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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

14 JANE DOE I, JANE DOE II, HELENE PETIT, )  
15 MARTIN LARSSON, LEESHAI LEMISH, and )  
16 ROLAND ODAR )  
17 Plaintiffs, )  
18 v. )  
19 LIU QI, and DOES 1-5, inclusive )  
20 Defendants. )

No. **C 02 0672 CW EMC**  
**PLAINTIFFS' RESPONSE TO AMICUS  
CURIAE BRIEF OF SAN FRANCISCO  
CHINESE CHAMBER OF COMMERCE**  
Date: October 30, 2002  
Time: 10:30 a.m.  
Place: Courtroom C, 15th Floor

23 Relying on the declaration of a San Francisco police officer who did not see the critical  
24 events, the San Francisco Chinese Chamber of Commerce (“Chamber of Commerce”) argues that  
25 Plaintiffs did not properly serve process on Defendant Liu Qi. However, as discussed below, and  
26 as is evident from the attached video taken at San Francisco International Airport, the Summons  
27 and Complaint in this matter were held out within arm’s length of Defendant Liu Qi by a process  
28 server who identified the papers as legal documents from a United States District Court. Defendant

1 refused the papers and moved away to evade service. Under California and federal law, this  
2 service was constitutionally adequate. San Francisco Police Officer Higgins did not interact with  
3 the process server until after these events had transpired.

4 **I. AMICUS CURIAE DO NOT HAVE STANDING INTRODUCE EVIDENCE**  
5 **REGARDING SERVICE OF PROCESS**

6 Though the Court is entitled to conduct its own inquiry to confirm the existence of personal  
7 jurisdiction in this proceeding for default judgment, Plaintiffs object to declarations, and argument  
8 based thereon, offered by amicus curiae.

9 An amicus curiae is not a party to litigation. *Miller-Wohl Co., Inc. v. Commissioner of*  
10 *Labor*, 694 F.2d 203, 204 (9th Cir. 1982). Amici cannot introduce new issues, *Moffatt Tunnel Imp.*  
11 *Dist. v. Denver & S.L. Ry. Co.*, 45 F.2d 715, 722 (10th Cir. 1930), nor can they “initiate, create,  
12 extend, or enlarge issues.” *Wyatt by and through Rawlins v. Hanan*, 868 F.Supp. 1356, 1358-59  
13 (M.D.Ala. 1994). Amici also do not have standing to raise due process arguments on behalf of  
14 parties. *See In re Alappat*, 33 F.3d 1526, 1536 (Fed. Cir. 1994). To permit an amicus to raise such  
15 issues would open proceedings to “an intruder with equal litigating rights of a named party/real  
16 party in interest,” and would “extend carte blanche discretion to a trial judge to convert the trial  
17 court into a free-wheeling forum of competing special interest groups capable of frustrating and  
18 undermining the ability of the named parties/real parties in interest to expeditiously resolve their  
19 own dispute.” *U.S. v. State of Michigan*, 940 F.2d 143, 166 (6th Cir. 1991).

20 Constitutional rights are personal and may not be asserted vicariously through another  
21 person. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Insufficiency of service is a personal  
22 defense which cannot be asserted by someone other than a defendant. *In re Blutrich, Herman and*  
23 *Miller*, 227 B.R. 53, 58 (S.D.N.Y. 1998). *See also DeFazio v. Wright*, 229 F.Supp. 111, 113  
24 (D.N.J. 1964). Lack of personal jurisdiction may be raised by the court, or by a party, but as a  
25 personal defense it may not be raised by a third party. *Williams v. Life Sav. and Loan*, 802 F.2d  
26 1200, 1202 (10th Cir. 1986).

27 As amicus, the Chamber of Commerce lacks standing to submit evidence on the issue of  
28 insufficiency of process. The declarations presented in the amicus brief cannot provide grounds for

1 the Court to dismiss the present case. Plaintiffs therefore object to amicus' submission of  
2 declarations to the court, and respectfully request that the court strike the declarations, and all  
3 argument based on facts set forth therein.

## 4 **II. PLAINTIFFS PROPERLY SERVED PROCESS ON DEFENDANT**

5 The declarations and accompanying video footage attached hereto demonstrate that on  
6 February 7, 2002, Adam Leining completed service of process on Defendant at San Francisco  
7 International Airport. *See* Declaration of Adam Leining (“Leining Dec.”). Youzhi Ma took video  
8 footage of the service with a digital photo camera, which appears in four separate video segments,  
9 referred to hereinafter as “Clips” or “Parts” 1-4. *See* Declaration of Youzhi Ma, (“Ma Dec.”). The  
10 video clips are submitted herewith.

### 11 **A. Facts**

12 As Defendant was preparing to enter a security screening area, Mr. Leining and Charles Li  
13 approached him. Leining Dec., ¶ 4. Mr. Ma began filming just before Messrs. Leining and Li  
14 walked toward Defendant. Ma Dec., ¶ 6. Mr. Li first addressed Defendant in Chinese. Leining  
15 Dec., ¶ 4. Then Mr. Leining held out a copy of the Summons, Complaint and other court papers to  
16 Defendant. *Id.*, ¶ 5. This can be seen on the left side of the screen in Clip 2 of the video. *Id.* At  
17 the time Mr. Leining was standing within arm’s length of Defendant and Defendant looked at him.  
18 *Id.* As he held out the documents, Mr. Leining said “Mr. Liu Qi, these are legal documents from  
19 the U.S. District Court of California. It’s serious.” *Id.* Defendant refused to accept the documents  
20 and turned and walked away toward the nearby screening area. *Id.* This is shown at the end of  
21 Clip 2. *Id.*

22 There was at least one person in front of Defendant in line at the metal detector gate, so he  
23 could not immediately pass through the metal detector. *Id.*, ¶ 7; Ma Dec., ¶ 10. Mr. Leining  
24 continued speaking, saying, “You can accept them or you do not have to. But you have been  
25 formally served by the U.S. District Court of Northern California.” Leining Dec., ¶ 6. This  
26 statement can be heard on Clip 3 of the video. *Id.* While Mr. Leining was speaking, Defendant  
27 turned and looked at him. *Id.*; Ma Dec., ¶ 10. At about this time, members of Defendant’s  
28 delegation began shouting in Chinese. Leining Dec., ¶ 7. After some time, Defendant passed

1 through the metal detector. *Id.*

2 After Defendant went through the screening gate, Mr. Leining attempted to give the  
3 documents to members of Defendant’s entourage. *Id.*, ¶ 8. No one accepted the papers. *Id.* At  
4 that point, Mr. Leining spoke with a person dressed in a business suit, who appeared to be a  
5 security or police officer. *Id.*, ¶ 9; Ma Dec., ¶ 11. Mr. Leining told the man who he was and  
6 explained that he was serving process on Defendant. Leining Dec., ¶ 9. When Mr. Leining  
7 expressed interest in passing through the screening area to try again giving the documents to  
8 Defendant, the person said, “No one’s going to do anything to anybody,” or words to that effect.  
9 *Id.*

10 **B. Officer Higgins Did Not Witness the Service of Defendant**

11 The declarations of Messrs. Leining and Ma, in conjunction with the video, demonstrate  
12 that the events witnessed by Officer Larry Lee Higgins occurred after service had already been  
13 made on Defendant. Officer Higgins declares that Defendant (referenced as “the Mayor”) was  
14 leading the group. Declaration of Larry Lee Higgins, ¶ 7 (“Higgins Dec.”). The video  
15 demonstrates that this is correct. However, Officer Higgins admits that he was at the rear of the  
16 group and that his back was turned. *Id.* Officer Higgins turned around when he heard someone  
17 yelling in what he believed was Chinese. *Id.*

18 Mr. Leining’s declaration confirms that members of the delegation shouted in Chinese as  
19 Defendant approached the security screening area. Leining Dec., ¶ 7. However, by this time, Mr.  
20 Leining had already informed Defendant that he was serving court papers and had tried to hand the  
21 documents to Defendant, and Defendant had already refused to accept the documents and moved  
22 away toward the screening area. Officer Higgins’ own statement indicates that by the time his  
23 attention was drawn to the shouting, Mayor Liu already had moved toward the screening area.  
24 Higgins Dec., ¶ 7. It is apparent that Officer Higgins simply did not witness Mr. Leining’s attempt  
25 to hand the documents to Defendant or tell Mayor Liu that he had been served.

26 Officer Higgins’ recollection is consistent with Mr. Leining’s and Mr. Ma’s accounts of  
27 events *after* service had been completed. Officer Higgins notes that he did not see anyone give or  
28 throw papers to Mayor Liu, and that he subsequently had an exchange with two men, apparently

1 Mr. Leining and Mr. Li. Higgins Dec., ¶¶ 7-9. Officer Higgins acknowledges that the man  
2 “holding a bundle of papers that looked like legal documents” – apparently Mr. Leining –  
3 “remained on the public side of the rope at all times.” Higgins Dec., ¶¶ 9-10.<sup>1</sup>

4 Officer Higgins simply failed to witness the key events constituting service of Defendant,  
5 visible on the accompanying videotape, and as reflected in the declarations of Mr. Leining and  
6 Mr. Ma.

### 7 **C. The Service Was Constitutionally Sufficient**

8 The Constitution requires that service of process be “reasonably calculated, under all the  
9 circumstances, to apprise interested parties of the pendency of the action and afford them an  
10 opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.  
11 306, 314 (1950). Mr. Leining, who served process for Plaintiffs, informed Defendant that he had  
12 legal documents, tendered the documents from within arm’s length of Defendant, and told  
13 Defendant that he had been served with documents from the United States District Court. Leining  
14 Dec., ¶¶ 5-6. Defendant evaded service by refusing to accept the papers and quickly walking away  
15 towards a security screening and gate area. *Id.*, ¶ 5 Mr. Leining’s actions and statements were  
16 sufficient to ensure that Defendant had notice of the present lawsuit and the opportunity to receive  
17 documents explaining the specific claims against him. At least one news report indicates that  
18 Mayor Liu speaks fluent English. *See* Declaration of Matthew Eisenbrandt, attached hereto.  
19 Plaintiffs thus have reason to believe that Defendant should have understood that he was being  
20 served with legal documents.

21 Mr. Leining is over the age of 18 and not a party to the action. Leining Dec., ¶1. He was  
22 therefore eligible to make service. Fed. R. Civ. P. 4(c)(2).

23 The Chamber of Commerce admits that, “in order to ensure due process, the defendant must  
24 know what is happening and have easy access to the court papers. And there must be evidence that  
25 the defendant is trying to evade service.” San Francisco Chinese Chamber of Commerce’s Amicus

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26  
27 <sup>1</sup> Regardless, Officer Higgins’ assertion that Defendant and his party were inside an area “set-up specifically  
28 for dignitaries to pass through security screening,” *Id.*, ¶ 5, is called into question by several of the video clips, which  
appear to show other travelers or members of the public passing through the same area. Ma Dec., ¶ 10; Leining Dec.,  
¶ 4.

1 Curiae Brief at 3 (“Amicus Brief”). Plaintiffs’ service met these requirements. Mr. Leining  
2 informed Defendant of what was happening by saying that he had legal documents from the  
3 District Court and that Mayor Liu had been served with the papers, and he tendered the papers to  
4 Defendant when they were standing in close proximity. Then Defendant evaded service by quickly  
5 turning and moving away to the line at the metal detector.

6 A defendant cannot avoid service by refusing to accept legal documents from the process  
7 server. *In re Ball*, 2 Cal.App.2d 578, 579 (1934). *See also Crescendo Corp. v. Shelsted, Inc.*, 267  
8 Cal.App.2d 209 (1968) (“The individual upon whom the process server attempts to make personal  
9 service by manual delivery may not be heard to claim that service was improper because he refused  
10 to accept service.”) The facts in *Ball* are similar to those of the present case. The process server  
11 walked to within approximately 12 feet of the defendant, holding out the court documents. The  
12 defendant walked away, refusing to accept the documents. The process server dropped the  
13 documents on the ground, and the defendant never picked them up. The *Ball* court held, “We take  
14 it that when men are within easy speaking distance of each other and facts occur that would  
15 convince a reasonable man that personal service of a legal document is being attempted, service  
16 cannot be avoided by denying service and moving away without consenting to take the document  
17 in hand.” *Ball*, 2 Cal.App.2d at 579.

18 In *Doe v. Karadzic*, 1996 WL 194298 (S.D.N.Y. 1996), the court similarly upheld service  
19 where the defendant, also served with a lawsuit alleging human rights abuses, avoided the process  
20 server and did not physically receive the court documents. In *Karadzic*, the process server  
21 approached the defendant and held out the summons and complaint, apparently without saying  
22 anything. A security officer knocked the papers out of the server’s hand and physically moved the  
23 defendant away. As this was happening, the server shouted, “You’ve been served. You’ve been  
24 served.” The *Karadzic* court ruled that the service was proper, even though the process server had  
25 never informed the defendant that the papers were court documents. The court reasoned that  
26 “where the defendant resists service, it suffices to have the summons in his general vicinity.” *Id.* at  
27 \*1 (quoting *McDonald v. Ames Supply Co., Inc.*, 22 N.Y.2d 111, 115, 238 N.E.2d 726, 728  
28 (1968)).

1           The Ninth Circuit and California state courts similarly have found that personal service is  
2 proper where the defendant tries to evade service and the process server leaves the documents  
3 nearby. *See Errion v. Connell*, 236 F.2d 447, 457 (9th Cir. 1956) (service was proper where the  
4 defendant hid behind a door and a sheriff pitched the papers through a hole in the screen door of  
5 the defendant’s apartment); *Crescendo*, 267 Cal.App.2d at 212-13 (service was proper where the  
6 defendant was at home but refused to come to the door, the defendant’s wife slammed the door on  
7 the server, and the server left the papers under the windshield of a car parked in the carport). Other  
8 courts have found similar service sufficient. *See Novak v. World Bank*, 703 F.2d 1305, 1311 n. 14  
9 (D.C. Cir. 1983) (“When a person refuses to accept service, service may be effected by leaving the  
10 papers at a location, such as on a table or on the floor, near that person.”); *Heritage House Frame*  
11 *and Moulding Co., Inc. v. Boyce Highlands Furniture Co., Inc.*, 88 F.R.D. 172, 174 (E.D.N.Y.  
12 1980) (service was proper where the defendant refused to accept the documents and the server left  
13 the papers nearby).

14           In this case, better than having merely left documents near the defendant, Mr. Leining  
15 offered the documents directly and within close proximity to Defendant. Defendant evaded service  
16 by refusing to accept the documents and by then quickly turning and walking away towards the  
17 screening and gate area, inaccessible to Mr. Leining. The fact that Mr. Leining retained the papers,  
18 rather than throwing them at Defendant or dropping them on the ground, is immaterial. Tossing  
19 the documents or placing them somewhere nearby was not feasible because service took place in  
20 an airport. Unlike the cases above, where personal service was attempted at an office or a home,  
21 Defendant here could not have returned to pick up the papers left by the process server.

22           After Defendant refused to accept the documents tendered by Mr. Leining and walked  
23 away, Mr. Leining attempted to give them to other members of the Chinese delegation but was  
24 refused. Leining Dec., ¶ 8. To require Mr. Leining to have pursued Defendant also would be  
25 unreasonable. “[T]he process server merely has to ‘tender’ the summons to the appropriate  
26 individual.” *Republic Credit v. Rance*, 172 F.Supp.2d 1178, 1181 (S.D. Iowa 2001). As the court  
27 noted in *Republic Credit*, “This Court has no interest in forcing process servers to chase down  
28 defendants and jam court papers into their hands in order to effect personal service, as depicted on

1 television.” *Id.*

2 Due process does not require that a defendant actually receive a copy of the summons and  
3 complaint, so long as the service was reasonably calculated to inform the defendant of the  
4 pendency of a lawsuit. *Zhou v. Li Peng*, 2002 WL 1835608 (S.D.N.Y. 2002); *see also Kloeping*  
5 *v. Fireman's Fund*, 1996 WL 75314 (N.D.Cal. 1996) (holding that “the due process clause will not  
6 protect defendant in his willful disregard and active evasion of service” in a default case where  
7 plaintiffs unsuccessfully tried numerous times to serve process on the defendant). In *Zhou*, the  
8 defendant was too heavily guarded by security for in-person service, so the plaintiffs obtained a  
9 court order allowing them to serve a member of the security detail. The court found that it was  
10 immaterial that the defendant never received a copy of the summons or complaint. 1996 WL  
11 75314 at \*12. In fact, the court held, “[O]ur law has long been comfortable with many situations in  
12 which it was evident, as a practical matter, that parties to whom notice was ostensibly addressed  
13 would never in fact receive it.” *Id.* (quoting *Dobkin v. Chapman*, 21 N.Y.2d 490, 502 (1968)).

14 The case cited by the Chamber of Commerce, *Weiss v. Glemp*, 792 F.Supp. 215 (S.D.N.Y.  
15 1992), is distinguishable from the present case. In *Weiss*, the court made a factual finding that the  
16 process server never made clear that she was serving legal process. *Id.* at 223. The court held that  
17 the server’s methods were not “reasonably calculated to apprise” the defendant that he was being  
18 served with legal papers. *Id.* at 225 (quoting *Mullane*, 339 U.S. at 314). The court in *Weiss* relied  
19 on the fact that the papers offered by the process server in that case “could just as well have been a  
20 petition, a leaflet, a protest, or another non-legal document,” because the server never indicated that  
21 they were from the court. *Id.* This differs from the instant case, since Mr. Leining clearly told  
22 Defendant that he was serving legal papers from the District Court.

23 As the Chamber of Commerce also recognizes, the court in *Weiss* found that the defendant  
24 was not trying to evade service. *Id.* at 223-24. However, here, Mayor Liu did actively evade  
25 service by quickly moving away from the process server and moving towards the screening and  
26 gate area inaccessible to Mr. Leining.

27 The actions of Mr. Leining were “reasonably calculated” to apprise Defendant of the  
28 pendency of this lawsuit. Mr. Leining alerted Defendant that he was serving legal papers and



1 tendered the papers to Defendant. Defendant evaded service, and cannot now benefit from his  
2 evasion by relying on the claims of others that he was not served properly. Service was sufficient  
3 to meet the requirements of due process.

#### 4 CONCLUSION

5 For all the foregoing reasons, Plaintiffs respectfully request that the Court reject the  
6 arguments raised in the amicus brief and enter default judgment against Defendant in an amount to  
7 be proven at a later hearing on damages.

8  
9  
10 Dated: October 16, 2002

Respectfully submitted,

11  
12 s/Joshua Sondheimer

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28 Attorneys for All Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, declare under penalty of perjury that:

3 On October 16, 2002, I served a true copy of the following documents:

4 PLAINTIFFS’ RESPONSE TO AMICUS CURIAE BRIEF OF SAN FRANCISCO  
5 CHINESE CHAMBER OF COMMERCE

6 NOTICE REGARDING EXHIBIT ATTACHMENT

7 DECLARATION OF YOUZHI MA

8 DECLARATION OF ADAM C. LEINING

9 DECLARATION OF MATTHEW EISENBRANDT

10 on the following persons:

11 Joseph Remcho  
12 Thomas A. Willis  
13 Remcho, Johansen & Purcell  
201 Dolores Avenue  
San Leandro, CA 94577

14 By placing a true copy of said documents, enclosed in a sealed envelope, and by serving said  
15 envelope, with postage thereon fully prepaid, in the United States mail in San Francisco,  
California, addressed to said persons.

16 Executed in San Francisco, California, on October 16, 2002.

17 I declare under penalty of perjury that the foregoing is true and correct.

18  
19 s/Joshua Sondheimer  
20 JOSHUA SONDHEIMER (SBN 152000)