

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 08-MD-01916-MARRA**

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC.  
ALIEN TORT STATUTE AND SHAREHOLDER  
DERIVATIVE LITIGATION

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**This Document Relates to:**

ATS ACTIONS

10-60573-CIV-MARRA (*Montes* Florida)

17-80535-CIV-MARRA (*Montes* Ohio)

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**MOTION TO APPROVE NOTICE**

Boies Schiller Flexner LLP (“BSF”), by and through the undersigned attorney, files this Motion to Approve Notice in preparation for filing a future Motion to Withdraw as Counsel for the *Montes* Plaintiffs. BSF and Searcy Denney Scarola Barnhart & Shipley, P.A (“Searcy Denney”) both represent the *Montes* Plaintiffs with Searcy Denney serving as lead counsel.

On May 9, 2018, BSF moved to withdraw as counsel of record for the *Montes* Plaintiffs (DE 1910), and on September 13, 2018, this Court denied BSF’s motion to withdraw, citing certain deficiencies with part of the notice process (DE 2101).

BSF has renewed its notice efforts to inform the *Montes* Plaintiffs of its intent to withdraw and solicit any potential objections through various conventional channels of notice, including personal phone calls and email notices. While BSF has reached over 545 plaintiffs to inform them of its intent to move to withdraw as counsel, providing them with an opportunity to object (and receiving zero objections in response), BSF seeks to employ various “alternative” modes of notice, in an abundance of caution, to ensure it reaches as many hard-to-reach client plaintiffs as possible

with its notice efforts. Accordingly, BSF moves for the Court to consider its alternative modes of notice and issue an order approving such means of notice as sufficient for satisfying the notice requirements to move for withdrawal as counsel of record for the *Montes* Plaintiffs.

### **RELEVANT BACKGROUND**

Colombian-based counsel, Attorney Dr. Héli Abel Torrado Torrado (“Dr. Torrado”) investigated the *Montes* claimants and executed the engagement agreements with them, whereby each plaintiff granted power of attorney to Dr. Torrado. On or about January 5, 2018, Dr. Torrado, under power of attorney, hired and retained Searcy Denney to represent the *Montes* Plaintiffs in the present matter.

As the Court is aware, on May 9, 2018, BSF moved to withdraw as counsel of record for the *Montes* Plaintiffs. May 9, 2018, Motion to Withdraw (DE 1910). On September 13, 2018, this Court denied BSF’s motion to withdraw, citing certain deficiencies with part of the notice process. *See* September 13, 2018, Omnibus Order on Motions to Withdraw (DE 2101). Specifically, this Court found that BSF failed to “offer the client an opportunity to accept or reject the proposed new counsel.” *Id.* at 3. Further, this Court found that Dr. Torrado’s certificate of service “fail[ed] to demonstrate proof of service.” *Id.* at 2.

While this Court did not grant BSF’s withdrawal from the present matter, at all times since January 5, 2018, Searcy Denney has also appeared on behalf of the *Montes* Plaintiffs, vigorously representing them as lead counsel, and executing all day-to-day litigation activities on their behalf.

Starting in 2021, BSF has renewed its efforts to effectively notify the *Montes* Plaintiffs of its *intent* to move to withdraw as counsel of record in the above-styled action pursuant to this Court’s 2018 Order. First, BSF sought and received Dr. Torrado’s approval to withdraw as local counsel with power of attorney on behalf of each *Montes* Plaintiff. Second, BSF drafted a notice

letter to distribute to the *Montes* Plaintiffs explaining that BSF and Searcy Denney both represent them, with Searcy Denney serving as lead counsel, seeking their permission for BSF to move the Court for leave to withdraw as counsel, and providing contact information for them to make any objections to BSF moving to withdraw within 90 days of receipt. *See* McCawley Decl., Exhibit 1. BSF then obtained a certified Spanish translation of the notice to provide plaintiffs. *See* McCawley Decl., Exhibit 2. In seeking the best means of notifying the *Montes* Plaintiffs, BSF consulted Dr. Torrado, and with Dr. Torrado's assistance, attempted to provide notice to each *Montes* Plaintiff in March and April of 2022 through various modes of communication, including personal phone calls, email notices, WhatsApp cell phone number messages, Facebook publications, Twitter communications, and Instagram posts. McCawley Decl. at 7. In total, BSF delivered notice to at least 545 of the *Montes* Plaintiffs. *Id.* at 7.

It has been well over 90 days since BSF delivered those notices and **zero** *Montes* Plaintiffs have objected to BSF's notice of intent to move to withdraw. To the contrary, some of the plaintiffs explicitly agreed to permit BSF to move to withdraw. *See, e.g.,* McCawley Decl., Exhibits 3 and 4.

The remaining *Montes* Plaintiffs that BSF has not yet been able to verifiably notify are harder to reach, in part, because during the lengthy time this litigation has been ongoing, many of the *Montes* Plaintiffs have moved or changed contact information since providing their last known addresses and contact information to Dr. Torrado, BSF, and Searcy Denney.

Dr. Torrado, as local counsel for the *Montes* Plaintiffs, and as a well-regarded and experienced attorney in Colombia, has advised BSF that the most effective means of notifying the remaining *Montes* Plaintiffs is to send notice through certified mail, through radio messaging via a particular, popular radio station in the region that many *Montes* Plaintiffs are known or thought

to reside in, and through additional social media publications by a particular, popular media company in that region via their company website, WhatsApp, Facebook, Instagram, and Telegram platforms. McCawley Decl. at 9.

In the interest of going above and beyond traditional notice that is required by counsel seeking leave to move to withdraw, BSF intends to employ each of those additional means of notice specified by Dr. Torrado so as to leave no stone unturned in its efforts to reach the *Montes* Plaintiffs. Prior to implementing such additional notice measures, BSF now moves the Court to approve the completed and intended means of notice as sufficient for satisfying the notice requirements under S.D. Fla. L.R. 11.1(d)(3).

#### MEMORANDUM OF LAW

BSF respectfully requests that the Court enter an Order approving the aforementioned means of notice as sufficient for compliance with the local rules for withdrawal of appearance for the three key reasons set forth below.

***First***, BSF's proposed collective means of notice is more comprehensive and more reasonably calculated to provide the *Montes* plaintiffs with notice than other alternative means of notice that federal courts have approved for overseas *defendants* for *service of process*. “[T]rial courts have authorized a wide variety of alternative methods of service including publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex, and most recently, email.” *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002). Courts have approved these alternative means of service even where only one means is employed. For example, when reasonably calculated, courts approve service via email in jurisdictions that do not even locally allow for service by email. *See, e.g., Chanel, Inc. v. Zhixian*, 2010 WL 1740695, at \*3–4 (S.D. Fla. Apr. 29, 2010) (Cohn, J.) (“the Court is reasonably satisfied

that service [of process] upon Defendants via e-mail... is reasonably calculated to notify Defendants *of the pendency of this action*)” (emphasis added); *U.S. ex rel. Barko v. Halliburton Co.*, 952 F. Supp. 2d 108, 116–17 (D.D.C. 2013) (approving service of process on defendants by email in Jordan even though Jordanian law does not allow service by email); *Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 331–32 (S.D.N.Y. 2015) (approving service by email and stating email “may be more reliable than long-distance postal communications”); *Lexmark Int’l, Inc. v. Ink Techs. Printer Supplies, LLC*, 291 F.R.D. 172, 174–75 (S.D. Ohio 2013) (“a court may order service by email, where appropriate”).

Similarly, “[s]ervice by publication for a defendant in a foreign country when his exact whereabouts are unknown has also been recognized.” *BP Prod. N. Am., Inc. v. Dagra*, 236 F.R.D. 270, 272 (E.D. Va. 2006). *See, also, Javier H. v. Garcia-Botello*, 217 F.R.D. 308, 308–09 (W.D.N.Y. 2003) (approving publication of legal notice in Spanish in local newspaper to execute alternative service of process); *Mwani v. bin Laden*, 417 F.3d 1, 8 (D.C. Cir. 2005) (authorizing service by publication); *SEC v. Tome*, 833 F.2d 1086, 1094 (2d Cir.1987) (condoning service of process by publication in the Int’l Herald Tribune).

Social media publication is also recognized as an appropriate means of alternative service of process. *See, e.g., F.T.C. v. PCCare247 Inc.*, 2013 WL 841037, at \*3–\*4 (S.D.N.Y. March 7, 2013) (authorizing service by email and Facebook to defendants in India).

Service on counsel – even where counsel is not granted power of attorney (in contrast to this case) – is a recognized mode of alternative service for hard-to-reach defendants. *See, e.g., F. Fin. Grp., LLC v. President, Fellows of Harvard Coll.*, 199 F.R.D. 22, 23–25 (D. Me. 2001) (holding service on counsel “is likely to fulfill the due process requirement”); *FMAC Loan*

*Receivables v. Dagra*, 228 F.R.D. 531, 534–35 (E.D. Va. 2005) (permitting service on counsel for defendant whose current whereabouts are unknown).

Furthermore, courts routinely authorize alternative service of process when multiple methods are employed. *See, e.g., Tracfone Wireless, Inc. v. Hernandez*, 126 F. Supp. 3d 1357, 1359–60 (S.D. Fla. 2015) (Martinez, J.) (approving attempted service via FedEx and email). In contrast to the singular means of alternative service consistently approved by federal courts, BSF proposes a comprehensive and multi-faceted approach to providing notice.

Significantly, while the undersigned has put forth cases in which courts allowed alternative service process on defendants, the request in the instant motion does not rise to that level of gravity: it does not affect whether or not a party even knows that it is the subject of a lawsuit and therefore subject to the jurisdiction of this Court. Instead, this motion seeks alternative service to let represented plaintiffs know that one of its retained law firms (leaving the other law firm still in place for representation purposes) will move the Court to be allowed to withdraw as counsel.

**Second**, the *Montes* Plaintiffs’ right to choose their counsel must be respected. The *Montes* Plaintiffs have chosen Searcy Denney to represent them as sole, lead counsel and to allow BSF to withdraw as counsel of record. BSF knows that the *Montes* plaintiffs do not object to BSF’s withdrawal and want to continue their representation with Searcy Denney because of all the hundreds of plaintiffs who verifiably received notice, *none* objected to BSF’s withdrawal. As stated above, some even wrote to give BSF their affirmative consent.

The Eleventh Circuit has recognized that “[b]ecause a party is presumptively entitled to the counsel of his choice, that right may be overridden only if compelling reasons exist.” *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (internal quotation marks and citations omitted). *See also Itamar Med. Ltd. v. Ectosense nv*, 2021 WL 6066261, at \*3 (S.D. Fla. Dec. 7,

2021) (Snow, J.), report and recommendation adopted, 2021 WL 6062827 (S.D. Fla. Dec. 22, 2021) (Dimitrouleas, J.) (same); *Rahal v. Mussel Beach Rest. Inc.*, 2017 WL 11454443, at \*1 (S.D. Fla. Nov. 29, 2017) (Middlebrooks, J.) (“a party is presumptively entitled to the counsel of his choice, that right may be overridden only if compelling reasons exist”) (internal quotations omitted); *Vital Pharms., Inc. v. Alfieri*, 2022 WL 456403, at \*2 (S.D. Fla. Feb. 11, 2022) (Singhal, J.) (“a court must ‘be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely chosen counsel’”) (internal citation omitted).

No such compelling reasons exist to deny the *Montes* plaintiffs their choice of counsel. To the contrary, plaintiffs are, and will remain, represented by well-regarded and effective lead counsel in Searcy Denney, a firm that took on the role of lead counsel and has executed the day-to-day litigation responsibilities of this matter since their 2018 appearance.

***Third***, the Eleventh Circuit respects the right to a party’s choice of counsel even when that right is exercised by a representative, as is the case here with Dr. Torrado’s power of attorney over the *Montes* plaintiffs. *See, e.g., LaTele Television, C.A. v. Telemundo Commc'ns Grp., LLC*, 9 F.4th 1349, 1360–61 (11th Cir. 2021) (finding the district court properly removed counsel-at-subject because “[a]s the proper representative of LaTele, the Junta had the right to select counsel for LaTele in this litigation and it selected [other counsel]”). The affected plaintiffs have all given their Colombian counsel, Dr. Torrado, power of attorney under Colombian law as part of their individual engagement agreements with Dr. Torrado. May 9, 2018, Motion to Withdraw (DE 1910), Ex. A, Torrado Report, at 6 (DE 1910-1). Accordingly, Dr. Torrado has the power to approve – on the plaintiffs’ behalf – BSF’s motion to withdraw as counsel. (Notwithstanding that power of attorney, Dr. Torrado has worked diligently with BSF to effectuate notice to his clients

pursuant to this Court's 2018 Order on the same.) Accordingly, under Eleventh Circuit precedent, Dr. Torrado's agreement to BSF's withdrawal and to the continued retention of Searcy Denney, standing alone, is sufficient for this Court to honor the *Montes* plaintiffs' choice to allow BSF to withdraw through Dr. Torrado's power of attorney.

For the foregoing reasons, BSF respectfully requests that this Court approve its various means of notice, both already employed and planned as set forth herein, of its intent to move for withdrawal of counsel in satisfaction of S.D. Fla. L.R. 11.1(d)(3).

**WHEREFORE**, the undersigned counsel respectfully requests that this Court enter an Order: (a) granting the motion; (b) declaring that BSF's stated completed and intended means of notice, collectively, are sufficient for compliance with the notice requirements under S.D. Fla. L.R. 11.1(d)(3) for moving for withdrawal of appearance; and (c) awarding such other and further relief as this Court deems just and proper.

**CERTIFICATE OF COUNSEL**

After conferring with counsel representing Defendants, Defendants informed the undersigned counsel by email on July 20, 2022, that they would not consent to BSF's Motion to Approve Notice.

Dated: September 22, 2022

Respectfully submitted,

**BOIES SCHILLER FLEXNER LLP**

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*Co-counsel for Montes Plaintiffs*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 22, 2022, a true and correct copy of the foregoing document was electronically transmitted to all counsel of record via the CM/ECF system.

/s/ Sigrid McCawley  
Sigrid McCawley