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7
8 IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

| | | |
|-----------------------------|---|-----------------------------------|
| 9 UNITED STATES OF AMERICA, |) | Case No. 2:16-cv-689-JLR |
| |) | |
| 10 Plaintiff, |) | UNITED STATES' EX PARTE |
| |) | MOTION TO AUTHORIZE |
| 11 v. |) | ALTERNATIVE SERVICE OF |
| |) | PROCESS ON JEFFREY |
| 12 JEFFREY P. POMERANTZ, |) | POMERANTZ PURSUANT TO FED. |
| |) | R. CIV. PROC. 4(f)(3) |
| 13 Defendant. |) | NOTE ON MOTION CALENDAR: |
| |) | March 3, 2017 |

14 Pursuant to Fed. R. Civ. P. 4, the United States of America hereby moves this Court for
15 an order authorizing alternative means of service of the summons and complaint in this matter
16 upon Defendant Jeffrey Pomerantz. This request is supported by an affidavit of trial attorney
17 Paul T. Butler and exhibits thereto.

18 **I. INTRODUCTION**

19 Plaintiff United States of America ("United States") filed this action on May 13, 2016 to
20 reduce to judgment and collect penalties assessed against Defendant Jeffrey P. Pomerantz
21 ("Pomerantz") for willful failure to file required Treasury Forms TD F 90-22.1 ("FBAR") with
respect to interests in foreign accounts for the years 2007-2009 in the amount of \$860,300.35.

22 **II. BACKGROUND**

23 After commencement of this action the United States, concerned with the costs and

1 logistical challenges of locating and personally serving Defendant, sent on May 19, 2016 via
2 Federal Express a Notice of Lawsuit and Request to Waive Service of Summons, a copy of the
3 Complaint, and a pre-paid return Fed Ex envelope (“waiver package”) to the Defendant at three
4 separate addresses known to the United States to have been used by Defendant in his dealings
5 with the United States Internal Revenue Service (“IRS”). Butler Decl. ¶ 7, Ex, F-H.

6 Based upon the results of Federal Express’ attempts to deliver the waiver packages to
7 Defendant, the United States confirmed that all three locations were mail service store locations.
8 Two of the three waiver packages were successfully delivered. The waiver package addressed to
9 the domestic address was delivered to 250 H Street, #77, Blaine, WA 98230. The waiver
10 package addressed to the address contained on Defendant’s United States Tax Court petition was
11 delivered, but it was delivered, presumably at the direction of Defendant, to a different mail
12 services business located at 207-1425 Marine Drive, North Vancouver, BC, Canada V7T 1B7.
Butler Decl. ¶¶ 9-12, Exs. A, pg. 2, J, K.

13 In a telephone conversation with Defendant on August 2, 2016, Defendant confirmed to
14 undersigned Counsel for the United States that he had received the waiver package, but he
15 refused to consent to waive service, failed to provide a residence address, and failed to consent to
16 service by e-mail. Butler Decl. ¶ 15.

17 Counsel for the United States has attempted on at least six occasions to reach Hari
18 Nesathurai, counsel who represented Defendant during the administrative process before the IRS
19 that lead to the assessment of the penalties at issue in this case and who continues to represent
20 Defendant in a United States Tax Court case involving tax and penalties for the same years at
21 issue in this case, and had left messages requested a return call or e-mail regarding the
22 Defendant. Butler Decl. ¶¶ 16-17, Exs. M-N. No response has been received..

23 Having established that Defendant received a copy of the Complaint and the reliability of
delivery of communications to the Defendant via delivery to one or more of the store-front
mailbox locations he has used in his prior dealings with the government, the United States seeks

1 an order pursuant to Fed. R. Civ. Proc. 4(f)(3) authorizing service by international or domestic
2 (depending on the address) mail and courier to each of the following three addresses: 250 H
3 Street, #77, Blaine, WA 98230; 207-1425 Marine Drive, North Vancouver, BC, CANADA V7T
4 1B7; and 189-1075 Marine Drive, North Vancouver, BC, CANADA V7P 3T6. Additionally, in
5 order to create the greatest probability of actual receipt of the summons in this case, the United
6 States seeks an order pursuant to Fed. R. Civ. Proc. 4(f)(3) authorizing service by international
7 mail on Defendant's counsel in the pending United States Tax Court case who also filed a Power
8 of Attorney with the IRS related to administrative process that lead to the FBAR penalties at
9 issue in this case, Hari Nesathurai, whose primary office is located in Ontario, Canada.

9 III. ARGUMENT

10 A. This Court can authorize service via e-mail, international mail, and 11 international courier pursuant to Federal Rule of Civil Procedure 4(f)(3).

12 Federal Rule of Civil Procedure 4(f)(3) permits service in a place not within any judicial
13 district of the United States by an alternative method of service when the service is (1) directed
14 by the court, and (2) not prohibited by international agreement. *RioProperties, Inc. v. Rio*
15 *International Interlink*, 284 F.3d 1007, 1014-15 (9th Cir. 2002) (authorizing e-mail service on
16 Internet business entity defendant located in Costa Rica). Furthermore, as long as it is court-
17 directed and not prohibited by international agreement, service of process under Rule 4(f)(3) may
18 be accomplished in contravention of the laws of the foreign country. *Id.*, citing *Mayoral-Amy v.*
19 *BHI Corp.*, 180 F.R.D. 456, 459, fn. 4 (S.D. Fla. 1998). Rule 4 does not require that a party
20 attempt service of process by those methods enumerated in Rule 4(f)(2), including by diplomatic
21 channels and letters rogatory, before petitioning the court for alternative relief under Rule
22 4(f)(3). *Rio Properties*, 284 F.3d at 1014-15.

23 Courts have authorized a wide variety of alternative methods of service including
ordinary mail, mail to the defendant's last known address, and e-mail. *See Nanya Technology*
Corp. v. Fujitsu Ltd., 2007 WL 269087, slip. op., No. 06-00025 (D. Guam, Jan. 26, 2007)

1 (authorizing service by international mail requiring a signed receipt); *Levin v. Ruby Trading*
2 *Corp.*, 248 F. Supp. 537, 541-44 (S.D.N.Y. 1965) (authorizing service by ordinary mail); *Intl'l*
3 *Controls Corp. v. Vesco*, 593 F.2d 166, 176-78 (2d Cir. 1979) (authorizing service by mail to last
4 known address); *Broadfoot v. Diaz (In re Int'l Telemedia Assoc.)*, 245 B.R. 713, 719-20 (Bankr.
5 N.D. Ga. 2000) (authorizing service by e-mail); *Williams v. Advertising Sex LLC*, 231 F.R.D.
6 483 (N.D.W.V. 2005) (authorizing email service on defendants located in Australia); *Popular*
7 *Enterprises, LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560 (E.D. Tenn. 2004) (authorizing
8 e-mail service on defendant located in Portugal).

9 In this case, international mail and international courier service are not prohibited by
10 international agreement. Because Defendant's last known address as provided to the IRS is in
11 Canada, the Hague Convention of the Service Abroad of Judicial and Extrajudicial Documents in
12 Civil or Commercial Matters (the "Hague Convention") applies. *Volkswagenwerk*
13 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988).¹ Though it does not expressly
14 authorize e-mail, international mail, or international courier service, the Hague Convention does
15 not *prohibit* service by these means, and thus, is no bar to court-directed international mail,
16 international courier, or e-mail service under Rule 4(f)(3). In fact, U.S. courts have routinely
17 authorized international mail and e-mail service notwithstanding the applicability of the Hague
18 Convention. *See, e.g., Brockmeyer v. May*, 383 F.3d 798, 800 (9th Cir. 2004) ("We join the
19 Second Circuit in concluding that the Convention . . . does not prohibit service of process by
20 international mail"); *Nanya Technology Corp.*, 2007 WL 269087 (Hague Convention, to which
21 Japan is a signatory, did not prohibit e-mail service upon Japanese defendant); *Popular*
22 *Enterprises*, 225 F.R.D. at 562; *MPS IP Services Corp. v. Modis Communications, Inc.*, 2007

23 ¹ Although the Hague Convention applies, service under the Convention is not possible here because Plaintiff cannot provide a residential address at which Pomerantz can be personally served.

1 WL 723841, No. 06-270 (M.D. Fla. March 6, 2007) (Hague Convention, to which Canada is a
2 signatory, did not prohibit e-mail service upon Canadian defendants). Canada has filed no
3 declarations under the Hague Convention expressly prohibiting service by e-mail, international
4 mail, or international courier. Furthermore, e-mail, international mail, and international courier
5 service is appropriate under the Hague Convention because the “Hague Convention together with
6 Rule 4” places an emphasis on “actual notice, rather than strict formalism.” *Burda Media, Inc. v.*
7 *Viertel*, 417 F.3d 292, 301 (2d Cir. 2005).

8 Given the background of this case, there is no doubt that Defendant, by his own
9 admission to undersigned counsel, has received notice of the filing of the Complaint in this
10 action and that notice was delivered to mailbox service addresses used by Defendant. Service
11 through these mailbox service locations is the most reliable way—if not only way—of providing
12 the Defendant with the Summons issued in this matter directing him to file an answer or risk
13 default judgment. Despite acknowledging receipt of the Complaint in this matter, Defendant has
14 neither made an appearance nor filed any responsive pleading.

15 In contrast, the United States has already delivered the complaint, and other documents to
16 Pomerantz via courier service to his mailbox addresses, requested that he waive service or accept
17 service by e-mail, and attempted to arrange for service with Pomerantz’ counsel for related
18 matters pending in the United States Tax Court. All of these efforts as well as efforts to locate a
19 residential address for Pomerantz have proved fruitless. Pomerantz continues to operate (and
20 hold himself out as the principal of) a business that uses the phone number provided on his
21 Petition to the United States Tax Court, the same business that advertises having its business
22 office at the same mailbox location in Blaine, Washington to which the United States’ request to
23 waive service was successfully delivered. In the unlikely event that service of the summons and
complaint to the three mailbox locations identified herein fail to provide Pomerantz with the
Summons and an additional copy of the Complaint case, service upon the attorney who both
currently represents Pomerantz in the United States Tax Court case involving related matters and

1 who provided a Power of Attorney to the IRS for the same matters at issue in this case will
2 ensure notice to Pomerantz.

3 **B. E-mail, international mail, and international courier service is**
4 **reasonable under the circumstances and comports with Due Process.**

5 Even if permitted under FRCP 4(f)(3), alternative service must also comport with
6 constitutional notions of due process. *Rio Properties*, 284 F.3d at 1016. To meet this
7 requirement, the method of service must be reasonably calculated, under all the circumstances, to
8 apprise interested parties of the pendency of the action and afford them an opportunity to present
9 their objections. *Id.* at 1016-17, citing *Mullane v. Cent.Hanover Bank & Trust Co.*, 339 U.S. 306,
10 314 (1950). The Ninth Circuit in *Rio* held, “without hesitation,” that e-mail service of an online
11 business defendant “was constitutionally acceptable.” *Rio Properties*, 284 F.3d at 1017. The
12 Court concluded “not only that service of process by e-mail was proper—that is, reasonably
13 calculated to apprise [the defendant] of the pendency of the action and afford it an opportunity to
14 respond—but in this case, it was the method of service most likely to reach [the defendant].” *Id.*
15 The Court reached this conclusion in part because the defendant conducted its business over the
16 Internet, used e-mail regularly in its business, and encouraged parties to contact it via e-mail.
17 Courts cannot be blind to changes and advances in technology. *Rio Properties*, 284 F.3d at 1017
18 (quotations omitted). Nor can they be blind to efforts of defendants to avoid service of process.
19 No longer must process be mailed to a defendant’s door when he can receive complete notice at
20 an electronic terminal inside his very office, even if the door is steel and bolted shut. *Id.*

21 Here, Pomerantz has used a series of mailbox store addresses to conduct business and to
22 interact with authorities. While the United States was able to deliver service documents to
23 Pomerantz via Federal Express to his mailbox store addresses, all attempts to locate a current
residential address have proved futile. Federal Express delivery to Pomerantz of the pendency of
the lawsuit is sufficient under Due Process. *Rio Properties*, 284 F.3d at 1018.

1 **IV. CONCLUSION**

2 For all of the reasons set forth above, the Court should issue an order authorizing service on
3 Defendant Jeffrey Pomerantz via international (or domestic depending on the address) mail and
4 courier (Federal Express), and via international mail and courier (Federal Express) directed to
5 Hari Nesathurai.

6 DATED: March 3, 2017

7 DAVID A. HUBBERT
8 Acting Assistant Attorney General

9 */s/ Paul T. Butler*
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