IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BUZZ PHOTOS, INC., *et al.* *Plaintiffs,* v. THE PEOPLE'S REPUBLIC OF CHINA, *et al.* *Defendants*.	Civil Action No. 3:20-cv-00656-K-BN

PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF SEPTEMBER 24, 2020

Plaintiffs Buzz Photos Inc. ("Buzz Photos"), Freedom Watch, Inc. ("Freedom Watch"), Larry Klayman ("Klayman") and Members of the Class and Subclass ("Members"), hereby respond to this Honorable Court's Order of September 24, 2020 and respectfully submit as follows:

I. INTRODUCTION.

Earlier this year, Plaintiffs filed suit against People's Republic of China ("PRC"), The People's Liberation Army ("People's Army"), the Wuhan Institute of Virology ("the Institute"), Shi Zhengli ("Zhengli"), and Major General Chen Wei ("MG Chen Wei") for the illegal engineering, manufacture and release of the deadly COVID-19 virus, which experts in this case will testify under oath, based on empirical and other compelling evidence, was designed to be a bioweapon, banned by international treaty, of which the PRC is a signatory. Thus, there is no immunity from suit.

This case is of extreme importance, particularly since our own federal government has

not made any effort to seek redress for American citizen victims for the massive damage this bioweapon has caused. It thus falls to the American people, and in this case the citizenry of Texas, to take legal matters into their own hands, to seek compensation for the severe damage to their health, financial welfare and emotional well-being.

Plaintiff Buzz Photos and scores of other businesses have been shut down and forced to file for bankruptcy because of what amounts to Defendants' illegal attack on Texas and the nation as a whole. And now, Defendants have flouted court process, lawfully implemented by the very clerk of this Court. Defendants have deliberately and defiantly thumbed their noses at American law by brazenly and defiantly refusing to accept service on two (2) separate occasions, even writing "we did not sign for this", knowing that signing it would constitute proper service. Defendants are not stupid, now having an economy greater than even our own, thanks to the massive damage they have done.

Since April 21, 2020, Plaintiffs have attempted to effectuate service properly through the Foreign Sovereign Immunities Act ("FSIA"). Because of Defendants' arrogant and lawless refusal to receive either Federal Express or DHL packages containing the Complaint, summonses and notice of suit (together with a Chinese translation of each) – again sent by the clerk under the authority of this Court – Plaintiffs filed a Motion for Alternative Service [Dkt. # 29]. On September 24, 2020, this Court ordered Plaintiffs to file a "supplemental brief to their motion for alternative service to explain, in [our] view, which provision of the FSIA – Section 1608(a) or Section 1608(b) – applies to each defendant." [Dkt. #34 at p. 4].

II. THE LAW.

Section 1608(a) of the FSIA states that "[s]ervice in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:"

> **(1)** by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
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> **(2)** if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
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> **(3)** if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
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> **(4)** if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.
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> As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

28 U.S.C. § 1608(a).

Section 1608(b) states that "[s]ervice in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:"

> **(1)** by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
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> **(2)** if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

> **(3)**if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—
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> > **(A)** as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
> >
> > **(B)** by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
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> > **(C)** as directed by order of the court consistent with the law of the place where service is to be made.

III. LEGAL DISCUSSION.

The FSIA defines the circumstances under which jurisdiction may be asserted over foreign sovereigns in the United States. The FSIA, as amended, covers actions brought against foreign states, their political subdivisions and agencies or instrumentalities of the foreign state. *See Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 434-35 (1989). It also provides subject matter jurisdiction in cases of waiver, expropriation in violation of international law, noncommercial torts occurring in the United States, disputes over rights in real property and estates located in the United States, and states designated by the U.S. Department of State as terrorist states.

Regarding the terms "political subdivision" of a foreign state and "agency or instrumentality" of the foreign state, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") reasoned:

> [u]nder 28 U.S.C. § 1603(a), the term "political subdivision" includes all governmental units beneath the central government. An "agency or instrumentality" of a foreign state, on the other hand, is defined as any organ or political subdivision of a foreign state which is a separate legal person or entity. 28 U.S.C. § 1603(b). Whether an entity is a "separate legal person" depends upon the nature of its "core functions" – governmental vs. commercial – and whether the entity is treated as a separate legal entity under the laws of the foreign state.

Magness v. Russian Fed'n, 247 F.3d 609, n.7 (5th Cir. 2001) (citing *Transaero*, *Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 683 (S.D.N.Y. 1996)).

A. Defendants PRC and the People's Army.

Plaintiffs agree with the Court that Defendant PRC is, of course, the foreign state. Since the provisions for service of process upon a foreign state or political subdivision of a foreign state are outlined in Section 1608(a), Defendant PRC must be served pursuant to 28 U.S.C. § 1608(a).

Similarly, while Defendant the People's Army is not the state itself, it must be considered a political subdivision of the foreign state and not an agency or instrumentality. In *Transaero, Inc*., a case that this Honorable Court cited in its Order, the dispute was whether the Bolivian Air Force counts as a "foreign state" or rather as an "agency or instrumentality" under 28 U.S.C. § 1608. That, in turn, depended upon whether the Bolivian Air Force was a "separate legal person, corporate or otherwise," under section 1603(b)(1). There, the court concluded that a nation's air force is a "foreign state or political subdivision" rather than an "agency or instrumentality" of the nation for purposes of the service of process provisions of the FSIA. *Transaero*, 30 F.3d at 149-50.

Similarly, in *Roeder, et al. v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004), the court held that, because "the conduct of foreign affairs is an important and 'indispensable' governmental function," Iran's Foreign Ministry "must be treated as the state of Iran itself rather than as its agent." The court explained:

> We adopted a categorical approach: if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state. A nation's armed forces are clearly on the governmental side. *Id*. For similar reasons, the Ministry of Foreign

> Affairs must be treated as the state of Iran itself rather than as its agent. The conduct of foreign affairs is an important and "indispensible" governmental function.

Roeder, 333 F.3d at 234-35 (citation omitted). As the court in *Transaero* ruled, " . . . it is hard to see what could count as the 'foreign state' if its armed forces do not." *Transaero*, 30 F.3d at 153. "We hold that the armed forces of a foreign sovereign are the "foreign state" and must be served under section 1608(a)." *Id*. Thus, like Defendant PRC, Defendant the People's Army must be served pursuant to 28 U.S.C. 1608(a).

Both Defendant PRC and Defendant the People's Army can be served "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). Plaintiffs attempted one means of service pursuant to section 1608(a)(3) twice already, and the communist Defendants flouted this Court's authority to have the clerk serve them. Plaintiffs respectfully request that, consistent with FSIA law, this Court order the clerk of the court to dispatch the documents to the U.S. Ambassador, Terry Branstad ("Ambassador Branstad"), located in the U.S. Embassy in Beijing, and have his security guard, U.S. military police or other personnel hand-carry it to the Ministry of Foreign Affairs, signed receipt required. The clerk would still be dispatching the materials to Defendant PRC and Defendant the People's Army after verifying each package contains the Complaint, notice of suit and summonses, together with a translation into the official language of China. Considering the defiance of Defendant PRC and Defendant the People's Army, dispatching it to Ambassador Branstad and requesting that he deliver it to Defendant PRC and Defendant the People's Army, signature required, can be easily implemented under subsection 28 U.S.C. §

1608(a)(3).

B. Defendant the Institute.

Unlike the state defendants, Defendant the Institute is an agency or instrumentality of the foreign state of Defendant PRC because its "core function" is not governmental in nature and it is treated as a separate legal entity. Thus, it must be served pursuant to 28 U.S.C. § 1608(b).

Importantly, several circuits, including the Fifth Circuit, ruled that strict adherence to the FSIA is *not* mandatory when serving an agency or instrumentality of a foreign state pursuant to 28 U.S.C. § 1608(b). In *Magness*, for example, when discussing serving the Russian Diamond Fund, an instrumentality of Russia, the court ruled: "we are convinced that substantial compliance with the provisions of service upon an agency or instrumentality of a foreign state – that is, service that gives actual notice of the suit and the consequences thereof to the proper individuals within the agency or instrumentality – is sufficient to effectuate service under section 1608(b)." *Magness*, 247 F.3d at 616. The Fifth Circuit reasoned that most significant to the determination that actual notice is sufficient for serving an agency or instrumentality "is the express statement in section 1608(b)(3) that delivery under that subsection is authorized 'if reasonably calculated to give actual notice.' This language reflects the fact that 'Congress was there concerned with substance rather than form." *Id*. (quoting *Transaero*, 30 F.3d at 154). The *Magness* court even quotes *Transaero*, which noted that "the authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the [defendant]. In authorizing substantial compliance under section 1608(b), the court observed that foreign agencies and instrumentalities, which are 'typically international commercial enterprises, often possess a sophisticated knowledge of the United States legal system that other organs of foreign governments may lack." *Id*. at 617 (internal citations omitted).

Similarly, in *Janvey v. Libyan Inv. Auth. & Libyan Foreign Inv. Co*., No. 3:11-cv-1177-N, 2011 WL 13299660, at *5 (N.D. Tex. June 16, 2011), when analyzing service of process pursuant to 28 U.S.C. § 1608(b) for instrumentalities of the foreign state of Libya, the court held that "the touchstone of service under section 1608(b) is whether the utilized modes of service are 'reasonably calculated to give actual notice.'" *Janvey*, 2011 WL 13299660, at *14 (quoting 28 U.S.C. § 1608(b)). There, the Receiver (the plaintiff) proposed to effect service via email of facsimile pursuant to section 1608(b)(3)(C) because he averred that he had been unable to locate any officer or agent of the Libyan defendants in the United States. *Id*. at *13. After careful analysis, the court found that the Receiver's proposed email and fax service was reasonably calculated to give the Libyan defendants actual notice. *Id*. at *14.[1]

Moreover, in *Janvey*, the court directed the Receiver to attempt service through the Embassy as an alternative method of contacting the Libyan defendants because "a foreign embassy effectively, and as a matter of law, is a foreign state within the United States." *Id*. at * 15; *see, e.g., Int'l Road Federation v. Embassy of the Democratic Republic of the Congo*, 131 F. Supp. 2d 248, 250 (D.D.C. 2001).

[1] *Cf. Harris Corp.*, 691 F.2d 1344 (upholding service via telex); *Int'l Schs. Serv. v. Gov't of Iran*, 505 F. Supp. 178, 179 (D.N.J. 1981) (authorizing service on government-controlled Iranian corporations by telex, reasoning that "[m]odern technology, with communications satellites and other sophisticated devices, ought not to be deprived the opportunity to attempt effective service, if it can"); *New England Merch. Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73, 78-80 & n.2 (S.D.N.Y. 1980) (holding that "a substituted form of service is not precluded under the [Act]," authorizing service via telex under section 1608(b), and noting that "nothing contained in the Act restrict[s] the court's otherwise unfettered authority under Rule 4 . . . of the Federal Rules of Civil Procedure to fashion a mode of service upon those not found within the United States").

C. Defendants Zhengli and MG Chen Wei.

Upon review of binding case law concerning FSIA and individual defendants, Plaintiffs came upon *Samatar v. Yousef*. In 2010, the Supreme Court decided unanimously in *Samatar v. Yousef* that the FSIA does not apply against foreign officials. This ruling makes certain that officials of foreign governments, whether present or former, are not entitled to invoke the FSIA as a shield. *Samatar v. Yousef*, 130 S. Ct. 2278 (2010).

There, a terrorist in that case appealed a U.S. Court of Appeals for the Fourth Circuit's decision to the Supreme Court, arguing that the FSIA should be read to provide him immunity on the basis that the examples outlined under the definitions of "foreign state" and "agency and instrumentality" are non-exhaustive and merely illustrative. The Supreme Court disagreed. Justice Stevens found that while individual foreign officials could "literally" fit the definition of an "agency or instrumentality," the textual clues cut against such a broad construction. *Id*. at 2286. Importantly, the Supreme Court also emphasized the purpose of FSIA as evidence that Congress did not intend to encompass foreign officials within the definition of a foreign state.

Since Defendants Zhengli and MG Chen Wei are individuals and not considered to be the state itself, neither defendant is protected by FSIA. Instead, Plaintiffs can serve these two Defendants pursuant to Federal Rule of Civil Procedure ("FRCP") 4(f), which governs service of process on individuals in foreign countries.

FRCP 4(f) establishes three (3) mechanisms for establishing service abroad: 1) "by any internationally agreed means of service that is reasonably calculated to give notice, such as those provided by the Hague Convention," Fed. R. Civ. P. 4(f)(1); 2) if there is no internationally agreed means, then by following the law of the country where the defendant is located, following directions given by an official in the foreign country where the defendant is located, hand

delivering a copy of the summons and complaint to the defendant (unless the defendant is an organization), or mailing the summons and complaint with a request for a signed receipt, Fed. R. Civ. P. 4(f)(2), 4(h)(2); or 3) by "other means not prohibited by international agreement, as the court orders," *see* Fed. R. Civ. P. 4(f)(3); *see also Rio Props., Inc. v. Rio Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002) (quoting *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950)).

Importantly, there is no hierarchy among these three means of service. A plaintiff need not attempt service under Rule 4(f)(1) or Rule 4(f)(2) before the Court authorizes service on an international defendant under Rule 4(f)(3). *Nabulsi v. Nahyan*, 2007 U.S. Dist. LEXIS 75077 (S.D. Tex. Oct. 9, 2007) (". . . Rule 4(f) does not denote any hierarchy or preference for one method of service over another, and 'service of process under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief' [but instead] . . . merely one means among several which enables service of process on an international defendant'") (quoting *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002)).

When a court exercises its authority under Rule 4(f)(3), it may authorize any means of service that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). As such, this Court may allow Plaintiffs to serve Defendants Zhengli and MG Chen Wei alternatively, pursuant to FRCP Rule 4(f)(3).

D. The Service Solution.

As analyzed fully above, Plaintiffs respectfully request that this Court grant their request to serve Defendant Institute, Defendant Zhengli and Defendant MG Chen Wei alternatively.

Specifically, as the Texas court in *Janvey v. Libyan Inv. Auth. & Libyan Foreign Inv. Co*., already authorized, Plaintiffs request to serve these three Defendants by sending a copy of the Complaint, notice of suit and summonses, together with a translation of each, to the Embassy of the People's Republic of China in Washington, D.C.

Moreover, Plaintiffs request that this Court have the clerk of the Court dispatch the documents to Ambassador Branstad, located in the U.S. Embassy in Beijing, with a request to have his security guard, U.S. military police or other personnel hand-carry it to the Ministry of Foreign Affairs, signed receipt required.

IV. CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their request to serve Defendants the Institute, Zhengli and MG Chen Wei alternatively, as the Institute is an agency or instrumentality of Defendant PRC in compliance with 28 U.S.C. § 1608(b), as Defendants Zhengli and MG Chen Wei are individuals and are not protected by FSIA pursuant to Supreme Court precedent, and this alternative service would be "reasonably calculated to provide notice and an opportunity to respond." Plaintiffs also request that this Court allow the Clerk of the Court to dispatch the materials to Ambassador Branstad with a request, pursuant to 28 U.S.C. § 1608(a)(3), to send his official representative to Defendant PRC's Ministry of Foreign Affairs to have it sign for the Complaint, notice of suit and summonses. Again, 28 U.S.C. § 1608(a)(3) provides that service is effectuated "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

In sum, the Court has the power to further service on the Defendants with alternative means consistent with the law. Given the stakes involved, where these lawless Defendants, whose evil actions have so harmed ordinary hard-working Texans and citizens in the other forty-nine (49) states, time is of the essence, as the damage caused either intentionally or accidentally through the release of the internationally banned COVID-19 bioweapon, mounts exponentially with each passing day.

Dated: October 15, 2020

Respectfully submitted,

/s/ Larry Klayman

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