

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

DOGGIE DENTAL INC, *et al.*,

Plaintiffs,

v.

MAX_BUY, *et al.*,

Defendants.

Civil Action No.

19-746

(Judge Hornak)

**PLAINTIFFS' MOTION TO
(1) AMEND THE ORDER AUTHORIZING ALTERNATIVE SERVICE AND
(2) DEEM SERVICE ACCOMPLISHED UPON CERTAIN DEFENDANTS**

Plaintiffs Doggie Dental Inc. and Peter Dertsakyan (collectively "Plaintiffs"), hereby move to (1) amend the Court's June 27, 2019, Order authorizing alternate service of process on certain Defendants (ECF No. 17) to include the nine (9) defendants set forth in Schedule "C" hereto and (2) deem the electronic service of the Complaint and Summons made upon all of the Defendants (*See* Summons/Return of Service Return Executed (ECF No. 39)) service upon the nine (9) defendants set forth in Schedule "C" hereto. In support thereof, Plaintiffs submit the following:

FACTUAL BACKGROUND

On June 27, 2019, the Court entered an Order granting Plaintiffs' Motion for Alternative Service, authorizing Plaintiffs to serve the Summonses and Complaint and all future filings upon Defendants via electronic mail and publication. (ECF No. 17). Plaintiffs, however, did not include thirty-one (31) defendants in their Motion for Alternative Service because Plaintiffs investigated the physical address information associated with each and determined their

addresses to be valid physical addresses at which to attempt to effectuate service of process on those Defendants. *See Malkin Dec.*¹, ¶ , and Motion for Alternative Service (ECF No. 9 at p. 1, n.2) (“Alternative Service Motion”). Indeed, Plaintiffs have been able to serve all but nine (9) of the defendants upon whom plaintiff attempted service, and Plaintiffs now move to amend the June 27, 2019, Order authorizing alternative service to include these nine (9) defendants. *Id.*, ¶ 4.

Plaintiffs mailed to each of the nine (9) Defendants on attached Schedule “C” copies of the Complaint and Summons by regular U.S. Mail and Certified/Return Receipt with a signature required to addresses located within the United States. (“Schedule “C” Defendants”). *Id.*, ¶ 5. To date, none of these Defendants have been served conventionally as the certified mailings have been returned to Plaintiffs’ counsel. *Id.*, ¶ 6. The failed service efforts are noted in the “Reason certified not delivered” column in Schedule “C”. *Id.*, ¶ 7. Thus, despite Plaintiffs’ efforts, they have not accomplished conventional service upon the Schedule “C” Defendants. *Id.*, ¶ 8.

Despite the apparent falsity of their physical address information, each of the nine (9) Defendants on Schedule “C” hereto have received notice of this action electronically via their PayPal and/or customer service e-mail addresses. *Id.*, ¶ 9. Specifically, on July 14, 2019, these nine (9) Defendants were served with, *inter alia*, a copy of the Summons and Complaint by e-mail to the e-mail addresses provided for these Defendants by eBay and/or PayPal. *Id.*, ¶ 10.

The e-mails to these nine (9) Defendants were not bounced back nor returned and/or notified as “undeliverable,” thereby demonstrating the e-mails were delivered and their e-mails are valid and operational. *Id.*, ¶ 11. *See Chanel, Inc. v. Zhixian*, Case No. 10-cv-60585-JIC, 2010 WL 1740695, at *3 (S.D. Fla. April 29, 2010) (finding that e-mails sent to e-mail addresses

¹ Refers to September 24, 2019 Declaration of Brian Samuel Malkin filed herewith.

supplied by Defendant to his domain name registrars that did not bounce back presumptively reached Defendant). Furthermore, each of these nine (9) Defendants is able to receive notice of this action via the Internet marketplace platform it uses to conduct its commercial transactions. *Ference Dec.*², ¶¶ 3 - 4, incorporated herein by reference.

Moreover, Plaintiffs have also notified each of these nine (9) Defendants of this action via website publication. Specifically, Plaintiffs have created a website appearing on www.ferencelaw.com where all copies of the Summons, Complaint, and all other pleadings, documents, and orders issued in this action are posted, such that anyone accessing the website will find copies of all documents filed in this action. *Malkin Dec.*, ¶ 12. The address and a link to the publication website have been provided to each of these nine (9) Defendants via their known e-mail accounts. *Id.*

**THE COURT MAY AUTHORIZE SERVICE VIA E-MAIL
PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE**

The unregistered business names under which these nine (9) Defendants operate their electronic stores make it difficult to identify the defendants. This sales arrangement between sellers and third party service providers like eBay was recently described by the Third Circuit in the context of an Amazon seller's anonymity:

“This enables third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor. There are numerous cases in which neither Amazon [the third party service provider] nor the party injured by a defective product, sold by Amazon.com, were able to locate the product's third-party vendor or manufacturer.”

Overdorf v Amazon.com, Inc., (No. 18-1041, 3d Cir. July 3, 2019) (*rehearing. granted August, 23, 2019*). Under these circumstances, the Court should permit electronic

² Refers to Declaration of Stanley D. Ference III in Support of Plaintiffs' Motion Authorizing Alternate Service of Process (ECF No. 9 -2).

service through the email, regardless of whether each of these nine (9) Defendants is located within the United States or in a foreign country. Where as here, conventional service has failed, Courts have granted motions to amend an alternative service order to include the defendants who were not conventionally served. *Cartier International A.G. v. Replicapaneraiwatches.cn*, No. 17-cv-62401, ECF No. 40 (S.D. Fla. Feb. 1, 2018).

E-mail is the primary means by which sellers of this nature communicate with the payment processing company (PayPal) and the public. Service in this manner, to a virtual storefront via e-mail, is the modern equivalent of delivering the complaint and summons to a party's business address. In addition, electronic service is the most expeditious manner because online sellers generally check these message inboxes frequently.

If any of the nine (9) Defendants are located in the United States, under Fed. R. Civ. P. 4(e)(1), service in a federal district court action can be accomplished "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 or where service is made." Under Pennsylvania law, service on an out of state defendant may be accomplished, *inter alia*, "by any mail in a manner provided by Rule 403. Pa. R. Civ. P. 404. Rule 403 provides that original process may be mailed to the defendant by any form of mail requiring a receipt." If the mail is returned noting that the defendant "refused to accept the mail", the plaintiff may serve at the same address by ordinary mail. If the mail is returned as "unclaimed", the plaintiff "shall make service by another means pursuant to the rules." Pa R. Civ. P. 403. Rule 430 provides that "if service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service." Pa. R. Civ. P. 430.

Service by electronic messaging (including e-mail) under Fed. R. Civ. P. 4(e)(1) has been approved by various courts in numerous cases where conventional service was not able to have been made. *General Nutrition Investment Co. v. Zhang*, No. 19-cv-486, ECF No. 11 (W.D. Pa. May 29, 2019) (Hornak, J.) (applying New York law and authorizing service by email and Amazon messaging where defendant provided incorrect address); *Power Corp. of Canada v. Power Financial*, No. 4:09-cv-0510, 2009 WL 982750 (M.D. Pa., April 13, 2009) (applying Pennsylvania law and authorizing service by email under Pa. Rule 430 when defendant uses online service that shields owner's identity); *Products, LLC v. Mobile Rush Inc.*, Case No. 1:19-cv-00512, ECF 13 (D. Colo. April 16, 2019) (applying New York law and authorizing service via Amazon messaging system and New York Department of State); *Pure Encapsulations LLC v. Wind & Sky, Inc.*, Case No. 1:19-cv-10127, ECF 9 (D. Mass. Mar. 19, 2019) (applying New York law and authorizing service via Amazon messaging system after service on Amazon-supplied physical location failed); *The Pet Health People, LLC v. Misovski*, Case No. 1:19-cv-02644, ECF 14 (N.D. Ill. May 21, 2019) (same, applying Illinois law).

If any of the nine (9) defendants are located outside of the United States, Fed. R. Civ. P. 4(h)(2) permits a foreign business entity to be served with process “in any manner prescribed by Rule 4(f),” including any manner ordered under Rule 4(f)(3). A foreign partnership or other unincorporated association can therefore be served pursuant to Rule 4(f)(3). Fed. R. Civ. P. 4(f)(3) allows alternative methods for service of process, so long as those methods are not prohibited by international agreement and are directed by the Court. The plain language of Rule 4(f)(3) reflects that the decision to issue an order allowing an alternative means of service lies within the sole discretion of the district court. *Rio Props. v.*

Rio Intern. Interlink, 284 F. 3d 1007, 1018 (9th Cir. 2002) (alternate forms of service pursuant to Rule 4(f)(3), such as e-mail service, are appropriate and may be the only means of effecting service of process “when faced with an international e-business scofflaw.”).

Additionally, the Constitution itself does not mandate that service be effectuated in any particular way. Rather, Constitutional due process considerations require only that the method of service selected be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Brookshire Bros., Ltd. v. Chiquita Brands Int’l*, Case No. 05-CIV-21962, 2007 WL 1577771, at *1 (S.D. Fla. May 31, 2007) (quoting *Mullane v. Cent. Hanover Bank & Trust 10 Co.*, 339 U.S. 306, 314 (1950)); *see also TracFone Wireless, Inc. v. Bitton*, 278 F.R.D. 687, 692 (S.D. Fla. Jan. 11, 2012); *Rio Props., Inc.*, 284 F.3d at 1016.

Accordingly, federal courts have allowed a variety of alternative service methods, including service by e-mail and publication on a designated website, where a plaintiff demonstrates the likelihood that the proposed alternative method of service will notify a defendant of the pendency of the action. *See, e.g., Rio Props., Inc.*, 284 F.3d at 1017 (holding, “without hesitation,” that e-mail service of an online business defendant “was constitutionally acceptable”); *In re Int’l Telemedia Assocs.*, 245 B.R. 713, 721 (N.D. Ga. 2000) (“If any methods of communication can be reasonably calculated to provide a defendant with real notice, surely those communication channels utilized and preferred by the defendant himself must be included among them.”); *National Association for Stock Car Auto Racing, Inc. v. Does*, 584 F. Supp. 2d 824, 826 (W.D.N.C. 2008) (in “acknowledging the realities of the twenty-first century and the information age, the Court determined that the most appropriate place for publication was [Plaintiff’s Website].”).

As noted above, as a result of each of the nine (9) Defendants' own efforts to conceal their respective location, Plaintiffs are unable to determine their physical whereabouts. *See Malkin Dec.*, ¶¶ 5 – 9. Article 1 of the of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and commercial Matters (the “Hague Convention”) provides that, “[the] convention shall not apply where the address of the person to be served with the document is not known.” *See Hague Convention, Article I* (ECF No. 9 - 3, p. 1). *See also Philip Morris USA Inc. v. Veles Ltd.*, No. 06 Civ. 2988, 2007 WL 725412, at *2 (S.D.N.Y. March 12 ,2007) (e-mail service authorized and the Hague Convention did not apply because despite physical “addresses” having been provided to defendants’ registrars, the actual addresses could not be confirmed as valid). Thus, as each of the nine (9) Defendants’ address are unknown, Plaintiffs respectfully submit that the Hague Convention does not apply in this case.

Notwithstanding, alternative means of service, such as e-mail and publication, are not prohibited by the Hague Convention where a signatory nation has not expressly objected to those means. *See Stat Med. Devices, Inc. v. HTL-Strefa, Inc.*, Case No. 15-cv-20590-FAM, 2015 U.S. Dist. LEXIS 122000 (S.D. Fla. Sept. 14, 2015) (noting that an objection to the alternative forms of service set forth in the Hague Convention is limited to the forms of service expressly objected to). Article 10 to the Hague Service Convention allows service of process through means other than a signatory’s Central Authority, such as “postal channels” and “judicial officers,” provided the State of destination does not object to those means. *See Hague Convention, Art. 10*, 20 U.S.T. 361 (1969). Although certain countries objected to the alternative means of service outlined in Article 10 of the Convention, that objection is specifically limited to the means of

service enumerated in Article 10. *Gurung v. Malhotra*, 279 F.R.D. 215, 219 (S.D.N.Y. 2011); *WhosHere, Inc. v. Orun*, Case No. 13-cv-00526-AJT, 2014 U.S. Dist. LEXIS 22084, at *9 (E.D. Va. Feb. 20, 2014) (authorizing e-mail service, noting objection to means of service listed in Article 10 “is specifically limited to the enumerated means of service in Article 10.”). Moreover, an objection to the alternative means of service provided in Article 10 does not represent a per se objection to other forms of service, such e-mail or website publication. *See In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 434, 437 (S.D.N.Y. 2009) (requiring express objection to alternative method of service by signatory nation to preclude that particular means of service). Consequently, a country’s objections to the means of alternative service provided in Article 10 are no bar to court-directed service and do not prevent this Court from authorizing alternative service of process via e-mail or website publication. *See, e.g., Gurung*, 279 F.R.D. at 220 (approving service of process on foreign defendants via e-mail despite India’s objection to Article 10, stating that an “objection to service through postal channels does not amount to an express rejection of service via electronic mail.”); *Stat Med. Devices, Inc.*, 2015 U.S. Dist. LEXIS 122000, at *8-9 (permitting service of process on foreign defendants via e-mail and substituted service on domestic counsel despite Poland’s objection to Article 10, noting “This Court and many other federal courts have permitted service by electronic mail and determined that an objection to Article 10 of the Hague Convention . . . does not equate to an express objection to service via electronic mail.”); *FTC v. PCCare247 Inc.*, Case No. 12-cv-7189-PAE, 2013 U.S. Dist. LEXIS 31969, at *10 (S.D.N.Y. March 7, 2013) (authorizing service of process via e-mail and Facebook, explaining that “Numerous courts have held that service by email does not violate any international agreement where the objections of the recipient nation are limited to those means enumerated in Article 10.”); *WhosHere, Inc.*, 2014 U.S. Dist. LEXIS 22084

(authorizing service of process on foreign defendants via e-mail despite Turkey’s objection to Article 10); *Richmond 17 Techs., Inc. v. Aumtech Bus. Solutions*, Case No. 11-CV-02460-LHK, 2011 U.S. Dist. LEXIS 71269 (N.D. Cal. July 1, 2011) (“[N]umerous courts have authorized alternative service under Rule 4(f)(3) even where the Hague Convention applies. This is true even in cases involving countries that, like India, have objected to the alternative forms of service permitted under Article 10 of the Hague Convention.”).

CONCLUSION

Given Plaintiffs’ attempts to locate and conventionally serve each of the nine (9) Defendants on Schedule “C” hereto, and, given that each has already received, at their PayPal and/or eBay registered email addresses a complete copy of the Complaint and Summons, Plaintiffs respectfully request that the Court issue an order (1) amending the Court’s June 27, 2019, Order authorizing alternate service of process on certain Defendants (ECF No. 17) to include the nine (9) defendants set forth in Schedule “C” hereto and (2) deem the electronic service of the Complaint and Summons made upon all of the Defendants (*See* Summons/Return of Service Return Executed (ECF No. 39)) service upon the nine (9) defendants set forth in Schedule “C” hereto.

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Respectfully submitted,

Dated: September 24, 2019

/s/ Brian Samuel Malkin
Stanley D. Ference III
Pa. ID No. 59899
courts@ferencelaw.com

Brian Samuel Malkin
Pa. ID No. 70448
bmalkin@ferencelaw.com

FERENCE & ASSOCIATES LLC
409 Broad Street
Pittsburgh, Pennsylvania 15143
(412) 741-8400 – Telephone
(412) 741-9292 – Facsimile

Attorneys for Plaintiffs

SCHEDULE C

Defendant No.	Seller Name	Reason certified was not delivered
17	4dice_international	Return to sender, insufficient address, unable to forward
63	ricji-45	Return to sender, refused, unable to forward
76	us2014.runzh	unclaimed, regular mail not returned
88	daos_34	Return to sender, not deliverable as addressed, unable to forward
91	gohastings	Return to sender, vacant, unable to forward
93	ljsuperiorchew	Return to sender, not deliverable as addressed, unable to forward
98	pege-318	unclaimed, regular mail delivered
103	raysal_64	no green card returned by post office, responded by email
113	vestut-56	Return to sender, unclaimed, unable to forward