



By Order of the Court, Judge Joseph N. Camacho

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**FOR PUBLICATION**



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**CNMI SUPERIOR COURT**  
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**IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

<b>LC RENTAL COMPANY, LLC,</b>	)	<b>CIVIL ACTION NO. 16-0146</b>
	)	
<b>Plaintiff,</b>	)	<b>ORDER GRANTING DEFENDANT’S</b>
	)	<b>MOTION TO SET ASIDE DEFAULT</b>
<b>v.</b>	)	<b>JUDGMENT AS PLAINTIFF FAILED TO</b>
	)	<b>PROPERLY SERVE THE DEFENDANT,</b>
<b>CHINA YANBIAN FOREIGN</b>	)	<b>THEREFORE THE JUDGMENT IS VOID</b>
<b>ECONOMIC &amp; TECHNICAL</b>	)	
<b>COOPERATION CORPORATION,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**I. INTRODUCTION**

This matter came before the Court on September 30, 2016 at 1:30 p.m. in Courtroom 220 on Defendant’s Motion to Set Aside the Default Judgment Pursuant to Com. R. Civ. P. 60(b). Attorneys Benjamin K. Petersburg and Bruce Berline appeared on behalf of the Plaintiff LC Rental Company, LLC (“LC Rental”). Sang Hun Lee appeared as LC Rental’s representative. Attorneys Janet H. King and Daniel Guidotti<sup>1</sup> appeared on behalf of the Defendant, China Yanbian Foreign Economic & Technical Cooperation Corporation (“China Yanbian”).

Based on a review of the filings, oral arguments, and applicable law, the Court makes the following order.

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<sup>1</sup> Mr. Guidotti appeared for attorney Colin M. Thompson.

1 **II. BACKGROUND**

2 This case involves a dispute regarding rental payments for commercial retail space in the LC  
3 Building in Garapan. China Yanbian owns and operates two restaurants, Seoul One Restaurant and  
4 Shinsen Restaurant in the LC Building. Byung Deuk Lee is the president of China Yanbian. Byung  
5 Deuk Lee’s son, Sang Hun Lee, is the organizing member of LC Rental Company. Sang Hun Lee  
6 was the manager of the two restaurants until March or April of 2016, when Byung Deuk Lee  
7 removed him from China Yanbian. Sang Hun Lee Decl. at 3.

8 The summons and complaint in this case were filed with the Court on July 18, 2016. On  
9 July 21, 2016, William Barrineau delivered a copy of the complaint and summons to Wu Shun Yu.  
10 Proof of Service at 1. Mr. Barrineau’s proof of service listed Wu Shun Yu as a “general manager.”  
11 *Id.* Wu Shun Yu describes herself as a waitress at Seoul One Restaurant, while Byung Deuk Lee  
12 describes her as a cook. Wu Shun Yu Decl. at 1; Byung Deuk Lee Decl. at 2. Sang Hun Lee, on the  
13 other hand, claims that Wu Shun Yu took over his management duties when he was ousted from  
14 China Yanbian in March or April of 2016. Sang Hun Lee Decl. at 3.

15 According to Wu Shun Yu, she was given papers during the night shift on July 21, 2016 by  
16 Sang Hun Lee and a “short American man with white hair,” presumably Mr. Barrineau. Wu Shun  
17 Yu Decl. at 2. No additional attempts at service were made, and no documents were posted at the  
18 premises. Wu Shun Yu does not speak or read English. Wu Shun Yu Decl. at 1.

19 In July, 2016, Byung Deuk Lee was off-island in South Korea receiving medical treatment  
20 for a dog bite. Byung Deuk Lee Decl. at 2. When Byung Deuk Lee returned from South Korea on  
21 or about July 25, 2016, Wu Shun Yu gave him a copy of the documents, but both Byung Deuk Lee  
22 and Wu Shun Yu stated in their declarations that they did not know what the documents were.  
23 Byung Deuk Lee Decl. at 2; Wu Shun Yu Decl. at 2. Since Byung Deuk Lee speaks limited  
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1 English, he passed the documents to his interpreter, Uta Kwon. Byung Deuk Lee took no action.  
2 Byung Deuk Lee at 2.

3 On July 21, 2016, Attorney Mark Hanson, counsel for LC Rental, emailed Attorney Janet  
4 King a copy of the complaint. Ms. King initially indicated that she would be China Yanbian's  
5 lawyer but asked for additional time to respond since she would be off-island until August 5, 2016.  
6 Exhibit 1 to Hanson Decl. On July 22, Mr. Hanson refused Ms. King's requested extension. *Id.* Ms.  
7 King then notified Mr. Hanson that she would not be representing China Yanbian in the matter and  
8 that China Yanbian would be looking for an alternate attorney. *Id.*

9 LC Rental filed its Motion for Default Judgment on August 12, 2016, and the Court set it for  
10 a hearing on September 20, 2016. LC Rental subsequently filed a Motion to Shorten Time. The  
11 Motion for Default Judgment ultimately came before the Court on August 26, 2016, and the Court  
12 entered a default judgment that same day.

13 China Yanbian filed Defendant's Motion to Set Aside the Default Judgment Pursuant to  
14 Com. R. Civ. P. 60(b) on September 22, 2016. LC Rental filed its opposition on September 30,  
15 2016. China Yanbian did not file a reply. The Court heard arguments from the parties on September  
16 30, 2016.

17 At the September 30, 2016 hearing, the Court ordered the parties to submit proposed orders.  
18 LC Rental filed its Proposed Order Denying Motion to Set Aside Default Judgment on October 11,  
19 2016. China Yanbian also filed its Proposed Findings of Fact and Conclusions of Law on October  
20 11, 2016.

### 21 **III. LEGAL STANDARD**

22 China Yanbian brings the present motion under Rule 60(b) of the Commonwealth Rules of  
23 Civil Procedure. Rule 60(b) provides:

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1 On motion and upon such terms as are just, the court may relieve a party or a party's  
2 legal representative from a final judgment, order, or proceeding for the following  
3 reasons: (1) mistake, inadvertence, surprise, or excusable neglect... (4) the judgment  
4 is void.

5 NMI R. Civ. P. 60(b).

6 Typically, to set aside a default judgment under Rule 60(b), the moving party must  
7 establish: “(1) that the plaintiff will not be prejudiced; (2) the existence of a meritorious defense;  
8 and (3) that the default was not the result of the defendant’s culpable conduct.” *Roberto v. De Leon*  
9 *Guerrero*, 4 NMI 295, 297 (1995). Although this test applies generally to Rule 60(b) motions,  
10 motions made specifically under Rule 60(b)(4) alleging that a judgment is void do not require this  
11 inquiry. *Muna v. Commonwealth*, Civ. No. 07-0216 (NMI Super. Ct. Nov. 12, 2009) (Order at 4-5).

12 When a judgment is void, the Court has no discretion in determining whether to set the  
13 judgment aside: “Either a judgment is void or it is valid.” *Estate of Ogumoro v. Han Yoon Ko*, 2011  
14 MP 11 ¶ 17 (quoting *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*,  
15 614 F.2d 1247, 1256 (9th Cir. 1980). When a party makes a motion under Rule 60(b)(4), “there is  
16 no question of discretion on the part of the court.” *Reyes v. Reyes*, 2001 MP 13 ¶ 24 (citing  
17 *Chambers v. Armontrout*, 16 F.3d 257, 260). If a judgment is void due to lack of service, the Court  
18 has no jurisdiction over the defendant. *Direct Mail Specialists, Inc. v. Eclat Computerized Techs.,*  
19 *Inc.*, 840 F.2d 685, 688 (9th Cir. 1988).<sup>2</sup> Since the Court lacks discretion when a judgment is void,  
20 “the relative culpability of the moving defendant’s conduct in the matter is irrelevant.” *Muna*, Civ.  
21 No. 07-0216 (Order at 4-5).

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24 <sup>2</sup> Because the Commonwealth Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal cases interpreting the counterpart Federal Rules are helpful in interpreting the Commonwealth Rules of Civil Procedure. *Ada v. Sadhwani’s Inc.*, 3 NMI 303 (1992).

1 **IV. DISCUSSION**

2 China Yanbian seeks relief from the default judgment on two grounds: first, that the  
3 judgment is void under Rule 60(b)(4), and second, that the judgment must be set aside under Rule  
4 60(b)(1) due to China Yanbian’s excusable neglect. The Court will first address whether the default  
5 judgment is void under Rule 60(b)(4) before turning to whether the judgment must be set aside  
6 under Rule 60(b)(1).

7 **A. Whether the Judgment is Void**

8 Rule 60(b)(4) allows the Court to relieve a party from a void judgment. NMI R. Civ. P.  
9 60(b)(4). As such, the Court must first decide whether service was proper under Rule 4(h) of the  
10 Commonwealth Rules of Civil Procedure.

11 **1. Service Under Rule 4(h)**

12 China Yanbian argues that the judgment must be set aside pursuant to Rule 60(b)(4) since  
13 China Yanbian was not properly served with the summons and complaint under Rule 4(h) of the  
14 Commonwealth Rules of Civil Procedure.<sup>3</sup> If China Yanbian was not properly served, the Court  
15 does not have jurisdiction over it, since the Court “does not have jurisdiction over a defendant  
16 unless the defendant has been served properly under [Rule 4].” *Direct Mail Specialists v. Eclat*  
17 *Computerized Techs., Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (citing *Jackson v.*  
18 *Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982)). Although Rule 4 “is a flexible rule that should be  
19 liberally construed so long as a party receives sufficient notice of the complaint,” notice alone is  
20 insufficient. *Id.* (quoting *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d  
21 1371, 1382 (9th Cir. 1984)). “Without substantial compliance with Rule 4, ‘neither actual notice nor  
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23 <sup>3</sup> The Court notes that the attorney for LC Rental conceded at the motion hearing that they were not proceeding under  
24 the theory that service had occurred pursuant to Rule 4(h). Rather, the attorney indicated that they were arguing service  
pursuant to the Holdover Tenancy Act, 2 CMC § 40201 *et seq.*

1 simply naming the defendant in the complaint will provide personal jurisdiction.” *Id.* (quoting  
2 *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986)).

3 Rule 4(h) of the Commonwealth Rules of Civil Procedure covers service of corporations  
4 and associations. Under Rule 4(h)(1), a domestic corporation may be served:

5 [I]n a jurisdiction of the United States (including the Commonwealth) in the manner  
6 prescribed for individuals by subdivision (e)(1), or by delivering a copy of the  
7 summons and of the complaint to an *officer, a managing or general agent, or to any  
other agent authorized by statute* and the statute so requires, by also mailing a copy to  
the defendant.

8 NMI R. Civ. P. 4(h)(1) (emphasis added). Service may be made “upon a representative so  
9 integrated with the organization that he will know what to do with the papers. Generally, service is  
10 sufficient when made upon an individual who stands in such a position as to render it fair,  
11 reasonable and just to imply the authority on his part to receive service.” *Direct Mail*, 840 F.2d at  
12 688 (quoting *Top Form Mills, Inc. v. Sociedad Nacional Industria Aplicaciones Viscosa*, 428  
13 F.Supp. 1237, 1251 (S.D.N.Y. 1977)). Determining whether an individual is a “‘managing or  
14 general agent’ depends on a factual analysis of that person’s authority within the organization.” *Id.*  
15 (citation omitted).

16 The key issue is whether Wu Shun Yu is an individual who is able to properly receive  
17 service for China Yanbian. On July 21, 2016, Mr. Barrineau delivered the complaint and summons  
18 to Wu Shun Yu at the Seoul One Restaurant in Garapan. Proof of Service. On the Proof of Service,  
19 Mr. Barrineau described Wu Shun Yu as the “general manager” of China Yanbian. *Id.*

20 Wu Shun Yu describes herself as a waitress, and stated in her declaration that she does not  
21 speak or understand English. Wu Shun Yu Decl. at 1-2. Byung Deuk Lee describes Wu Shun Yu as  
22 a cook for China Yanbian. On July 21, 2016, Wu Shun Yu says she was given a document during  
23 her night shift at the restaurant by “Sang Hun Lee and a short American man with white hair,” and  
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1 that Sang Hun Lee asked her to sign the document and give it to Byung Deuk Lee. Wu Shun Yu  
2 Decl. at 2.

3 In his declaration, Sang Hun Lee states that Wu Shun Yu is the manager of both the Seoul  
4 One and Shinsen Sushi Restaurants. Sang Hun Lee Decl. at 3. According to Sang Hun Lee, he was  
5 the manager of the restaurants up until his father, Byung Deuk Lee, removed him as manager in  
6 March or April of 2016. *Id.* According to Sang Hun Lee, after he was removed from China  
7 Yanbian, Wu Shun Yu took over a substantial list of management duties. *Id.* at 3-4.

8 Sang Hun Lee, Wu Shun Yu, and Byung Deuk Lee all have different descriptions of Wu  
9 Shun Yu's duties within China Yanbian. In resolving this factual conflict, the Court notes that Sang  
10 Hun Lee is no longer part of China Yanbian, and thus any of his assumptions regarding Wu Shun  
11 Yu's duties are those of a person outside of the company who would not be privy to day to day  
12 information about the company. Wu Shun Yu and Byung Deuk Lee, on the other hand, are still  
13 currently working within China Yanbian's business structure. Thus, the Court finds Wu Shun Yu  
14 and Byung Deuk Lee's characterization of Wu Shun Yu's position within the organization to be  
15 credible. Sang Hun Lee by his own admission was ousted from the organization by his father.  
16 Although Sang Hun Lee claims that Wu Shun Yu is heavily integrated in China Yanbian's business  
17 affairs, Sang Hun Lee's statements about Wu Shun Yu appear to be speculation rather than fact.  
18 Thus, the Court will analyze whether Wu Shun Yu, as a waitress/cook, is the proper person to  
19 receive service for China Yanbian.

20 In *Direct Mail Specialists*, a receptionist was found to be a proper individual to receive  
21 service in a small company. 840 F.2d at 688-689. In *Direct Mail Specialists*, the receptionist  
22 "appears to have been the only employee in the office when the process server arrived,  
23 demonstrating that more than minimal responsibility was assigned to her," considering the small  
24 size of the company. *Id.* In *Direct Mail Specialists*, a manager did eventually receive the

1 documents, and the company’s attorney “complained about the service of process the day after it  
2 was made.” *Id.*

3 In *Top Form Mills*, a secretary in a two-person office was found to be a proper individual to  
4 receive service. 428 F.Supp. at 1251-1252. Since the secretary in *Top Form Mills* was essentially  
5 the manager’s right hand man—she did a wide range of duties related to managing the office,  
6 including but not limited to endorsing checks and writing letters on behalf of the office. *Id.* The *Top*  
7 *Form Mills* court noted that “[i]n view of Ms. Curry’s responsibilities and the indications that she  
8 and [her supervisor] alone did much, if not all, of the business activities done for [the company], it  
9 may be properly inferred that she was, in practical effect, if not in formal title, an assistant manager  
10 of the affairs of [the company] and not a mere clerical employee.” *Id.*

11 In *Union Abestos & Rubber Co. v. Evans Prods. Co.*, service on a secretary was acceptable  
12 where the manager was out of the office “75 to 80 percent of the time” and the secretary  
13 immediately told the manager about the served documents. 328 F.2d 949, 953 (7th Cir. 1964).

14 Despite this, a receptionist or secretary in a small company is distinguishable from a  
15 waitress/cook. A receptionist or secretary is the gatekeeper of an office and as a result handles a  
16 great deal of paperwork on behalf of the office, including forwarding incoming communication to  
17 the appropriate managers. In a small office with limited staff, a secretary or receptionist’s duties  
18 include a fair amount of office administration and handling of documents. Although Byung Deuk  
19 Lee was off-island receiving medical care at the time of the attempted service, there is no  
20 significant credible evidence that Wu Shun Yu had taken on managerial duties as extensive as that  
21 of the receptionist in *Direct Mail Specialists* or the secretary in *Top Form Mills*.



1 The Court notes that Wu Shun Yu did eventually give Byung Deuk Lee the documents on  
2 July 25, 2016.<sup>4</sup> Byung Deuk Lee Decl. at 2; Wu Shun Yu Decl. at 2. Despite this, Wu Shun Yu, a  
3 waitress/cook, is not the proper person to receive service on behalf of China Yanbian. Notice is not  
4 the same thing as proper service pursuant to the Commonwealth Rules of Civil Procedure.

5 “[A]ctual receipt of process by the correct person may be a factor in finding valid process  
6 when there are other factors that make process fair.” *Direct Mail Specialists*, 840 F.2d at 688 (citing  
7 *Top Form Mills*, 428 F. Supp. at 1251; *Nichols v. Surgitool, Inc.*, 419 F.Supp. 58, 63 (W.D.N.Y.  
8 1976)). Those factors are not present here. Service may be made “upon a representative so  
9 integrated with the organization that he will know what to do with the papers.” *Direct Mail*  
10 *Specialists*, 840 F.2d at 688 (citation omitted). Further, “service is sufficient when made upon an  
11 individual who stands in such a position as to render it fair, reasonable and just to imply the  
12 authority on his part to receive service.” *Direct Mail Specialists*, 840 F.2d at 688 (citation omitted).  
13 Based on the facts before the Court, there is nothing on the record indicating that Wu Shun Yu was  
14 “so integrated with the organization” that she would know what to do with legal documents. *Direct*  
15 *Mail Specialists*, 840 F.2d at 688 (citation omitted).

16 Wu Shun Yu, in her employment as a waitress/cook, has not assumed duties as extensive as  
17 the receptionist in *Direct Mail Specialists* or the secretary in *Top Form Mills*. Thus, Wu Shun Yu  
18 does not occupy a position in China Yanbian that would make it “fair, reasonable and just to imply  
19 the authority on [her] part to receive service.” *Direct Mail Specialists*, 840 F.2d at 688 (citation  
20 omitted).

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23 <sup>4</sup> The Court distinguishes the attempted service of process by Mr. Barrineau from Wu Shun Yu giving the documents to  
24 Byung Deuk Lee. Wu Shun Yu giving the papers to Byung Deuk Lee is not service of process. At best, Wu Shun Yu’s  
delivery of the documents is notice, but notice alone is not service. Wu Shun Yu was not an agent of LC Rental for the  
purpose of service of process.

1           Based on these facts, China Yanbian was not properly served pursuant to Rule 4(h) of the  
2 Commonwealth Rules of Civil Procedure since Wu Shun Yu in her capacity as a waitress/cook does  
3 not have sufficient “authority within the organization” to be considered a “managing or general  
4 agent.” *Direct Mail Specialists*, 840 F.2d at 688.

## 5                           **2. Service Under the Holdover Tenancy Act**

6           LC Rental argues that China Yanbian was properly served pursuant to the Holdover  
7 Tenancy Act, 2 CMC § 40201 *et seq.* Section 40207 of the Holdover Tenancy Act governs service  
8 pursuant to the act.

9           Under the Holdover Tenancy Act, “[t]he summons and complaint shall be served as  
10 provided by the rules of the court.” 2 CMC § 40207(a). As described above, China Yanbian was not  
11 properly served pursuant to Rule 4(h) of the Commonwealth Rules of Civil Procedure. Despite this,  
12 the Holdover Tenancy Act provides for alternate service. 2 CMC § 40207(c).

13           Section 40207(c) provides:

14           *After at least two attempts to obtain service as provided by the rules of the court, if the*  
15 *defendant cannot be found in the CNMI; the officer serving process shall serve the*  
16 *same by attaching a copy of the summons and complaint to some part of the premises*  
17 *involved in the proceeding (such as a wall of any store, shop, dwelling, or other*  
18 *building, and if none then to some permanent object thereon such as a tree or fence).*  
19 *The minimum time between the two attempts to obtain service shall be six hours.*

20           2 CMC § 40207(c) (emphasis added). Specifically, Section 40407(c) requires two attempts at  
21 service pursuant to the Commonwealth Rules of Civil Procedure, and these attempts must be at  
22 least six hours apart. *Id.* “[I]f the defendant cannot be found in the CNMI,” then the landlord may  
23 attempt service by attaching the summons and complaint to the premises. *Id.*

24           Here, only one attempt at service was made on July 21, 2016. On July 21, 2016, the  
documents were merely given to Wu Shun Yu and were not posted at the premises. LC Rental  
argues that they did not need to make a second attempt at service since “a second attempt to serve

1 Byung six hours later, pursuant to statute, would be futile.” Opp. at 4. Regardless, the statute  
2 requires that a second attempt at service occur *at least* six hours later. 2 CMC § 40207(c). The  
3 Holdover Tenancy Act does not allow parties to short circuit its service provisions if a second  
4 attempt at service would be “futile.” The law requires at least two attempts at service prior to  
5 posting the summons and complaint, and since this was not done here, the requirements of Section  
6 § 40207(c) are not met.

7 Further, if service is made by attaching the summons to the premises pursuant to Section  
8 40207(c), the Holdover Tenancy Act requires that the plaintiff take several additional steps pursuant  
9 to Section 40207(d).<sup>5</sup> After serving the summons and complaint by posting the documents at the  
10 premises, the landlord must then provide two prestamped envelopes to the Clerk of Court, so that  
11 the documents can be mailed to the tenant. 2 CMC § 40207(d). *None* of these additional steps were  
12 taken. LC Rental simply attempted service one time at the premises and did not actually follow  
13 through with the rest of the steps required by the Holdover Tenancy Act. Thus, the additional  
14 requirements of Section 40207(d) are also not met.

15 Accordingly, China Yanbian was not properly served pursuant to the Holdover Tenancy  
16 Act. Since the China Yanbian was not properly served, the default judgment is void. Therefore, the

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<sup>5</sup> Section 40207(d) provides:

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If the landlord causes, or anticipates causing, a defendant to be served with a summons and complaint solely by attaching them to some conspicuous part of the premises involved in the proceeding, the landlord shall provide the clerk of the court with two additional copies of the complaint and two prestamped envelopes addressed to the defendant. One envelope shall be addressed to such address or location as has been designated by the tenant for receipt of notice in a written lease or other agreement or, if none has been designated, to the residential mailing address of the tenant, if known. The second envelope shall be addressed to the last known business address of the tenant. The clerk of the court shall immediately mail the copies of the summons and complaint by first class mail, note the fact of mailing in the docket, and file a certificate in the court file of the fact and date of mailing. Service shall be effective on the date of posting or mailing, whichever occurs later; and at least five working days from the date of service must have elapsed before a judgment for final removal of the defendant may be entered.

2 CMC § 40207(d).

1 Court has no jurisdiction over the Defendant. *Direct Mail Specialists*, 840 F.2d at 688. Thus, the  
2 Court need not reach the issue of excusable neglect pursuant to Rule 60(b)(1).

3 **V. CONCLUSION**

4 Accordingly, China Yanbian’s motion to set aside default judgment is **GRANTED**.

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6 **IT IS SO ORDERED** this 27<sup>th</sup> day of October, 2016.

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9 /s/ \_\_\_\_\_  
10 JOSEPH N. CAMACHO  
11 Associate Judge  
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