

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS OF ILLINOIS EASTERN DIVISION**

GAG GIFTS FOR GOOD CAUSES, LLC,
dba POOPING POOCHES,

Plaintiff,

v.

THE INDIVIDUALS, CORPORATIONS,
LIMITED LIABILITY COMPANIES,
PARTNERSHIPS, AND UNINCORPORATED
ASSOCIATIONS IDENTIFIED ON
SCHEDULE A HERETO,

Defendants.

Case No.:

**PLAINTIFF’S MOTION MOTION FOR ELECTRONIC SERVICE OF PROCESS
PURSUANT TO FED. R. CIV. P. 4(f)(3) AND MEMORANDUM OF LAW IN SUPPORT
THEREOF**

Plaintiff, GAG GIFTS FOR GOOD CAUSES, LLC, dba POOPING POOCHES (“Plaintiff” or “Pooping Pooches”), respectfully moves the Court for alternate service of process by email pursuant to Rule 4(f)(3) on Defendants identified in Schedule A to the Amended Complaint [DE 1], pursuant to further belief that these Defendants are foreign corporations, and respectfully requests as follows:

I. INTRODUCTION

Pooping Pooches initiated this action for federal trademark infringement and counterfeiting, false designation of origin, and violation of the Illinois Uniform Deceptive Trade Practices Act against Defendants who are harming Pooping Pooches and consumers by their improper, unauthorized, and illegal sales of Pooping Pooches Branded Products.

Pooping Pooches seeks permission to serve the Defendants with process through alternate means (i.e., email) pursuant to Rule 4(f)(3), as email addresses may be the only information able to be obtained for these foreign infringers.

II. STATEMENT OF FACTS

Plaintiff is a corporation formed under the laws of the State of California with its principal place of business in California. It is in the business of developing, marketing, selling, and distributing products bearing the Pooping Pooches Trademarks. These products have become a highly sought after product, a staple gift, and a staple “gag gift” for consumers across the country for over a decade. Plaintiff’s original Pooping Pooches calendars bring life’s beauty and humor to light by displaying high quality images of animals relieving themselves in beautiful natural settings. These calendars feature original and copyright protected photography. Additionally, Pooping Pooches has been partnered with the Maui Humane Society since 2013 and has pledged to donate \$1 from the sale of each calendar to the Maui Humane Society to support animals in need. Jacob Wagenman is the Chief Executive Officer of Pooping Pooches and the sole distributor of Pooping Pooches Branded Products in the United States. The Defendants identified on Schedule “A” are not sub-distributors of Pooping Pooches Products, nor has Mr. Wagenman authorized any of those defendants to sell any other products bearing the Pooping Pooches names. Thus, any sales by the Defendants are unauthorized and illegal.

Upon information and belief, Defendants are individuals and business entities who mostly reside in the People’s Republic of China or other foreign jurisdictions. Defendants conduct business throughout the United States, including Illinois and within this Judicial District, through the operation of the fully interactive commercial websites and online marketplaces operating under

the Defendant Internet Stores. The platforms the Defendants use include, but are not limited to, Temu.com, eBay.com, Walmart.com, Amazon.com, AliExpress.com, and Etsy.com.

Defendants deceive unknowing consumers by using the Plaintiff's Pooping Pooches Trademarks without authorization on its infringing and inferior products, and within the content, text, and/or meta tags of its websites to attract various search engines looking for websites relevant to consumer searches for Plaintiff's Products. Further, upon information and belief, Defendants do not donate proceeds to the Maui Humane Society to support animals in need as consumers have come to expect when purchasing a Pooping Pooches Branded Product. Defendants' willful, intentional and unauthorized use of Plaintiff's Pooping Pooches Trademarks is likely to cause and is causing confusion, mistake, and deception as to the origin and quality of the counterfeit products among the general public. Defendants' sales are unauthorized, illegal, and damaging to consumers and to the Pooping Pooches brand and reputation.

III. THE COURT SHOULD PERMIT SERVICE BY EMAIL UNDER RULE 4(F)(3) AND 4(H)(2)

Federal Rule of Civil Procedure 4(h)(2) provides that a "foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name" may be served "at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual." Fed. R. Civ. P. 4(h)(2). Thus, pursuant to Rule 4(f)(3), Pooping Pooches requests permission to serve process on Defendants in the Schedule A to the Complaint by "other means not prohibited by international agreement." *See* Fed. R. Civ. P. 4(f)(3).

Proper service requires satisfying both Fed. R. Civ. P. 4 and constitutional notions of due process. *See Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). Due process requires only that service of process be "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) (collecting cases). Service by email not only comports with due process requirements, but is actually the preferred method of reaching the Defendants and how the Defendants engage in business on Amazon and other third party platforms. *See Rio Props.*, 284 F.3d at 1116-18; *Amazon.com Inc. v. Sirowl Tech.*, 2020 WL 7122846, at *3 (W.D. Wash. Dec. 4, 2020) (“[P]laintiffs have demonstrated an inability to obtain a valid physical address for defendants and that defendants conduct business through the internet, so that service by email will provide defendants with sufficient notice and an opportunity to respond”); *Facebook, Inc v. Banana Ads, LLC*, 2012 WL 1038752, at *2 (N.D. Cal. Mar. 27, 2012) (finding email service comported with due process because defendants were “involved in commercial internet activities” and “rel[ie]d on electronic communications to operate their businesses,” and plaintiff had valid email addresses for defendants); *Monco v. Zoltek Corp.*, 2018 WL 3190817, at *4 (N.D. Ill. Apr. 24, 2018); *Strabala v. Zhang*, 318 F.R.D. 81, 115 (N.D. Ill. 2016).

Service by email to the email addresses a defendant uses in connection with its business is calculated to provide actual notice of this suit. As an online business, Defendants rely primarily on electronic communications to communicate with the online platforms through which they list their products, which demonstrates the reliability of this method of communication. *Id.* Defendants use email addresses to communicate with these online platforms regarding all aspects of their business operations and in setting up their storefronts. Expedited discovery with the online platforms, specifically Amazon, will request the email addresses for the Defendants.

Authorizing service by email under Rule 4(f)(3) will benefit the parties and the Court, ensuring that Defendants receive prompt notice of this action and allowing this action to move

forward expeditiously. Moreover, it is proportional and reciprocal that service of process might be effectuated by email. Absent the ability to serve Defendants by “other means,” Pooping Pooches will be forced to pursue costly and time-consuming service of process in foreign countries once Amazon provides addresses, which could take over one year to effect in these foreign territories.

a. Alternative Service By “Other Means” Is Appropriate and Not Prohibited By International Agreement

Rule 4(f)(3) allows service “by other means not prohibited by international agreement, as the court orders.” Fed. R. Civ. P. 4(f)(3). However, “service of process under Rule 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.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002) (internal citation omitted).

To obtain relief under Rule 4(f)(3), plaintiff need “only to demonstrate that the facts and circumstances of the present case necessitated the district court’s intervention.” *Id.* at 1016. *Rio Properties* held “without hesitation” that e-mail service on an online business “was constitutionally acceptable.” *Id.* at 1017. The Court reached this conclusion because—as in this case—the defendant conducted business over the Internet, used email regularly, and encouraged parties to contact it via-email. *Id.* Rule 4(f)(3) allows a court to order alternative service upon a foreign defendant through any means not prohibited by international agreement. *Id.* at 1014. To establish that service under Rule 4(f)(3) is appropriate in a given case, plaintiff must also show that the alternative method “comport[s] with constitutional notions of due process,” meaning that service must 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.” *Id.* at 1016-17 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

A number of Courts, including the Northern District of Illinois, have held that alternate forms of service pursuant to Rule 4(f)(3), including email service, are appropriate and may be the only means of effecting service of process “when faced with an international e-business scofflaw.” *Rio Props.*, 284 F.3d 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 email service); *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”).

The Fifth Circuit has approved of service by email under Rule 4(f)(3) in circumstances similar to the facts here. *Nagravision SA v. Gotech Int'l Tech. Ltd.*, 882 F.3d 494, 498 (5th Cir.), cert. denied, 139 S. Ct. 480, 202 L. Ed. 2d 376 (2018). In *Nagravision*, the plaintiff had only an email address obtained from a pirate-TV server during expedited discovery; with permission of the District Court, the plaintiff effected service by email. *Id.* at 498. The Fifth Circuit affirmed the validity of service by “other means,” i.e., email, pursuant to Rule 4(f)(3):

Rule 4 permits service on foreign defendants “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents” and “by other means not prohibited by international agreement, as the court orders.” ***Service here was court-ordered email service under Rule 4(f)(3), and Gotech has not shown that such service is prohibited by international agreement. Service was therefore proper.*** Overlooking Rule 4(f)(3) entirely, Gotech argues that the service did not comply with the Hague Convention and Rule 4(f)(1). This argument misses the mark because service was not effected pursuant to the Hague Convention, and that agreement does not displace Rule 4(f)(3).

Id. at 498 (emphasis added). *Nagravision* notes the distinction between Rule 4(f)(3) and the Hague Convention; the Hague Convention is not the only means of effecting service on a Chinese or foreign defendant. *Id.*; accord *Microsoft Corp. v. Goldah.com Network Tech. Co.*, No. 17-CV-02896-LHK, 2017 WL 4536417, at *3–4 (N.D. Cal. Oct. 11, 2017) (“[Chinese] Defendants’ claim incorrectly assumes that the Hague Convention is the only means of effecting service.”). Because Rule 4(f)(3) is an equally favored method of service on foreign defendants, the Court should permit service on Defendants here through “other means.” See *Rio Props.*, 284 F.3d at 1015.

Service by email is not prohibited by international agreement. In particular, the “Hague Convention does not expressly prohibit service by email.” *Love-Less Ash Co., Inc. v. Asia Pac. Constr., LLC*, No. 2:18-cv-595-CW-DAO, 2021 WL 3679971, at *2 (D. Utah Aug. 19, 2021). Additionally, numerous courts, including in the Tenth Circuit, have held that alternate forms of service pursuant to Rule 4(f)(3)—including e-mail service—are appropriate for a foreign e business defendant. See *Rio Props.*, 284 F.3d at 1018. See also *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 563 (E.D. Tenn. 2004) (quoting *Rio Props.*, 284 F.3d at 1018) (allowing e-mail service); *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 Props.*, 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”); *Elsevier, Inc. v. Siew Yee Chew*, 287 F. Supp. 3d 374, 379 n.2 (S.D.N.Y. 2018) (“[P]laintiffs’ requested alternative means of service does not violate the Hague Convention. While China has objected to service by postal channels under Article 10 . . . courts have routinely recognized that such objections do not extend to service by email.”);

Neck Hammock, Inc. v. Danezen.com, No. 2:20-CV-287, 2020 WL 6364598, at *4–5 (D.Utah Oct. 29, 2020) (unpublished) (concluding that “email service is not prohibited by international agreement,” even though China had objected to service by postal channels under Article 10 of the Hague Convention, and “email service can comport with constitutional notions of due process”); *DP Creations, Inc. v. Reborn Baby Mart*, No. 2:21-CV-00574-JNP, at *15 (D. Utah Nov. 22, 2021) (unpublished) (concluding that “[s]ervice by email is not prohibited by international agreements” and noting that “[i]n particular, the ‘Hague Convention does not expressly prohibit service by email.’”).

b. Email Service Under Rule 4(f)(3) Comports With Due Process

Allowing service by email under Rule 4(f)(3) also comports with constitutional notions of due process because it is reasonably calculated to give notice to the foreign defendants. *Rio Props.*, 284 F.3d at 1016–17 (“[W]e conclude [] that service of process by email was . . . reasonably calculated to apprise [defendant] of the pendency of the action and afford it an opportunity to respond.”); accord *Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 332 (S.D.N.Y. 2015) (service by email on a Chinese defendant was “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” (internal citation omitted)). Moreover, serving the Defendants via email at an email address they use for contacts related to this dispute is reasonably calculated to give notice of this lawsuit. *See ADT Sec. Servs. v. Sec. One Int’l, Inc.*, No. 11-cv-05149 YGR, 2012 WL 3580670, at *5-6 (N.D. Cal. Aug. 17, 2012) (service by email on the “the contact email address that is listed on [defendant’s] website” was “reasonably calculated to provide actual notice”). *See also DP Creations*, No. 2:21-CV-00574-JNP, at *16 (D. Utah Nov. 22, 2021) (unpublished) (“[i]n this case, email service clearly comports with

constitutional notions of due process. Most importantly, it is likely the best way to effectively notify Defendants of this case.”).

c. Rule 4 Does Not Require Other Attempts At Service

Lastly, Rule 4 does not require other attempts at service before Pooping Pooches requests service by “other means” under Rule 4(f)(3). *See Rio Props.*, 284 F.3d at 1014-15. *Rio Properties* explained that Rule 4(f) does not create a hierarchy of preferred methods of service of process. *Id.* at 1014 (“We find no support for [the argument that Rule 4(f) creates a hierarchy of preferred methods of service]. No such requirement is found in the Rule’s text, implied by its structure, or even hinted at in the advisory committee notes.”). To the contrary, the plain language of the Rule requires only that service be (1) directed by the court and (2) not 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 one means among several by which an international defendant may be served. *Id.*

IV. CONCLUSION

Pooping Pooches respectfully requests the Court grant its Motion for Alternative Service of Process on the Defendants by email addresses being sought from Amazon and pursuant to Rule 4(f)(3).

Dated: December 20, 2024

Respectfully submitted,

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(electronically signed)

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