UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABDULLAH K. ALKHUZAI, Plaintiff, v. ALI HASAN AL-MAJID AL-TIKRITI, a/k/a "CHEMICAL ALI," et al., Defendants.	Civil Action No. 03-1719 Judge Hardiman

STATEMENT OF INTEREST OF THE UNITED STATES

The United States of America, pursuant to 28 U.S.C. § 517, hereby files this Statement of Interest in these proceedings to state its position regarding the effectiveness of the procedures employed by plaintiff in his attempt to effect service of process on the defendants.

BACKGROUND

Plaintiff is a permanent resident alien who brought this suit against several individual Iraqi defendants, including Saddam Hussein and the Republic of Iraq, seeking both compensatory and punitive damages arising from the injuries allegedly suffered by plaintiff when he was captured, imprisoned and tortured by the former Iraqi regime of Saddam Hussein. See Compl. ¶¶ 17-24, Docket No. 1. The sole bases for federal court jurisdiction alleged by plaintiff are the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350, note 2.

In addition to the Republic of Iraq, plaintiff's November 10, 2003, Complaint identified eight former officials of the Government of Iraq – Ali Hasan Al-Majid Al-Tikriti (a/k/a Chemical Ali); Mohamed Hamza Al-Zubeidy; Ali Aziz Al-Numan; Kamal Mastafa Abdallah Sultan al-

Tikriti; Abid Mahmud Al-Tikriti; Mizban Khudr Al-Hadi; Hikmat Mizban Ibrahim Al-Azzawi; Zuhary Talib abd al-Sattar al-Naqib – as well as Saddam Husayn al-Tikriti, and the Estates of Uday Saddam Husayn and Qusay Saddam Husayn al-Tikriti, as defendants. All of these defendants are sued in their individual – not official – capacities. Plaintiff alleged that Saddam's whereabouts were unknown, that Uday and Qusay's last known addresses were in Baghdad, and that each of the remaining eight defendants was "currently a prisoner in the custody of the United States and is presumed to be detained at Guantanamo Bay, Cuba." See Compl. ¶¶ 2-13.[1/]

Summons were issued as to all defendants by the Clerk's Office on November 18, 2003. On December 15, 2003, plaintiff filed a Return of Service, indicating that an official at the Office of the Coalition Provisional Authority in Baghdad had accepted delivery of certified mail (Docket No. 5). On March 15, 2004, plaintiff filed a Proof of Service claiming that service had been accomplished. The sole basis for plaintiff's claim to proof of service was that the Department of Defense and the Department of State, on November 24, 2003, and November 28, 2003, respectively, accepted delivery of certified mail addressed to Secretaries Rumsfeld and Powell, allegedly as "agent[s] authorized to accept service of process on behalf of the above

---

[1/] The Department of Defense ("DoD") confirms that the eight Iraqi officials alleged by plaintiffs to be in U.S. custody were, in fact, in custody at the time the Complaint was attempted to be served. See www.centcom.mil/operations/Iraqi-Freedom/55mostwanted.htm. These defendants were detained in various capacities, some as enemy prisoners of war, and some as civilian internees; all were held in Iraq. See http://www.dod.mil/transcripts/2003 (April 25, 2003, transcript of DoD News Briefing – Secretary Rumsfeld and General Myers). Some of these defendants are now under the control of the Interim Iraqi Government. Specifically, as plaintiffs acknowledge, Saddam Hussein was not in custody at the time the complaint was attempted to be served. He was captured on December 13, 2003. See id. Moreover, he was released to the custody of the Iraqi Government on June 30, 2004, following the transfer of sovereignty. Finally, as plaintiffs acknowledge, neither Uday nor Qusay Saddam Hussein al-Tikriti was ever in U.S. custody; instead, each was killed in combat activity in Iraq.

named Defendants." See Proof of Service (Docket No. 6).

Shortly thereafter, plaintiff moved for the entry of default against all the named defendants, again relying on the representation that service had been properly accomplished, but that all defendants had failed to appear. See Praecipe for Default Judgment, Docket No. 7. On May 18, 2004, the Clerk entered a default against all defendants, and on May 19, 2004, the Court entered default judgment and set the matter for hearing on damages. A hearing was subsequently held, and on June 21, 2003, the Court awarded plaintiff $3 million in compensatory damages and a total of $85 million in punitive damages against all of the individual defendants, including Saddam Hussein and the two estates. See Order of Court, Docket No. 10. As to the Republic of Iraq, however, the Court ordered further briefing on the issue of Iraq's sovereign immunity. Id.

On July 2, 2004, the United States advised the Court that it was considering participating in the litigation. At or about the same time, plaintiff advised the Court that he no longer wished to pursue his claims against the Republic of Iraq, and was willing to stipulate to the dismissal of Iraq from his lawsuit. The United States has no objection to the dismissal of the Republic of Iraq from this case; as further described below, however, the United States files this Statement of Interest in order to advise the Court of its position regarding the procedures used by plaintiff in his attempt to effect service of process on the individual defendants.

ARGUMENT

The Federal Rules of Civil Procedure provide specific direction for the service of process on individuals located in foreign countries. Fed. R. Civ. P. 4(f). Plaintiff made no apparent effort to abide by these rules. For this reason alone, his effort to serve process should be deemed invalid.

Plaintiff appears to ground his effort at service on Federal Rule of Civil Procedure 4(e),

which sets forth the rules governing service of process upon individuals within a judicial district of the United States. As described above, see supra note 1, the individual defendants were not so located, and thus, Rule 4(e) has no applicability.

Even crediting, for the sake of argument, plaintiff's assumption that Rule 4(e) does apply, it provides no grounds for deeming the service attempted in this case to be proper. Rule 4(e) provides that service upon individuals located within a judicial district of the United States may be effected (1) "pursuant to the law of the state in which the district court is located, or in which service is effected,"[2/] or (2) by delivering a copy of the summons and complaint "to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age or discretion residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or law to receive service of process." Fed. R. Civ. P. 4(e) (emphasis added). No personal service was attempted. Moreover, neither the Pentagon nor the State Department's home office in Washington, D.C. is the "dwelling house" or "usual place of abode" of these defendants. Thus, plaintiff's claim to proper service rests on the underlined portion of Rule 4(e) allowing service on authorized agents.

Neither the now-dissolved Coalition Provisional Authority ("CPA") nor the Departments of State or Defense are authorized agents for service of process on the named defendants sued in their individual capacities. Certainly, neither agency was authorized "by appointment" to accept service on behalf of these defendants. Nor has plaintiff – who bears the burden of proving that proper service was effected – pointed to any source of law requiring these agencies to act as agents for the purposes of accepting service of process on foreign individuals when they are sued

---

[2/] Plaintiff does not claim that he attempted service under the law of any of the relevant states.

for civil damages.[3] See Weintraub Bros. Co., Inc. v. Technochem and Environmental Sys., Inc., 1991 WL 52699, at *3 (E.D. Pa. April 2, 1991) ("Inasmuch as such authority [to accept service] is unsubstantiated, proper service on this defendant has not been shown") (quoting Legett v. Amtrak, 1990 WL 182148, at *2 (E.D.Pa. Nov. 26, 1990) ("[N]othing in the record provide[d] any clue as to [the receipt signer's] relationship to [defendant] or his or her authority to accept service of process on [its] behalf. It is impossible to conclude that service conformed with Pa.R.Civ.P. 403")).

Although the United States recognizes that judgment in this case has entered – in part due to plaintiff's representation that service was adequate – the Federal Rules of Civil Procedure do not provide any basis upon which to require the Federal Government to object on the grounds of improper service in every instance in which an agency official accepts a misdirected piece of certified mail. To require such an objection as a condition of determining service to be improper would place an insuperable burden on the Federal Government. Instead, as is appropriate, the burden of demonstrating that service was properly effected falls on the plaintiff. See Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993) ("the party asserting the validity of service bears the burden of proof on the issue"); accord James v. Booz-

[3] Indeed, the Federal Rules of Civil Procedure reflect the policy determination that efforts to effect proper service on individual capacity defendants by substituting service on a federal agency to the exclusion of more personal methods of providing notice is highly disfavored. Thus, for example, even in those cases where federal employees are sued for actions taken in the course of their federal employment – but are sued in their individual capacities – the Rules require service both on the United States and notice to the employee personally in accord with the provisions of either Rule 4(e), (f), or (g). See Fed. R. Civ. P. 4(i)(2)(B). In light of this policy preference embodied in the Rules, and the clear importance placed upon effecting personal service, substituted service like that attempted by plaintiffs here – upon defendants whose connection with the federal agencies is far more attenuated than that of a federal employee sued for conduct undertaken in the course of his federal employment – was improper.

Allen & Hamilton, Inc., 206 F.R.D. 15, 18 (D.D.C. 2002) (citing Light v. Wolf, 816 F.2d 746, 751 (D.C. Cir. 1987) (citing additional cases)); Saez Rivera v. Nissan Mfg. Corp., 788 F.2d 819, 821 (1st Cir. 1986) (citing Familia de Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1139 (5th Cir. 1980)). That burden does not shift merely because certain federal agencies accepted the delivery of certified mail without objection.

Because no official of the Federal Government is authorized to accept service of process on behalf of foreign defendants – in whatever capacity they might be sued – the service attempted in this case was improper. Thus, the judgment against these defendants is subject to being set aside under Federal Rule of Civil Procedure 60 for lack of proper service should one of the Iraqi defendants appear to contest it in these proceedings or any subsequent proceedings. See Gold Kist, Inc. v. Laurinberg Oil Co., Inc., 756 F.2d 14, 19 (3d Cir. 1985) ("A default judgment entered when there has been no proper service of the complaint is, a fortiori, void, and should be set aside. See Rule (60)(b)(4)."); see generally Grand Entertainment Group, Ltd., supra (setting aside default judgment where service was improper); Mettle v. First Union National Bank, 279 F. Supp. 2d 598, 603 (D.N.J. 2003) (finding that good cause existed to set aside a default where there had been no proper service of the summons and complaint).

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General, Civil Division

MARY BETH BUCHANAN
United States Attorney

JOSEPH H. HUNT
Director, Federal Programs Branch

VINCENT M. GARVEY
Deputy Director, Federal Programs Branch

ROBERT L. EBERHARDT
Assistant U.S. Attorney
700 U.S. Post Office and Courthouse
Suite 400
Pittsburgh, PA 15219
Tel: (412) 894-7353
Fax: (412) 644-6995
Email: robert.eberhardt@usdoj.gov
PA ID No. 10325

RUPA BHATTACHARYYA (VA #38877)
Senior Trial Counsel
Federal Programs Branch, Civil Division
United States Department of Justice
P.O. Box 883, 20 Massachusetts Ave, N.W.
Washington, D.C. 20044
Tel: (202) 514-3146
Fax: (202) 616-8202
Email: rupa.bhattacharyya@usdoj.gov

Dated: July 30, 2004

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABDULLAH K. ALKHUZAI,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 03-1719
v.	)	
	)	Judge Hardiman
ALI HASAN AL-MAJID AL-TIKRITI, a/k/a "CHEMICAL ALI," et al.,	)	
	)	
	)	
Defendants.	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of a Notice by the United States of America of its Potential Participation has been served by first class mail, postage pre-paid, this _____day of July, 2004, to and upon:

Regis M. McClelland
Harrington, Schweers, Dattilo & McClelland
100 Ross Street
Pittsburgh, PA 15219

_____
ROBERT L. EBERHARDT
Assistant U.S. Attorney