UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF STETSON

OVER-ARMOR, INC., a California corporation,

Plaintiff,

v.

CASE NO. 14-cv-1311-EKN-EJB

COALITION AGAINST FOOTBALL CORRUPTION, INC., a Stetson corporation, and NELLIE KICKWOOD, individually,

Defendants.

PLAINTIFF OVER-ARMOR'S MEMORANDUM IN OPPOSITION TO DEFENDANT NELLIE KICKWOOD'S MOTION TO VACATE JUDGMENT

/s/ 1530
1530
Attorneys for Plaintiff

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QUESTIONS PRESENTED

I. Under Federal Rule of Civil Procedure 4(e), does Over-Armor's serving Kickwood by private Facebook message satisfy the constitutional and statutory requirements when the process server made a diligent effort to locate her and she intentionally evaded service?

II. Under 28 U.S.C. § 636(c), does Kickwood's failure to appear or object to the magistrate court's jurisdiction constitute implied consent or a waiver of the right to contest jurisdiction?

STATEMENT OF JURISDICTION

Over-Armor, Inc., a California corporation, commenced this defamation action in the Middle District of Stetson against Coalition Against Football Corruption, Inc., a Stetson corporation, and Nellie Kickwood, a domiciliary of Stetson. Jurisdiction in the United States District Court for the Middle District of Stetson is proper under 28 U.S.C. § 1332(a) for two reasons. First, the $75,000 amount-in-controversy requirement is satisfied. Second, the parties are of diverse citizenship. Further, venue is proper in this Court under 28 U.S.C. § 1391(a)(1). The subject matter of this lawsuit, regarding the alleged defamation of Over-Armor's business practices, originated in Stetson. This Court, therefore, has jurisdiction over this case.

STATEMENT OF FACTS

Plaintiff Over-Armor, an athletic apparel manufacturer, is a rising corporation seeking to expand its presence internationally. Compl. ¶¶ 10-11. To facilitate that goal, Over-Armor intended to bid on the latest apparel-supply contract announced by the Federation Internationale de Football Association (FIFA). Compl. ¶¶ 13-14.

Defendant Nellie Kickwood is an investigative journalist hired by her co-defendant, Coalition Against Football Corruption (CAFC), to investigate potential corruption in professional soccer. Compl. ¶¶ 17-18, 20. Specifically, Kickwood was asked to investigate and prepare a report concerning the bidding process for the FIFA apparel contract. Compl. ¶¶ 13, 21. Kickwood's final report contained unsubstantiated allegations of corruption, all of which Over-Armor unequivocally denied. Compl. ¶ 24.

CAFC posted Kickwood's report to the company's Facebook wall under a bold caption indicating Over-Armor's alleged misconduct. Compl. ¶ 25. Over-Armor responded to indicate the falsehood of the report, which generated several negative comments from both coaches and consumers. Compl. ¶¶ 28-30. Kickwood continued to engage in the banter on Facebook, insisting that her defamatory report was true. Compl. ¶ 31. Following disclosure of the report, Over-Armor was "barred from bidding on FIFA contracts 'while the serious

allegations of unethical and perhaps unlawful conduct [were] being investigated.'" Compl. ¶ 36. When Over-Armor threatened legal action, Kickwood responded by saying, "Good luck with finding me. You'll never be able to do it. I'm gone with the wind. ☺" Compl. ¶ 33.

Over-Armor sued both CAFC and Kickwood for defamation, requesting $500,000,000 in damages. Compl. ¶¶ 38-43. CAFC waived service of process and formally answered the complaint, effectively denying all pertinent allegations. Waiver of Service of Summers at ¶ 2; Ans. ¶¶ 1-43. But Kickwood failed to make herself available for service of process, dodging five attempts at personal service after receiving an email from the process server. Return of Service at ¶ 2. When personal service failed, the process server resorted to Facebook—Kickwood's seemingly preferred method of communication. *Id*. He posted the summons and complaint on CAFC's Facebook wall and sent Kickwood a private Facebook message containing the commencement paperwork. *Id*.

Over-Armor and CAFC formally consented to having a magistrate judge conduct the proceedings. Notice, Consent, and Reference of a Civil Action at ¶ 3. Kickwood, however, failed to object or participate in the litigation. *Id*. The magistrate judge entered a judgment of default against Kickwood, conducted a bench trial, and rendered a judgment against both CAFC and Kickwood for money damages in the amount of $750,000,000. Order Directing Entry of Final J. at ¶ 2.

SUMMARY OF THE ARGUMENT

This Court should deny the Motion to Vacate Judgment for two reasons. First, service of process was proper because it comported with the constitutional standard for notifying potential defendants of actions filed against them. Over-Armor conducted a diligent search to locate Kickwood by attempting personal service on five different occasions over a two-week span and by using Facebook and other internet resources to ascertain her whereabouts. Despite that effort, Kickwood intentionally evaded service, rendering service by publication the most effective means of notification.

So Over-Armor sent the summons and complaint by private message to Kickwood's personal Facebook account. Evidence shows that Facebook is Kickwood's primary means of communication, so the message was reasonably calculated to provide notice of the action against her. As such, Kickwood received both actual notice of the suit and proper service of process.

Second, the magistrate court had jurisdiction to enter a final, valid judgment. Kickwood impliedly consented under 28 U.S.C. § 636(c) because a magistrate court may infer consent by a party's failure to object to the proceedings against her. In the alternative, Kickwood, as a party in default, waived her right to contest the referral of the case to the magistrate court. This Court should not let Kickwood employ the "wait and see approach," in which the defendant waits to contest

jurisdiction only if she does not favor the outcome. Because the magistrate judge had the authority to enter final judgment, the judgment entered against Kickwood is valid, and the Motion to Vacate Judgment should be denied.

ARGUMENT

I. After a diligent effort to locate Nellie Kickwood, service by publication was proper because the private Facebook message was "reasonably calculated" to apprise Kickwood of the pendency of the action.

This Court should hold that service was proper and follow the modern-technology trend of federal district courts, allowing service by publication via Facebook and other forms of social media. Federal and state law provides several methods to properly serve a defendant. Under Federal Rule of Civil Procedure 4(e), a person may be served by (a) following state law, (b) affecting personal service, (c) leaving a copy at the person's home with a resident of suitable age, or (d) delivering a copy to an authorized agent.

Stetson's service-of-process statutes allow service by publication under these circumstances. Stetson Stat. §§ 120.80-81; *see infra* Apps. B, C. First, the plaintiff must file a sworn statement as a condition precedent to service by publication. Stetson Stat. § 120.11; *see infra* App. A. The statement must demonstrate that the defendant could not be located after a diligent search and that the residence of the defendant is (a) unknown, (b) out of state, or (c) that the defendant has concealed herself so that process could not be personally served. Stetson Stat. § 120.21; *see infra* App. D. In this case, Over-Armor filed a return of service to that effect. The process server testified that he was unable to ascertain

Kickwood's address and was unable to affect personal service—despite admittedly diligent efforts. Return of Service at ¶ 2.

In addition to state statutory requirements, the Supreme Court has also established a constitutional standard for determining whether service of process is proper: "notice must be such as is reasonably calculated to reach interested parties." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). Under the constitutional standard, this Court should hold that service by a private Facebook message was proper because the method was reasonably calculated to reach the Defendant. Private Facebook messaging is more likely to provide notice than publishing the summons and complaint in a newspaper—as required by state law. As such, this Court should deny the Motion to Vacate Judgment.

A. Over-Amor's search for Kickwood was sufficient because her residence is unknown.

This Court should hold that Over-Armor's efforts to locate Kickwood constituted due diligence. The plaintiff has the burden of establishing "that he or she made a good faith effort to serve the original process on the defendant." *Miller v. Klink*, 871 A.2d 331, 336 (Pa. Commw. 2005). But the trial court has substantial discretion to decide when the good-faith requirement is satisfied. *Id*.

To determine whether the search was sufficient, the court should consider whether the plaintiff acted reasonably under the circumstances. *Shepheard v.*

Deutsche Bank Trust Co. Americas, 922 So. 2d 340, 343-44 (Fla. Dist. Ct. App. 2006) (citing *Demars v. Village of Sandalwood Lakes Homeowner's Ass'n*, 625 So. 2d 1219, 1224 (Fla. Dist. Ct. App. 1993). In *Shepheard*, the defendants were domiciliaries of the United Kingdom who owned a seasonal property in Florida. *Id*. at 342. After they failed to make mortgage payments, the bank instituted foreclosure proceedings. *Id*. In its feeble attempt to affect service, the bank made one attempt to personally serve the defendants at their Florida home. *Id*. Although their neighbors in England offered assistance in locating the defendants, the bank did not attempt service by registered mail. *Id*. The Florida Court of Appeals held that the bank's search did not constitute due diligence. *Id*. at 343. Despite having actual knowledge as to the defendant's whereabouts, the bank failed to "follow leads likely to reveal [the defendant's] residence." *Id*.

Unlike the plaintiff in *Shepheard*, Over-Armor's search was reasonable for two reasons. First, the process server in this case made five attempts to personally serve the Defendant at the address he reasonably assumed was her residence. Return of Service at ¶ 2. The bank in *Shepheard* only made one attempt at personal service. Second, the process server was unable to locate Kickwood's actual residence, despite several internet queries. *Id*. The bank in *Shepheard* had several clues as to the defendants' whereabouts in the United Kingdom that it simply chose to ignore. *Shepheard*, 922 So. 2d at 343. Although no evidence

exists here to indicate that the process server made inquiries of Kickwood's friends or relatives, the record is entirely devoid of evidence as to any personal connections she may have had. Given that discrepancy, the internet searches and multiple attempts at personal service were reasonable.

The Middle District of Florida recognizes that computer searches, coupled with personal attempts at service, are sufficient to constitute due diligence. *Grange Ins. v. Walton Transport*, 2014 WL 1917987 *1, *3 (M.D. Fla. May 13, 2014). In *Grange*, the plaintiff tried unsuccessfully for a period of time to affect service of process on the defendant. *Id.* The process server made numerous attempts to locate the defendant at the address given. *Id.* Because the address was located in a gated community, the server was unable to identify the defendant's residence. *Id*. Judge Richardson held that the plaintiff's attempt at service was insufficient. *Id*. The plaintiff did not "engage[] the services of an investigator or perform[] any computer searches to locate [the defendant]." *Id*. In other words, a few meager attempts at personal service do not exhaust the options a plaintiff may exercise to locate an elusive defendant. *Id*.

Over-Armor followed the recommendation of the court in *Grange*. Similar to the plaintiff in *Grange*, Over-Armor was not able to personally serve Kickwood. Unlike the plaintiff in *Grange*, however, Over-Armor hired a process server who conducted a diligent search and inquiry, performed numerous electronic searches

for Kickwood, and made repeated efforts at personal service. Return of Service at ¶ 2. Specifically, he located the Defendant's Facebook page, which was registered to the e-mail address: kickwood2@kmail.com. *Id*. Next, the process server sent an email to kickwood2@kmail.com, and he received a response containing both Kickwood's name and a residential address. *Id*. Over-Armor attempted personal service at Kickwood's known residence on five different occasions over a two-week period. *Id*. Eventually, the process server made contact with a minor child, who informed the server that Kickwood did not reside at the address. *Id*. Despite diligent efforts, Over-Armor could not locate any other residence where Kickwood might reside. Over-Armor's conduct, therefore, satisfies the reasonable-effort requirement. *See Grange at *2.*

Although a party's effort to locate and serve a defendant must be reasonable, a plaintiff is not required to exhaust all options to locate the defendant. *Miller v. Partin*, 31 So. 3d 224 (Fla. Dist. Ct. App. 2010). In *Miller*, the plaintiff's process server contacted the sheriff's office when attempting to locate the defendant's residence. *Id.* at 226. The Florida Court of Appeals held that the plaintiff's efforts failed the reasonableness test, and it provided examples of a sufficient effort—i.e., trying to contact the defendant by telephone or mail or speaking with neighbors and acquaintances. *Id.*

Unlike the plaintiff in *Miller*, Over-Armor repeatedly attempted to contact Kickwood. Return of Service at ¶ 2. The process server located Kickwood's Facebook page, contacted her via email, and went to her only-known residence five different times over a two-week span. *Id*. Further, he spoke with Kickwood's minor child when visiting the address listed on the return email's signature block. *Id*. Although the process server did not speak with Kickwood's neighbors or acquaintances, he was not required to exhaust all possible means of discovery. *See In Interest of A.W.,* 401 N.W.2d 477, 479 (Neb. 1987); *see also Davis v. Kressly*, 107 N.W.2d 5, 9 (S.D. 1961) (indicating that, while two attempts at personal service are insufficient, more than two attempts may be sufficient). Thus, the search was reasonable given the circumstances. Because Over-Armor conducted a diligent search, service was proper, and Kickwood's Motion to Vacate Judgment should be denied.

B. Kickwood intentionally evaded service of process, so Over-Armor's service by publication was proper.

The Defendant's Motion to Vacate Judgment should be denied because service by publication was properly made when Kickwood dodged personal service on five separate occasions. Service by publication is proper when the defendant "intentionally evades service." *Taylor v. Stanley Works*, 2002 WL 32058966 *1, *6 (E.D. Tenn. July 16, 2002) (citing *Habib v. General Motors Corp.*, 15 F.2d 72, 73 (6th Cir. 1994). A defendant who deliberately conceals

herself is "scarcely in a position to complain" when the plaintiff is relegated to using alternate methods of notification. *Cradduck v. Fin. Indem. Co.*, 242 Cal. App. 2d 850, 858 (Ct. App. 1966).

When determining whether a defendant has evaded service, courts should focus on the totality of the circumstances, including "non-cooperation and failure to respond." *In re Godette*, 919 A.2d 1157, 1164 (D.C. Cir. 2007). In *Godette*, the defendant-attorney abandoned a civil matter for which he was already paid a substantial fee. *Id.* at 1159. He ignored several letters, an order to respond, and the filing of an ethical complaint. *Id.* at 1161. The process server attempted personal service on seven different occasions but was unable to make contact. *Id.* As a result, the D.C. Circuit held that the defendant deliberately evaded service of process. *Id.* at 1166.

Here, the facts strongly suggest that Kickwood evaded personal service under the totality of the circumstances analysis. After Over-Armor threatened legal action on Facebook, Kickwood responded: "Good luck with finding me. You'll never be able to do it. I'm gone with the wind. ☺" Compl. ¶ 33. After the suit was ultimately filed, Over-Armor's process server emailed Kickwood in an attempt to ascertain her whereabouts. Return of Service at ¶ 2. She responded to his original email but provided no clue as to her place of residence or employment. *Id*. And then Kickwood disappeared, just as she promised to do. Like the plaintiff

in *Godette*, Over-Armor attempted personal service on five separate occasions—with no success. Kickwood's elusive behavior in this case should not be rewarded. She evaded personal service on several occasions, so service by private Facebook message was proper. As such, the Motion to Vacate Judgment should be denied.

C. Over-Armor's private Facebook message was constitutionally permissible because it was as likely to provide notice as any other potential method.

This Court should deny the Defendant's Motion to Vacate Judgment because service of process by Facebook message was sufficient to provide Kickwood notice of the lawsuit against her. A method of service is constitutionally permissible and satisfies the *Mullane* standard if it "is a reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane,* 339 U.S. at 315. Here, serving the summons and complaint by Facebook message satisfies that standard. Fundamentally, service by email or some form of electronic communication is sufficient when publication is likely to be effective—for example, when electronic communication is the defendant's **primary means of communication**. *See BP Products North America, Inc. v. Dagra*, 236 F.R.D. 270 (E.D. Va. 2006).

Service by private Facebook message is a sufficient method of service under these circumstances. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (N.Y. Sup. Ct. 2015). In *Baidoo*, a wife sought to serve her husband by Facebook in her divorce

action. *Id.* at 712. Despite hiring an investigator, no records of the husband could be found. *Id.* Under these circumstances, the New York state court held that service of process by Facebook would be reasonably calculated to notify the defendant of the action. *Id.* at 716. The court reasoned that:

> The past decade has [] seen the advent and ascendency of social media, with websites such as Facebook and Twitter occupying a central place in the lives of so many people. *Thus, it would appear that the next frontier in the developing law of the service of process over the internet is the use of social media sites as forums through which a summons can be delivered.*

Id. at 711 (emphasis added). In fact, 157,000,000 people in the United States checked their Facebook accounts each day at the end of 2014. *Id*. at 711 n.2.

Like the court in *Baidoo*, this Court should permit service of process by Facebook messaging. The record demonstrates that Facebook was essentially Kickwood's sole method of communication. Compl. ¶¶ 30-33. She engaged in a continuous banter with Over-Armor and other Facebook users at the height of the defamation dispute—responding often within twenty-four hours. *Id*. Her Facebook activity also indicates that she was actually notified of Over-Armor's threat of legal action. *Id*. at ¶ 33. Further, Kickwood's relationship with CAFC was initiated through Facebook; the record shows that the company both located and hired her via social media. *Id*. at ¶¶ 18-20. Although *Baidoo* was a matrimonial action, the notice requirements are no different in that context. Fundamentally, a method of service—even service by Facebook message—is

proper if the defendant is likely to receive notice of the suit against her. As such, service was proper, and the Motion to Vacate Judgment should be denied.

II. The magistrate judge's entry of final judgment is valid because Kickwood's failure to object to magistrate court jurisdiction equates to implied consent and because her default status necessarily waived her right to object.

This Court should uphold the judgment rendered against Nellie Kickwood because her conduct during litigation satisfied the consent requirements of 28 U.S.C. § 636. The Federal Magistrates Act of 1979 allows magistrate judges to conduct proceedings and enter judgment orders with the consent of the parties. 28 U.S.C. § 636(c)(1) (2012). In keeping, Federal Rule of Civil Procedure 73 provides that consent of all parties is sufficient for a magistrate judge to conduct a civil proceeding. *See Roell v. Withrow*, 583 U.S. 580, 585 (2003). But a party's consent may be implied from her conduct during litigation. *Id*. at 586. Even if implied consent is present, defaulting nullifies the right to argue lack of a magistrate court's jurisdiction after the entry of final judgment. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 99 (D.D.C. 2011). Further, the defendant's constitutional rights are not jeopardized under these circumstances because waiver based on actions substantially honors the right to adjudication by an Article III judge. *Wellness Intern. Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1948 (2015).

The magistrate judge had authority to enter the final judgment for two reasons. First, Kickwood's conduct (failure to object to the magistrate court's jurisdiction) amounts to implied consent—satisfying the requirements of Section 636(c). Second, Kickwood's status as a defaulted party waived her right to contest the referral of the action to the magistrate judge. Federal Rule of Civil Procedure 60(b)(4) provides that a party may be relieved from final judgment if the judgment is void. A judgment is void only if the rendering court lacked jurisdiction. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). The magistrate judge possessed jurisdiction to enter a final judgment, so the Motion to Vacate Judgment should be denied.

A. Kickwood's failure to object to the magistrate court's jurisdiction equates to implied consent.

Kickwood's failure to object during the course of the litigation should compel this Court to infer her consent to the magistrate court's jurisdiction. Prior to a finding of implied consent, the defendant must be notified of the need for consent and the right to refuse referral of the action to the magistrate court. *Roell v. Withrow*, 583 U.S. 580, 590 (2003). In *Roell*, the petitioners (members of a prison's medical staff) faced a suit concerning a violation of the respondent's constitutional rights. *Id.* at 582. After being put on notice that the case had been referred to a magistrate judge and being notified of the right to refuse that referral, the petitioners proceeded with litigation and made no objections. *Id.* at 583. The

Supreme Court held that the petitioners' failure to voice objections to the proceedings in the magistrate court implied their consent to the referral. *Id.* at 584.

Like the petitioners in *Roell*, Kickwood had notice of the right to consent and the right to refuse referral of her case to the magistrate court. But she failed to do so. Although the petitioners in *Roell* voluntarily appeared before the magistrate judge, the Supreme Court focused its analysis on the petitioners' failure to object after being notified of that right. Here, since service of process was proper and assuming that Kickwood received the District Court's Notice, Consent, and Referral of a Civil Action, the requirement that Kickwood be notified of her right to give and refuse consent is satisfied.

Further, a defendant's failure to object is synonymous with consent. *Peretz v. United States,* 501 U.S. 923, 926-40 (1991) (drawing the parallel that a magistrate judge may supervise jury selection "provided that the parties consent" or conduct a *voir dire* "when the defendant raises no objection"); *see also United States v. Underwood*, 597 F.3d 661, 666 (5th Cir. 2010). In *Underwood*, the defendant was indicted for drug conspiracy and entered a guilty plea. *Id.* at 663. The district court entered an order referring the defendant's plea allocution to a magistrate judge. *Id.* Neither the defendant nor his attorney filed any objections to the exercise of the magistrate court's jurisdiction. *Id.* at 664. After his sentence was upheld, the defendant challenged the authority of the plea proceeding

conducted by the magistrate judge. *Id.* The court ultimately affirmed the magistrate judge's order and held that under 28 U.S.C. § 636(b)(3), the petitioner's failure to object to the magistrate court's jurisdiction amounted to consent. *Id.* at 663.

Like the defendant in *Underwood*, Kickwood failed to object to the magistrate court's jurisdiction. Although *Underwood* concerned the application of Section 636(b)(3), the court reasoned by analogy. Although Section 636(b)(3) contains no consent requirement, the court held that "the parties had evinced consent by trying the action before the magistrate judge without objection." *Id*. at 668. If failure to object equates to implied consent for a statute with no consent requirement, reason follows that the consent requirement for a statute within the same statutory scheme is satisfied by the same facts. By way of the court's reasoning in *Underwood*, Kickwood's actions amount to implied consent.

B. Even if this Court finds no implied consent, Kickwood's default status necessarily waived her right to contest referral of the case to the magistrate judge.

Kickwood waived her right to contest referral to the magistrate judge. A totally unresponsive party, i.e., a defendant who fails to appear or otherwise indicate an intent to defend the suit, provides ripe conditions for a default judgment. *Baker*, 810 F. Supp. 2d at 95. The default judgment protects diligent parties and deters parties "who choose delay as part of their litigation strategy." *Id.*

(citing *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Leopfe*, 432 F.2d 689, 691 (D.C. Cir. 1970). This Court should ensure that the goals of default judgments are properly recognized in this case.

A party in default waives any right to argue the absence of the magistrate court's jurisdiction. *Baker*, 810 F. Supp. 2d at 99. In *Baker*, the plaintiff brought suit against Syrian defendants resulting from acts of terrorism. *Id.* at 93. After receiving proper service of process and being notified of the entry of default for their failure to appear, the magistrate judge entered a default judgment against the defendants. *Id.* at 94. In response to the default judgment, the defendants appeared for the first time to appeal. *Id.* at 95. The district court for the District of Columbia held that the defendant's default amounted to a waiver of their right to contest referral to a magistrate judge. *Id.* at 99. Specifically, the court reinforced the reasoning behind *Roell*—that implied consent safeguards the policy of judicial efficiency by limiting gamesmanship. *Id.* at 98. Courts should prohibit the parties from waiting and denying the magistrate court's jurisdiction after the outcome. *Id.* at 98 (citing *Roell*, 583 U.S. at 590).

Like the defendants in *Baker*, Kickwood chose to use silence as weapon to manipulate the judicial process when she failed to appear to voice any lack of consent. The record indicates that Kickwood received a message from Over-Armor indicating its intention to aggressively pursue all legal options against her.

Compl. ¶ 32. But Kickwood wished Over-Armor luck in finding her as she would be "gone with the wind." *Id*. at ¶ 33. Kickwood continued to employ this trickery throughout the litigation, avoiding appearance until after the entry of final judgment some seven months later. Kickwood was notified of the proceedings and chose not to appear, suggesting willful avoidance. This Court should adopt the *Baker* court's reasoning and hold that the default judgment extinguished Kickwood's right to contest referral of the case to the magistrate court.

This Court should not relax its standards. The consequences are particularly severe if a defendant remains silent and belatedly raises her objections only after the case does not conclude in her favor. If Kickwood believed that the magistrate judge lacked the authority to decide her claim, she should have said so—and said so promptly.

The Eighth Circuit, however, has held that default does not amount to a waiver of a party's right to contest referral to a magistrate judge. *Henry v. Tri-Services, Inc.,* 33 F.3d 931, 933 (8th Cir. 1994). In *Henry*, the plaintiffs attempted but failed to serve a foreign, corporate defendant with service of process. *Id.* at 932. The district court clerk entered default against the defendant when it did not answer or enter any appearances. *Id.* After the proceedings were conducted and the magistrate judge entered final judgment, the defendants moved to vacate the judgment in district court. *Id.* The court held that because the defendant provided

no "clear statement" of consent to the magistrate court's jurisdiction, the defendant did not waive its right to contest referral. *Id.* at 933.

Henry is legally and factually irrelevant for several reasons. First, the *Henry* court's requirement of a "clear statement" to manifest consent was decided prior to the recognition of implied consent under Section 636(c)(1) in *Roell*. But this Court is bound by *Roell* and its progeny. In order to give proper effect to the *Roell* decision, this Court should hold that the defendant's actions, and not her words, are determinative. Kickwood's inaction here—failing to enter an appearance or otherwise appear to defend the suit—suggests waiver of the right to contest the jurisdiction of the magistrate court. Second, the defendant in *Henry* did not receive notice of the lawsuit until after the entry of default judgment. But Kickwood received proper service of process, and her conduct indicates that she willfully defaulted. Kickwood's objection to the default judgment is, therefore, too late—defaulting waives the right to contest the magistrate court's jurisdiction. As such, the Motion to Vacate Judgment should be denied.

CONCLUSION

For the reasons previously stated, Defendant Nellie Kickwood's Motion to Vacate Judgment should be denied and this Court should find that (1) service of process was proper because it comported with the constitutional standard for notifying potential defendants of actions filed against them, and (2) Kickwood's failure to object to the magistrate court's jurisdiction constituted implied consent. Because the magistrate judge had jurisdiction to enter a final judgment, the judgment is valid as a matter of law. As such, this Court should deny the Motion to Vacate Judgment.

Respectfully submitted,

/s/ 1530
1530
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Defendants certify that a true and accurate copy of this memorandum has been served by electronic mail to all attorneys of record on this the 11th day of September, 2015.

/s/ 1530
1530
Attorneys for Plaintiff

APPENDIX A

Stetson Statute § 120.11

(1) As a condition precedent to service by publication, a statement shall be filed in the action executed by the plaintiff, the plaintiff's agent or attorney, setting forth substantially the matters hereafter required, which statement may be contained in a verified pleading, or in an affidavit or other sworn statement.

(2) As used in this chapter:

(a) The word "plaintiff" means any party in the action who is entitled to service of original process on any other party to the action or any person who may be brought in or allowed to come in as a party by any lawful means.

(b) The word "defendant" means any party on whom service by publication is authorized by this chapter, without regard to his or her designation in the pleadings or position in the action.

(c) The word "publication" includes the posting of the notice of action as provided for in ss. 120.80 and 120.81.

APPENDIX B

Stetson Statute § 120.80—Notice of Pending Lawsuit, Publication

(1) All notices of action shall be published once during each week for 4 consecutive weeks (four publications being sufficient) in some newspaper published in the county where the court is located. The newspaper shall meet such requirements as are prescribed by law for such purpose.

(2) Proof of publication shall be made by affidavit of the owner, publisher, proprietor, editor, business manager, foreman or other officer or employee of the newspaper having knowledge of such publication. The affidavit shall set forth or have attached a copy of the notice, shall set forth the dates of each publication and otherwise comply with the requirements of law.

APPENDIX C

Stetson Statute § 120.81—Notice of Pending Lawsuit, Posting

If there is no newspaper published in the county, three copies of the notice shall be posted at least 28 days before the return day thereof in three different and conspicuous places in such county, one of which shall be at the front door of the courthouse in said county. Proof of posting shall be by affidavit of the person posting the notices, which affidavit shall include a copy of the notice posted and the date and places of its posting.

APPENDIX D

Stetson Statutes § 120.21

The sworn statement of the plaintiff, his or her agent or attorney, for service of process by publication against a natural person, shall show:

(1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and

(2) Whether such person is over or under the age of 18 years, if his or her age is known, or that the person's age is unknown; and

(3) In addition to the above, that the residence of such person is, either:

(a) Unknown to the affiant; or

(b) In some state or country other than this state, stating said residence if known; or

(c) In the state, but that he or she has been absent from the state for more than 60 days next preceding the making of the sworn statement, or conceals himself or herself so that process cannot be personally served, and that affiant believes that there is no person in the state upon whom service of process would bind said absent or concealed defendant.