant to Fed.R.Civ.P. 4(f)(3). Accordingly, for all of the reasons set forth below, plaintiffs respectfully request that they be granted leave to give notice by publication to these Defendants in newspapers of general circulation in the Middle East, supplemented by notice on the Internet.

Argument

Plaintiffs have sued two classes of defendants. The first class is the foreign State defendants, Iran, and Iraq.¹ The second class consists of individual terrorists and terrorist organizations including Osama Bin Laden, al Qaeda, and the Taliban, a/k/a the former Islamic Emirate of Afghanistan.

As to both classes, if plaintiffs know the specific address of a particular defendant, service will be made by conventional means pursuant to Fed.R. Civ. P. 4. As to foreign states, their agencies and instrumentalities, service will be effectuated pursuant to Fed.R.Civ.P. 4(j) and 28 U.S.C. § 1608. However, a number of the named defendants cannot be located. Therefore, alternative methods to effectuate service of process upon these defendants, as set forth on “Exhibit A”, pursuant to Fed.R.Civ.P. 4(f)(3), are fully warranted.

The Taliban a/k/a/ the Islamic Emirate of Afghanistan is included in the list of defendants to be served by publication because it no longer exists to accept service of process. As has been widely reported, the leaders of the former Islamic Emirate of Afghanistan and the Taliban have fled and are in hiding and as such can not be served process by direct means.

Service of process is governed by Rule 4 of the Federal Rules of Civil Procedure. Rule 4(f) governs service on individuals, Rule 4(h) governs service of corporations and associations, and Rule 4(j), and 28 U.S.C. § 1608 govern service on foreign nations. Rule 4(h) states that service on associations and corporations not within a judicial district of the United States is achieved pursuant to Rule 4(f).²

¹ Included in this class are numerous agencies and instrumentalities of the foreign States.

²Rule 4(h): Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other

Rule 4(f)(3) permits service upon individuals and associations not in a judicial district within the United States as directed by the Court, as long as it is not prohibited by international agreement.³ The 9th Circuit in *Rio Properties v. Intl. Interlink*, 2002 WL 431915 (9th Circuit 2002), conducted an extensive analysis of Rule 4(f)(3). The *Rio* court concluded that Rule 4(f)(3) stands on equal footing with the other sections of Rule 4(f), i.e., there is no order of preferential service between the provisions of Rule 4(f)(1), (2), and (3).⁴ In *Rio*, the Court approved Plaintiff's service of process through Internet e-mail. In analyzing and reviewing the case law concerning Rule 4(f)(3), the Court stated:

Applying this proper construction of Rule 4(f)(3) and its predecessor, trial courts have authorized a wide variety of alternative methods of service including publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex, and most recently, email. See *SEC v. Tome*, 833 F.2d 1086, 1094 (2d Cir. 1987) (condoning service of process by publication in the Int'l Herald Tribune); *Smith v. Islamic Emirate*, Nos. 01 Civ. 10132, 01 Civ. 10144, 2001 U.S. Dist. LEXIS 21712, at *5-13 (S.D.N.Y. Dec. 26, 2001) (authorizing service of process on terrorism impresario Osama bin Laden and al-Qaeda by publication); *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537, 541-44 (S.D.N.Y. 1965) (employing service by ordinary mail); *Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 176-78 (2d Cir. 1979)(approving service by mail to last known address);

unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

... (2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

³ Rule 4(f): Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

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

⁴ "By all indications, court-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1) or Rule 4(f)(2). See *Forum Fin. Group, LLC v. President & Fellows*, 199 F.R.D. 22, 23-24. (D. Me. 2001)" *Id.*

Forum Fin. Group, 199 F.R.D. at 23-24 (authorizing service to defendant's attorney); *New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 80 (S.D.N.Y. 1980) (allowing service by telex for Iranian defendants); *Broadfoot v. Diaz* (In re Int'l Telemedia Assoc.), 245 B.R. 713, 719-20 (Bankr.N.D.Ga. 2000) (authorizing service via email).

Thus, analysis of F.R.C.P. 4(f) and the case law interpreting the Rule demonstrates that this Court is well within its discretion to craft a device to achieve service of process that is tailored to the specific needs and difficulties present in this case.

The next issue is whether plaintiffs should be allowed to serve a subset of the defendants by publication. The Advisory Committee notes to Rule 4(f)(3) shows that the Court, in its discretion, should authorize a method for service of process that is reasonably calculated to apprise the interested parties of the pending action and to afford them an opportunity to present their objections.⁵ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In analogous cases, service by publication has regularly been approved. For example, service of process by publication was approved by the United States District Court for the District of Columbia in a case arising out of the bombing of the United States Embassy in Kenya in 1998, *Mwami, et al. v. Osama Bin Laden, et al.*, 99-0125. In that case, Judge Colleen Kollar-Kotelly granted plaintiffs' request to serve defendants Osama Bin Laden and al Qaeda by publication in the *Daily Washington Reporter*, *The International Herald Tribune* and *Al-Quds Al-Arabi* (in Arabic). See Order attached as "Exhibit B". Osama Bin Laden and al Qaeda were also served by publication in *Smith v. Islamic Emirate*, Nos. 01 Civ. 10132, 01 Civ. 10144, 2001 U.S. Dist. LEXIS 21712, at *5-13 (S.D.N.Y. Dec. 26, 2001). In *S.E.C. v. Tome*, 833 F.2d 1086, 1093 (2nd

⁵ "An earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law" Advisory Committee Notes, 1993 Amendments.

Cir. 1987). *cert. denied* 486 U.S. 1014 (1988), an insider trading suit, service by publication was affirmed where the foreign defendants were difficult to serve personally. The Court found that the plaintiff “reasonably concluded that the [defendants] resided or conducted business in Europe and chose a publication likely to be read by international investors,” and that the facts of that case were “distinguishable from cases where notice was published in a small regional paper or the advertisement contained nothing which would draw a party’s attention to it.” *Id.* at 1093. For this reason, and because the defendants were likely to have been aware of the SEC’s investigation into their actions, the *Tome* Court concluded that “[n]otice by publication, in the circumstances surrounding this action, was reasonably calculated to apprise the interested parties of the lawsuit.” *Id.* The Court also noted that:

As business dealings have become increasingly interstate and international, the means of giving notice have been extended to meet these situations, so that parties may be held accountable in our courts of justice.

In the instant case, no doubt exists that defendants Bin Laden, al Qaeda, the Taliban and Omar are not amenable to service by the specific methods authorized by Rule 4. As Judge Baer recognized in *Smith, supra*, the whereabouts of Bin Laden are unknown, “no legitimate authority knows his location and it is not improbable that he will continue to evade capture for some time yet,” and that the methods of service authorized by Rule 4(2)(B) and Rule 4(f)(2) “would be futile at this point.” Thus, the *Smith* Court authorized service of process on Bin Laden by publication. Similarly, the *Smith* Court concluded that service by publication on al Qaeda was warranted as none of the captured al Qaeda members “appear to be sufficiently high-ranking to accept service for the association” and that, “because of the fluid state of affairs in Afghanistan,

al Qaeda may cease to exist before any high-ranking officials capable of being served are captured or surrender. Thus, again, service by publication on al Qaeda was authorized.

Therefore, service by publication is fully warranted in this case with respect to those defendants who are listed on the attached “Exhibit A”, given the elusiveness of the listed defendants, including the unsuccessful efforts of American authorities to locate these individuals and entities. Plaintiffs also request that service of the contemporaneously filed Motion for Class Certification, Motion for Relief from F.R.C.P. 26(f), proposed Class Notice and this Motion be served via the Internet. The documents will be placed on the Internet at <http://www.september11classaction.com/>.

Conclusion

For the foregoing reasons, plaintiffs respectfully request that this Court permit service by publication on the subject defendants through publication, once a week for six successive weeks,⁶ in (1) *Al Quds Al-Arabi* (in Arabic), a Middle Eastern Newspaper⁷ in which defendant Bin Laden published one or more “fatwas” (religious decrees) prior to the bombing, and (2) *The International Herald Tribune* (in English), an international English-language newspaper. Furthermore, plaintiffs will supplement the publication by placement on <http://www.september11classaction.com/> copies of all of the documents that have been filed to date in this case, including the Amended Complaint, the Order for service by publication, Motion

⁶ Fed.R.Civ.P 71A(d)(3)(B), which relates to condemnations of real and personal property, provides that service by publication should be “once a week for not less than three successive weeks,” in addition to service by mail.

⁷ *Al-Quds Al-Arabi* is a daily newspaper that is circulated in Europe, The Middle East, North Africa and North America. In February 1998, Bin Laden and al Qaeda published in *Al Quds Al Arabi* an anti-American fatwa. A “fatwa” is a formal legal opinion or religious decree issued by an Islamic leader. *Encarta World English Dictionary, 2001*.

for Certification, Class Notice and other such documents. A copy of the English version of the proposed notice is annexed as “Exhibit C”.

Respectfully submitted,

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Attorneys for Plaintiffs

EXHIBIT A

PUBLICATION NOTICE

To Named Defendants listed below.

SHEIKH USAMAH BIN-MUHAMMAD BIN-LADEN, a/k/a OSAMA BIN-LADEN
Current location is unknown. Last known location was in Afghanistan;

THE TALIBAN, a/k/a. the Islamic Emirate of Afghanistan, an incorporated association
Current location is unknown. Last known location was in Afghanistan;

MUHAMMAD OMAR,
Current location is unknown. Last known location was in Afghanistan;

AL QAEDA/ISLAMIC ARMY,
Current location is unknown. Last known location was in Afghanistan;

UNIDENTIFIED TERRORIST
DEFENDANTS 1-500

**Thomas Mellon
Mellon Webster & Shelly
87 North Broad Street
Doylestown, Pennsylvania 18901**

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CIVIL DIVISION, FIONA HAVLISH, et al. V. SHEIKH USAMAH BIN-MUHAMMAD BIN-LADEN, a/k/a OSAMA BIN-LADEN, et al., Case No. 1:02CV00305. NOTICE OF FILING OF COMPLAINT. Judge James Robertson issued an order for Service by publication on _____, _____, 2002. It was ordered that notice of the above-captioned action should be published once a week for six consecutive weeks in *The International Herald Tribune* (in English) and *Al-Quds Al-Arabi* (in Arabic) as well as posted on the Internet at <http://www.september11classaction.com/>. Notice is hereby served on Defendants listed above. Defendants are hereby summoned and required to serve upon **The Clerk of the Court, United States District Court for the District of Columbia, 333 Constitution Avenue, N.W. Washington, D.C. 20001** and **Thomas Mellon, Mellon Webster & Shelly, 87 North Broad Street, Doylestown, Pennsylvania 18901** an Answer to the Complaint within sixty (60) days after service of the summons, exclusive of the day of service. If Defendants fail to do so, judgment by default may be taken against Defendants for relief demanded in the Complaint. The Complaint was filed for wrongful death, conspiracy and actions for compensatory and punitive damages pursuant to 28 U.S.C. § 1605(a)(5) and 28 U.S.C. § 1605(a)(7), survival actions, , negligent and/or intentional infliction of emotional distress, 28 U.S.C. § 1350, and 18 U.S.C. § 2333.

Service of all pleadings, motions and discovery that are filed in this case are available on the Internet at <http://www.september11classaction.com/>.

SHEIKH USAMAH BIN-MUHAMMAD
BIN-LADEN, a/k/a OSAMA BIN-LADEN
Current location is unknown. Last known
location was in Afghanistan;

THE TALIBAN, a/k/a. the Islamic Emirate
of Afghanistan, an incorporated association
Current location is unknown. Last known
location was in Afghanistan;

MUHAMMAD OMAR,
Current location is unknown. Last known
location was in Afghanistan;

AL QAEDA/ISLAMIC ARMY,
Current location is unknown. Last known
location was in Afghanistan;

UNIDENTIFIED TERRORIST
DEFENDANTS 1-500

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ODILLIA MUTAKA MWAMI, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
OSAMA BIN LADEN, AL QAEDA,
SUDAN, AND AFGHANISTAN,
Defendants.

Civil Action No. 99-0125 (CKK)

FILED

AUG - 2 1999

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

This matter is before the Court on the Plaintiff's Motion for Service by Publication. The Motion will be granted as modified for the following reasons.

On January 15, 1999, Plaintiffs filed the above-captioned case. The April 30, 1999 Amended Complaint alleges three causes of action against Defendants Osama Bin Laden and Al Qaeda: Wrongful Death, Assault and Battery, as well as Violations of International and Kenyan Law. The Complaint invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1350, which provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* Defendant Bin Laden's Saudi Arabian citizenship was revoked in 1994, and he is believed to reside in Kandahar, Afghanistan; Defendant Al Qaeda is a terrorist group with its base of operations in Afghanistan. See Pla.' First Am. Compl. at 120. The Plaintiffs are (1) all Kenyans who were killed or injured in the August 7, 1998 bombing of the American Embassy in Nairobi, including surviving family members and estates or representatives, and (2) all businesses which

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were damaged or which sustained loss or injury. Briefly stated, the Plaintiffs aver that Defendants Bin Laden and Al Qaeda, by and through their agents, conspired, planned, and carried out a vehicular bomb attack on the United States Embassy Compound in Nairobi, Kenya, killing over 200 Kenyans and injuring over 4000 Kenyans. Plaintiffs complain that in doing so, Defendants Bin Laden and Al Qaeda wilfully, maliciously, and with a depraved indifference to life, caused to be placed at the Nairobi Embassy and detonated, explosives sufficient to cause death, injury, and loss. Further, Plaintiffs assert that Defendants Bin Laden and Al Qaeda violated elemental principles of international law, and interfered with the Protection of Fundamental Rights and Freedoms of the Individual, as set forth in Chapter V of the Constitution of Kenya.

Plaintiffs contend that service by publication is proper in this case because given the remote location of Defendants Bin Laden and Al Qaeda, publication is the only means by which Plaintiffs might give notice of the lawsuit. Plaintiffs seek an order from this Court permitting service by way of publication, once a week for three weeks, in newspapers of general circulation in the Middle East, pursuant to Fed. R. Civ. P. 4(f)(3). See Pls.' Mem. in Supp. of Mot. to Serve Defs.' by Pub. at 1, 4. This Rule authorizes service of the summons and complaint upon individuals in a foreign country "by other means not prohibited by international agreement as may be directed by the court." Fed. R. Civ. P. 4(f)(3).

In determining means by which service should be effectuated, "an earnest effort should be made to devise a method of communications that is consistent with due process and minimizes offense to foreign law." Fed. R. Civ. P. 4 advisory committee's note (1993) (citing *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537 (S.D.N.Y.1965)). Thus, when constructive notice is given, "an elementary and fundamental requirement of due process in any proceeding which is to be

accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950).

Federal courts have permitted service by publication where defendants' identity or address is unknown. In *S.E.C. v. Tome*, 833 F.2d 1086, 1093 (2nd Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988), the Second Circuit held that service by publication in *The International Herald Tribune* was reasonably calculated to notify unidentified defendants of a suit against them because the SEC reasonably concluded that the defendants resided or conducted business in Europe, and then chose a publication likely to be read by international investors. The facts in *S.E.C.* were "distinguishable from cases where notice was published in a small regional paper or the advertisement contained nothing which would draw a party's attention to it." *Id.* For this reason, and because the defendants were likely to have been aware of the S.E.C.'s investigation into their actions, the court concluded that "notice by publication, in the circumstances surrounding this action, was reasonably calculated to apprise the interested parties of the lawsuit." *Id.* Conversely, the Supreme Court has held that service by publication does not meet the requirements of the due process clause of the Fourteenth Amendment when the defendant's name and address are reasonably ascertainable. See *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983). Under these circumstances, the Court required personal service or mailed notice in addition to service by publication. *Id.*

The facts of this case are closer to those in *S.E.C.* than *Mennonite*. Defendants Bin Laden and Al Qaeda's identities are known, like the defendants in *Mennonite*. Nevertheless, their address is not known, nor is it easily ascertainable. Plaintiffs know only that Defendants Bin

Laden and Al Qaeda's base is "a fortified and heavily guarded hilltop compound outside the city of Kandahar." Pls.' Mem. in Supp. of Mot. to Serve Defs.' by Pub. at 4 (quoting Pamela Constable, *Terrorist Leader 'Safe,' Afghan Hosts Declare*, The Washington Post, August 21, 1998, at A1).

The Court finds that Plaintiffs' proposed means of service is reasonably calculated to apprise Defendants Bin Laden and Al Qaeda of the lawsuit and afford them an opportunity to present their objections. Prior to the bombing, Bin Laden published one or more "fatwas," or religious decrees, in Al-Quds Al-Arabi, a Middle Eastern newspaper. Plaintiffs propose publishing notice of their Complaint in the same newspaper. Like the defendants in *S.E.C.*, Defendants Bin Laden and Al Qaeda are likely to be aware of investigations into their activities.

Having reviewed the case law and the facts alleged in the Amended Complaint, the Court will permit service of the Complaint to be made by publication, recognizing that once served, Defendants Bin Laden and Al Qaeda may well challenge the Court's jurisdiction as well as the propriety of the means of service, should they choose to respond at all. Plaintiffs may serve Defendants Bin Laden and Al Qaeda by publishing the attached notice for six weeks in the Daily Washington Law Reporter, The International Herald Tribune, and Al-Quds Al-Arabi (in Arabic).

ACCORDINGLY it is this 1 day of August, 1999 hereby

ORDERED that the Plaintiffs' Motion for Service by Publication [#5] is GRANTED as MODIFIED; and it is

FURTHER ORDERED that the Plaintiff may effect service by publication of the attached Notice in the Daily Washington Law Reporter, The International Herald Tribune, and Al-Quds Al-Arabi (in Arabic) for six weeks.

SO ORDERED.


COLLEEN KOLLAR-KOTELLY
United States District Judge

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