

FILED

FEB 14 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CLERK U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

AIRIGAN SOLUTIONS, LLC.,

Plaintiff,

Civil Action No. 19-166

v.

BABYMOVE, *et al.*,

Defendants.

FILED UNDER SEAL

**PLAINTIFF'S EX PARTE MOTION FOR AN ORDER
AUTHORIZING ALTERNATIVE SERVICE ON DEFENDANTS
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 4(f)(3)**

Plaintiff, Arigan Solutions, LLC (“Airigan” or “Plaintiff”), hereby this Court on an *ex parte* basis,¹ for an order authorizing alternate service of process on Defendants, the Individuals, Partnerships, and Unincorporated Associations identified on **Schedule “A”** hereto (collectively “Defendants”), brought pursuant to Federal Rule of Civil Procedure 4(f)(3). In support thereof, Airigan submits the following:

¹ Airigan is moving for alternate service *ex parte* as Airigan has yet to provide Defendants with notice of this action. Contemporaneously herewith, Airigan has filed its *Ex Parte* Application for Temporary Restraining Order, Preliminary Injunction, and Order Restraining Transfer of Assets (“*Ex Parte* Application for Temporary Restraining Order”), together with the supporting Declarations and Exhibits. The present Motion makes reference to Airigan’s *Ex Parte* Application for Temporary Restraining Order, and as such, Airigan seeks to prevent premature disclosure of that filing. (See Declaration of Stanley D. Ference III in Support of Plaintiff’s *Ex Parte* Motion for Order Authorizing Alternate Service of Process on Defendants [“*Ference Dec.*”] ¶ 1, n.1, filed herewith.) However, Airigan is filing this Motion so that, in the event Airigan’s *Ex Parte* Application for Temporary Restraining Order and the instant Motion are granted, Airigan can effectuate service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure simultaneously with providing notice of the Court’s order on Airigan’s *Ex Parte* Application for Temporary Restraining Order. (See *id.*)

I. INTRODUCTION

Airigan is suing Defendants for trademark counterfeiting and infringement, false designation of origin, common law unfair competition, common law trademark infringement, and patent infringement. Defendants are knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling goods bearing counterfeits of Airigan's registered trademark within this district and throughout the United States by operating e-commerce stores established at least via the Internet marketplace website wish.com under their Store Names and Seller Names identified on Schedule "A" hereto (the "Seller IDs").

Pursuant to Federal Rule of Civil Procedure 4(f)(3), Airigan requests an order authorizing service of process on Defendants via electronic communication ("e-mail") and via website publication. E-mail and website publication service are appropriate and necessary in this case, because Defendants (1) operate via the Internet, and (2) rely on electronic communications to operate their businesses. Notwithstanding, Airigan still has the ability to contact Defendants directly and provide notice of Airigan's claims against them electronically via e-mail. Additionally, Airigan has created a publication website and will be posting copies of the Complaint, this instant Motion, and all other documents filed in this action. Airigan respectfully submits that an order allowing service of process via e-mail and website publication will benefit all parties and the Court by ensuring Defendants receive immediate notice of the pendency of this action and allowing this action to move forward expeditiously. Absent the ability to serve Defendants by email and website publication, Airigan will almost certainly be left without the ability to pursue a remedy.

II. STATEMENT OF FACTS

A. Defendants Have Valid and Operational Means of Electronic Contact.

Defendants operate Internet-based businesses and use electronic means of communication such that Airigan will be able to provide Defendants with notice of this action via e-mail and website publication. Specifically, Defendants have at least one method of electronic communication, such as e-mail via associated with their respective ecommerce stores operating under the Seller IDs. (*Ference Dec.* ¶¶ 3 - 5.) As a practical matter, ecommerce defendants generally must maintain accurate e-mail addresses where their marketplace platform administrator and payment processor may communicate with them regarding issues related to the maintenance of their e-commerce store accounts and transfer of funds for the payment for goods.

Airigan will serve Context Logic, Inc. d/b/a wish.com (“wish”)(the marketplace platform administrator for each of the Defendants) and PayPal, Inc. d/b/a paypal.com (“paypal”) (a payment processing company for some of the Defendants) with appropriate third party discovery requests seeking contact information and email addresses for each of the Defendants selling through their respective Store Names on wish.com. (*See id.* at ¶ 3.) Once the contact information and email addresses are received from wish and paypal, Airigan will be able to serve Defendants electronically. (*See id.* at ¶ 4.)

Airigan has also created a publication website that will be appearing on www.ferencelaw.com, such that anyone accessing the website will find copies of all documents filed in this action. (*See id.* at ¶ 5.) The address and a link to the publication website will be e-mailed directly to all of Defendants’ e-mail accounts and will be included upon service of process in this matter. (*Id.*)

B. Defendants Rely on Electronic Communications.

Defendants have structured their e-commerce store businesses so that the sole means for customers to purchase Defendants' counterfeit and infringing goods at issue is by placing an order over the Internet. Defendants take and confirm orders online as well. (See Declaration of Jennifer Lineberry in Support of Plaintiff's *Ex Parte* Application for Entry of Temporary Restraining Order, Preliminary Injunction, and Order Restraining Transfer of Assets [*Lineberry Dec.*] ¶ 2 and Comp. Ex. 1 thereto) Indeed, Airigan completed a purchase via each Defendant's respective e-commerce store operating under its Seller ID. (See *Lineberry Dec.* ¶ 2 and Comp. Ex. 1 thereto.) The orders placed by Airigan while investigating the Seller IDs were processed entirely online, which included providing shipping and billing information, payment, and confirmation of the orders via Defendants' respective Seller IDs. (*Id.*) Clearly, Defendants rely on electronic means as reliable forms of contact.

III. ARGUMENT

Pursuant to Federal Rule of Civil Procedure 4(h)(2), a foreign partnership or other unincorporated association may be served with process in any manner prescribed by Rule 4(f) for serving foreign individuals. Federal Rule of Civil Procedure 4(f)(3), allows a district court to authorize an alternate method for service to be effected upon a foreign defendant, provided that it is not prohibited by international agreement and is reasonably calculated to give notice to the defendant. In the present matter, alternate service of process via e-mail and website publication are appropriate given that Defendants have established Internet-based businesses by which they rely on electronic communications for their operation. Accordingly, this Court should permit service on Defendants by e-mail and website publication.

A. The Court May Authorize Service via Electronic Mail and Website Publication Pursuant to Federal Rule of Civil Procedure 4(f)(3).

Fed. R. Civ. P. 4(f)(3), which enables a court to grant an alternative method of service so long as it: (1) “is not prohibited by international agreement” and (2) “comports with constitutional notions of due process”. *Henry F. Teichmann, Inc. v. Caspian Flat Glass OJSC*, No. 13-cv-458, 2013 WL 1644808 at *1, *2 (W.D. Pa. April 16, 2013) (Hornak, J.). Notably, “[s]ervice under subsection [4(f)] (3) is neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant.” *Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 330 (S.D.N.Y. 2015) (quoting *Advanced Aerofoil Techs., AG v. Todaro*, 2012 U.S. Dist. LEXIS 12383, at *1 (S.D.N.Y. Jan. 31, 2012) (internal citations omitted)). Since third-party merchants on AliExpress.com and eBay.com, like Defendants, have been known to use aliases, false addresses and other incomplete identification information to shield their true identities and there are, in fact, no physical addresses whatsoever associated with the majority of Defendants’ User Accounts, this is exactly the circumstance where the courts should exercise, as they previously have exercised, the authority to grant alternative methods of service. *See id.* (quoting *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) (“The decision whether to allow alternative methods of serving process under Rule 4(f)(3) is committed to the sound discretion of the district court.”) (internal quotation marks omitted)); *see also FERENCE Dec.*, ¶¶ 3

- 6.

Thus, for the China based defendants, Fed. R. Civ. P. 4(f)(3) permits service in a place not within any judicial district of the United States² “by any internationally agreed means of service that is reasonably calculated to give notice”. *See Rio Props., Inc.*, 284 F.3d at 1014. The Ninth Circuit in *Rio Properties* held, “without hesitation,” that e-mail service of an online business defendant “was constitutionally acceptable.” *Id.* at 1017. The Court reached this conclusion, in part, because the defendant conducted its business over the Internet, used e-mail regularly in its business, and encouraged parties to contact it via e-mail. *Id.*

Similarly, a number of Courts in other jurisdictions have held that alternate forms of service pursuant to Rule 4(f)(3), including e-mail service, are appropriate and may be the only means of effecting service of process “when faced with an international ebusiness scofflaw.” *Id.* at 1018; *see also, MacLean-Fogg Co. v. Ningbo Fastlink Equip. Co., Ltd.*, No. 1:08-cv-02593, 2008 WL 5100414, *2 (N.D. Ill. Dec. 1, 2008) (holding e-mail and facsimile service appropriate); *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 563 (E.D. Tenn. 2004) (quoting *Rio*, 284 F.3d at 1018) (allowing e-mail service); *see also Juniper Networks, Inc. v. Bahattab*, No. 1:07-cv-01771-PLF-AK, 2008 WL 250584, *1-2, (D.D.C. Jan. 30, 2008) (citing *Rio*, 284 F.3d at 1017-1018; other citations omitted) (holding that “in certain circumstances ... service of process via electronic mail ... is appropriate and may be authorized by the Court under Rule 4(f)(3) of the Federal Rules of Civil Procedure”).

² In the unlikely event a defendant for whom Plaintiff does not have an address was located in the United States, service would be governed by Fed. R. Civ. P. 4(e)(1), which provides for “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located”. Pa. R. Civ. Pro. 430 provides “[i]f service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service.” Thus, service by email would also be sufficient in the event any Defendant is located in the United States. *See Power Corp. of Canada v. Power Financial*, No. 4:09-cv-0510, 2009 WL 982750 (M.D. Pa., April 13, 2009) (service by email is permitted under Rule 430 when defendant uses online service that shields owner’s identity).

Furthermore, in a number of counterfeiting cases last year this Court has authorized electronic service of process on merchants on various online marketplace platforms. *See, e.g. Airigan Solutions, LLC v. Bufujiugan, Civil Action No. 18-cv-1330-NBF (Amended Order Authorizing Alternative Service entered on October 16, 2018) and Airigan Solutions, LLC v. Artifacts_Selling, Civil Action No. 18-cv-1462-NBF (Order Authorizing Alternative Service entered on November 2, 2018).*

Rule 4 does not require that a party attempt service of process by other methods enumerated in Rule 4(f) before petitioning the court for alternative relief under Rule 4(f)(3). *Rio Props. v. Rio Intern. Interlink*, 284 F. 3d 1007, 1014-15 (9th Cir. 2002). As the *Rio Properties* Court explained, Rule 4(f) does not create a hierarchy of preferred methods of service of process. *Id.* at 1014. To the contrary, the plain language of the Rule requires only that service be directed by the court and not be prohibited by international agreement. There are no other limitations or requirements. *Id.* Alternative service under Rule 4(f)(3) is neither a “last resort” nor “extraordinary relief,” but is rather one means among several by which an international defendant may be served. *Id.* As such, this Court may allow Plaintiff to serve the defendants via electronic publication and/or e-mail.

B. E-mail and Publication Service Are Not Prohibited by International Agreement.

Service via e-mail and website publication is not prohibited by international agreement. Based upon the information contained on Defendants’ actual e-commerce marketplace stores, such as shipping information, and the data provided thereunder, Airigan has good cause to suspect some Defendants may be residing in the People’s Republic of China (“China”), or other foreign jurisdictions, and/or redistribute products from sources in those locations. (*Ference Dec.* ¶ 6.) Both China and the United States are signatories to the Hague Convention on the Service

Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (the “Hague Service Convention”). (See *Ference Dec.* ¶ 7 and Comp. Ex. 1 thereto, Hague Service Convention and list of signatory Members.) However, the Hague Service Convention does not preclude the Court from authorizing service of process via e-mail or website publication.

United States District Courts routinely permit alternative service of process notwithstanding the applicability of the Hague Convention. See e.g., *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 930 (N.D. Ill. 2009) (“plaintiffs are not required to first attempt service through the Hague Convention.”); see also *In re LDK Solar Secs. Litig.*, 2008 WL 2415186,*2 (N.D. Cal. Jun. 12, 2008) (authorizing alternative means of service on Chinese defendants without first attempting “potentially fruitless” service through the Hague Convention’s Chinese Central Authority); *Nanya Tech. Corp. v. Fujitsu Ltd.*, No. 1:06-cv-00025, 2007 WL 269087, *6 (D. Guam Jan. 26, 2007) (Hague Convention, to which Japan is a signatory, did not prohibit e-mail service upon Japanese defendant); *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 562 (E.D. Tenn. 2004) (recognizing that, while “communication via e-mail and over the internet is comparatively new, such communication has been zealously embraced within the business community”). In addition, the law of the People’s Republic of China does not appear to prohibit electronic service. *Ference Dec.*, ¶ 7.

Airigan respectfully requests that the Court, in its discretion, permit service via website publication.³ Publication on a website has been deemed appropriate service under Fed. R. Civ. P (4)(3) “so long as the proposed publication is ‘reasonably calculated, under all the circumstances,

³ The Ference firm is prepared to provide notice via website publication if permitted by the Court. Through the email addresses received from the Third Party Service Providers and Financial Institutions, Ference would provide the named Defendants with a link to a web page accessible at www.ferencelaw.com that includes all of the relevant pleadings to the lawsuit. See *Ference Dec.*, ¶ 8.

to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *National Association for Stock Car Auto Racing, Inc. v. Does*, 584 F. Supp. 2d 824, 826 (W.D.N.C. 2008) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315-16 (1950)). Here, Defendants have structured their businesses so that the sole means for customers to purchase Defendants’ Counterfeit Products is by placing an order over the Internet. *See Ference Dec.*, ¶ 6. The fact that Defendants’ businesses are entirely Internet-based thereby demonstrates the reliability of website publication as an additional means of service.

Ultimately, service on Defendants by various electronic means — namely by electronic mail and website publication through a specific page dedicated to this Lawsuit accessible through ferencelaw.com — comports with due process, as it 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*, 339 U.S. at 309. Due to Defendants’ purposeful anonymity, service by direct messaging application and website publication is most likely to provide Defendants with proper notice of this action and Airigan’s claims. *See Dama S.P.A.*, 2015 U.S. Dist. LEXIS 178076, at *7 (finding where service by email or other electronic means will provide adequate notice under Rule 4(f), such service is warranted and should be granted).⁴ Therefore, Plaintiff respectfully submits that an order allowing service of process via

⁴ This Court has handled two counterfeit cases filed by the Plaintiff and has authorized alternative electronic service in both. *See Airigan Solutions, LLC v. Bufujiugan*, Civil Action No. 18-cv-1330-NBF (*Amended Order Authorizing Alternative Service entered on October 16, 2018*) and *Airigan Solutions, LLC v. Artifacts_Selling*, Civil Action No. 18-cv-1462-NBF (*Order Authorizing Alternative Service entered on November 2, 2018*). Courts in the Southern District of New York are also very experienced in handling cases against counterfeiters and have consistently permitted alternate electronic service. *See, e.g. Intenze Products, Inc. v. 1586, et al.*, No. 18-cv-4611-RWS (S.D.N.Y. May 24, 2018); *Allstar Marketing Group, LLC v. 158, et al.*, No. 18-cv-4101-GHW, Dkt. 22 (S.D.N.Y. May 17, 2018); *William Mark Corporation v. 1&cc, et al.*, No. 18-cv-3889-RA, Dkt. 18 (S.D.N.Y. May 2, 2018); *WOW Virtual Reality, Inc. v. Bienbest, et al.*, No. 18-cv-3305-VEC, Dkt. 9

e-mail and website publication will benefit all parties and the Court by ensuring that Defendants receive immediate notice of the pendency of this action and allowing this action to move forward expeditiously.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court grant the present motion and authorize service of the Summonses, the Complaint, and all pleadings and discovery in this matter upon each Defendant in this action:

(S.D.N.Y. April 16, 2018); *Ideavillage Products Corp. v. abc789456, et al.*, No. 18- cv-2962-NRB, Dkt. 11 (S.D.N.Y. April 11, 2018); *Ideavillage Products Corp. v. Aarhus, et al.*, No. 18-cv-2739- JGK, Dkt. 22 (S.D.N.Y. March 28, 2018); *Moose Toys Pty Ltd. et al., v. 963, et al.*, No. 18-cv-2187-VEC, Dkt. 16 (S.D.N.Y. April 2, 2018); *Off-White, LLC v. A445995685, et al.*, No. 18-cv-2009-LGS, Dkt. 5 (S.D.N.Y. March 27, 2018); *Spin Master Ltd. and Spin Master, Inc. v. 158, et al.*, No. 18-cv-1774-PAE, Dkt. 18 (Feb. 27, 2018); *JLM Couture, Inc. v. Aimibridal, et al.*, No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018); *Spin Master Ltd. and Spin Master, Inc. v. Alisy, et al.*, No. 18-cv-543-PGG, Dkt. 16 (S.D.N.Y. Jan. 22, 2018); *WowWee Group Limited, et al. v. Meirly, et al.*, No. 18-cv-706-AJN, Dkt. 11 (S.D.N.Y. Jan. 26, 2018); *Ideavillage Products Corp. v. Dongguan Shipai Loofah Sponge Commodity Factory, et al.*, No. 18-cv-901-PGG, Dkt. 20 (S.D.N.Y. Feb. 1, 2018); *WowWee Group Limited, et al. v. A249345157, et al.*, No. 17-cv-9358-VEC, Dkt. 18 (S.D.N.Y. Dec. 11, 2017); *HICKIES, Inc. v. Shop1668638 Store, et al.*, No. 17-cv-9101-ER, Dkt. 14 (S.D.N.Y. Dec. 6, 2017); *Ideavillage Products Corp. v. Dongguan Opete Yoga Wear Manufacturer Co., Ltd., et al.*, No. 17-cv-9099-JMF, Dkt. 19 (S.D.N.Y. Nov. 27, 2017); *Ideavillage Products Corp. v. Shenzhen City Poly Hui Foreign Trade Co., Ltd., et al.*, No. 17-cv-8704-JGK. (S.D.N.Y. May 24, 2017); *Moose Toys Pty LTD et al. v. Guangzhou Junwei Trading Company d/b/a Backgroundshop et al.*, No. 17-cv-2561-LAK, Dkt. 12 (S.D.N.Y. May 11, 2017); *Rovio Entertainment Ltd. and Rovio Animation OY v. Angel Baby Factory d/b/a Angelbabyfactory et al.*, No. 17- cv-1840-KPF, Dkt. 11 (S.D.N.Y. March 27, 2017); *Ontel Products Corporation v. Airbrushpainting Makeup Store a/k/a Airbrushepainting et al.*, No. 17-cv-871-KBF, Dkt. 20 (S.D.N.Y. Feb. 6, 2017); *Ideavillage Products Corp. v. Bling Boutique Store, et al.*, No. 16-cv-09039-KMW, Dkt. 9 (S.D.N.Y. Nov. 21, 2016); *Gucci America, Inc., et al v. Alibaba Group Holding LTD, et al*, No. 1:15-cv-03784-PKC (S.D.N.Y. June 23, 2015) (unpublished); *Chanel, Inc. v. Conklin Fashions, Inc.*, No. 3:15-cv-893-MAD/DEP, 2015 U.S. Dist. LEXIS 109886, at *10-13 (N.D.N.Y. Aug. 14, 2015); *Belstaff Grp. SA v. Doe, No. 15-cv-2242-PKC/MHD*, 2015 U.S. Dist. LEXIS 178124, at *2 (S.D.N.Y. June 18, 2015); *AW Licensing, LLC v. Bao*, No. 15-cv-1373, 2015 U.S. Dist. LEXIS 177101, at *2-3 (S.D.N.Y. Apr. 1, 2015); *Klipsch Grp., Inc. v. Big Box Store Ltd.*, No. 1:12-cv-06283-VSB, 2012 U.S. Dist. LEXIS 153137, at *3-4 (S.D.N.Y. Oct. 24, 2012); *True Religion Apparel, Inc. et al. v. Xiaokang Lee et al.*, No. 1:11-cv-08242-HB (S.D.N.Y. Nov. 15, 2011) (unpublished); *N. Face Apparel Corp. v. Fujian Sharing Imp. & Exp. Ltd. Co.*, No. 1:10- cv-1630-AKH, 2011 U.S. Dist. LEXIS 158807 (S.D.N.Y. June 24, 2011).

(1) via the e-mail accounts provided by that Defendant as part of the data related to its e-commerce store, including by onsite contact forms, or

(2) via publication by posting copies of the Summonses, Complaint, and all subsequent pleadings and discovery on www.ferencelaw.com.

A Proposed Order granting this motion is submitted herewith.

Respectfully submitted,

Dated: February 14, 2019

/s/ Stanley D. Ference III

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SCHEDULE "A"
DEFENDANTS BY STORENAME AND MERCHANT ID

Def No.	Store Name	Merchant ID
1	Babymove	5a0053d9448a525e05f95b61
2	BinggoHO	59b780a8776ab911b97fe10e
3	BOUCHlet	59f292f19fbc517588f33c9d
4	Clynch	59f2e8540a332a6c1cd3c84f
5	Cobre_Guisante_E_Co_Ltd	5a65563187c25b41a3b940d9
6	Drakales	5a02c731471c1473154520dd
7	Fashionw	53abb83fd91139358bc33000
8	Flyingdreamss	5a0053d9448a525e05f95b61
9	Koofar	590c32aa0f961729bf71b3a3
10	Leapon	5a04103c37f9f833f59737a4
11	Linenstoreonline889	59dde1b6dbd28202fc4a0336
12	Loverver	58aae9777584195057a197cb
13	Maternitybargains4less	582c7b5f728de64721487e86
14	PENNYMAI	5a3f4e80da6ce64e16594439
15	Poley	5a050b4437f9f81e6b0dd89d
16	Sharongoogloe9	59b8e806eea5c553061c50c9
17	Ticloy	59e9558cdc7a91139c84a7b4
18	VOTRON ONLINE, LLC	566194f756521824069d571c
19	WhileHot	5a0ffbc4149ff83ea610805d
20	Yingweiyan	5ab9fe801b98df7014c70343