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5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**  
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8 BMO Harris Bank, N.A.,  
9 Plaintiff,  
10 v.  
11 Marty R. Guthmiller, et al.,  
12 Defendants.

No. CV-14-00275-PHX-JAT

**ORDER**

13  
14 Pending before the Court is Plaintiff BMO Harris Bank, N.A.'s *Ex Parte* Motion  
15 for an Order Permitting Alternate Service of Performance Audio Video, Inc.  
16 ("Performance") pursuant to Federal Rules of Civil Procedure ("Federal Rules")  
17 4(h)(1)(A) and 4(e)(1). (Doc. 11). Plaintiff requests an order authorizing alternative  
18 service of the Summons, Complaint, and this Order by: "(1) mailing process to  
19 Performance at its last known physical address; (2) emailing process to [Performance's  
20 president and statutory agent Marty] Guthmiller's business email account; and (3)  
21 mailing and emailing process to Guthmiller's bankruptcy counsel." (*Id.* at 1-2).

22 **I. BACKGROUND**

23 On February 12, 2014, Plaintiff instituted this action for breach of contract against  
24 Marty R. Guthmiller ("Guthmiller") and for breach of guaranty against Performance. (*See*  
25 Doc. 1 at 4-5). Plaintiff initiated these claims as a result of Guthmiller's alleged default  
26 on certain loans guaranteed by Performance. (*Id.* at 2-3). Guthmiller is Performance's  
27 "sole statutory agent" for service of process. (Doc. 11 at 4).

28 Plaintiff initially asked Guthmiller's current bankruptcy counsel to accept service

1 of the Complaint and Summons on behalf of Guthmiller. (Doc. 11-1 at 13). Upon  
2 consultation with Guthmiller, Guthmiller’s counsel stated he was not authorized to accept  
3 such service of process. (*Id.* at 12-13). Later, Plaintiff’s counsel approached Guthmiller’s  
4 bankruptcy counsel in Guthmiller’s presence to ask if the bankruptcy counsel could  
5 accept service and was again denied. (*Id.* at 11-13). Next, Plaintiff’s process server went  
6 to Guthmiller’s home address but because the property was gated and there was no  
7 indication of Guthmiller, service was unsuccessful. (Doc. 8 at 1). Finally, the process  
8 server went to Performance’s business address to serve Guthmiller. (Doc. 10 at 1). After  
9 the process server called Guthmiller’s name, Guthmiller jumped in his car, “drove away  
10 at a high speed and almost roll[ed] on [the process server].” (*Id.*) As a result, Plaintiff  
11 claims that it is left with “no effective – or safe – means to accomplish service.” (Doc. 11  
12 at 2).

13 Plaintiff knows Guthmiller’s business email address, *id.* at 4, and has confirmed  
14 Performance’s business address. (Doc. 10 at 1). Additionally, Plaintiff knows the email  
15 and mailing address for Guthmiller’s bankruptcy counsel, Edwin B. Stanley. (Doc. 11-1  
16 at 20). In view of the safety concerns that Guthmiller has imposed on Plaintiff’s process  
17 server, Plaintiff requests an order pursuant to Federal Rules 4(h)(1)(A) and 4(e)(1)  
18 permitting Plaintiff to satisfy service of process to Performance by: “(1) mailing [the  
19 Summons, Complaint, and this Order] to Guthmiller at Performance’s physical business  
20 address via First Class Mail; (2) emailing the same to Guthmiller’s business email  
21 account, marty@pavaz.com; and (3) mailing and emailing [the Summons, Complaint,  
22 and this Order] to Guthmiller’s bankruptcy counsel of record.” (Doc. 11 at 5).

## 23 **II. LEGAL STANDARD**

24 The procedural requirement of service of the summons must be satisfied before a  
25 federal court may exercise personal jurisdiction over a defendant. *Omni Capital Int’l, Ltd.*  
26 *v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987), *superseded by statute on other grounds*;  
27 *SEC v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007). Accordingly, “[a] federal court is  
28 without personal jurisdiction over a defendant unless the defendant has been served in

1 accordance with Fed.R.Civ.P.4.” *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986),  
2 amended by 807 F.2d 1514 (9th Cir. 1987).

3 Federal Rule 4(e)(1) allows summons to be served on an individual in a manner  
4 that follows “state law for serving a summons in an action brought in courts of general  
5 jurisdiction in the state where the district court is located or where service is made.”  
6 Under Arizona law, when personal service has become impracticable, Arizona Rule of  
7 Civil Procedure (“Arizona Rule”) 4.1(k) authorizes service by alternative means as  
8 follows:

9 **Alternative or Substituted Service.** If service by one of the  
10 means set forth in the preceding paragraphs of this Rule 4.1  
11 proves *impracticable*, then service may be accomplished in  
12 such manner, other than by publication, as the court, upon  
13 motion and without notice, may direct. Whenever the court  
14 allows an alternate or substitute form of service pursuant to  
15 this subpart, reasonable efforts shall be undertaken by the  
16 party making service to assure that actual notice of the  
17 commencement of the action is provided to the person to be  
18 served and, in any event, *the summons and the pleading to be  
19 served as well as any order of the court authorizing an  
20 alternative method of service, shall be mailed to the last  
21 known business or residence address of the person to be  
22 served.*

23 Ariz. R. Civ. P. 4.1(k) (emphasis added).

24 If alternative service of process is appropriate, any proposed alternative method of  
25 service must comport with constitutional notions of due process. *Rio Props., Inc. v. Rio*  
26 *Int’l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002). To meet such a requirement, the  
27 alternative method of service “must be ‘reasonably calculated under all the  
28 circumstances, to apprise the 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)).

### 29 **III. ANALYSIS**

30 Plaintiff has made the requisite showing under Federal Rule 4(e)(1) to justify  
31 alternative service. For the Court to grant Plaintiff’s Motion for Alternate Service, service  
32 must prove impracticable. Ariz. R. Civ. P. 4.1(k).

1 Arizona law does not expressly define the standard for  
2 impracticability, but in 2010, the Arizona Court of Appeals in  
3 [*Blair v. Burgener*] approvingly cited the language from a  
4 New York case on a similar service issue. [245 P.3d 898,  
5 903-04 ¶¶ 15-17 (Ariz. Ct. App. 2010)]. “[T]he standard of  
6 impracticability [i]s 'different from the more stringent one of  
7 'due diligence' . . . . That is, to meet the standard on  
8 impracticability does not require satisfying due diligence, or  
9 even showing that actual prior attempts to serve a party under  
10 each and every method provided in the statute have been  
11 undertaken[.]’” [*Id.* at 903 ¶ 15] (quoting *Kelly v. Lewis*, 220  
12 A.D.2d 485, 486, 632 N.Y.S.2d 186, 186 (App. Div. 1995)).  
13 Applying this standard of impracticability, the New York  
14 court concluded that three attempts at service on three  
15 different days constituted sufficient efforts to warrant  
16 alternative means of service. Adopting the same standard, the  
17 *Blair* court found that Blair’s efforts at service without  
18 success met the definition of impracticability justifying  
19 alternative service. Blair’s process server attempted service at  
20 both defendants’ place of business and the individual  
21 defendant’s residence on five different days at various times.  
22 In addition to these physical attempts, the process server  
23 attempted to ascertain over an additional seven days whether  
24 the individual defendant was present in the office so that  
25 service could be made. Each time he was told this defendant  
26 was not in the office. These facts and circumstances, the  
27 Arizona court concluded, “demonstrate that service of process  
28 through the usual means would have been ‘extremely difficult  
or inconvenient[.]’” and was impractical which justified the  
trial court’s authorization of alternative service under Arizona  
law. [*Id.* at 904 ¶ 18].

17 *BMO Harris Bank, N.A. v. D.R.C. Invs., L.L.C.*, No. CV-13-1692-PHX-LOA, 2013 WL  
18 4804482, at \*4 (D. Ariz. Sept. 9, 2013).

19 Here, after attempting multiple attempts to serve Guthmiller at both his home and  
20 business as well as attempts to obtain authorization to serve Guthmiller’s current  
21 bankruptcy counsel, Guthmiller placed the process server in danger of bodily harm. (Doc.  
22 10 at 1). As a result, service of process has been made not only extremely difficult and  
23 inconvenient but also dangerous. Thus, because the ‘impracticable’ requirement of  
24 Arizona Rule 4.1(k) is satisfied, service by an alternative method is allowed under  
25 Federal Rule 4.1(e).

26 Because alternative service of process is appropriate, the Court must analyze  
27 whether Plaintiff’s proposed method of alternative service comports with “constitutional  
28 notions of due process.” *Rio Props., Inc.*, 284 F.3d at 1016. Plaintiff’s proposed method

1 of alternative service is composed of three prongs that seek alternative service by: “(1)  
2 mailing [the Summons, Complaint, and this Order] to Guthmiller at Performance’s  
3 physical business address via First Class Mail; (2) emailing the same to Guthmiller’s  
4 business email account, marty@pavaz.com; and (3) mailing and emailing [the Summons,  
5 Complaint, and this Order] to Guthmiller’s bankruptcy counsel of record.” (Doc. 11 at 5).

6 **1. Mailing Process to Performance’s Physical Business Address**

7 The first prong of Plaintiff’s motion for alternative service proposes “mailing [the  
8 Summons, Complaint, and this Order] to Guthmiller at Performance’s physical business  
9 address via First Class Mail.” (*Id.*) According to Arizona Rule 4.1(k), when alternative  
10 service is allowed by a court, the summons, pleading and court order authorizing the  
11 alternative service “shall be mailed to the last known business. . . address of the person to  
12 be served.” Additionally, this Court has previously allowed service by first-class U.S.  
13 mail. *Composite Industrie S.A. v. Vision Air Am., Inc.*, No. CV-13-01984-PHX-JAT,  
14 2014 WL 1230492, at \*2 (D. Ariz. Mar. 25, 2014).

15 Here, Plaintiff knows Performance’s physical address. (Doc. 10 at 1).  
16 Additionally, because the process server saw Guthmiller at that address, *id.*, there is a  
17 strong indication that Guthmiller will receive actual notice at this location. As a result,  
18 alternative service of the Summons, Complaint and this Order by first-class mail to  
19 Performance’s business address is allowed and comports with the due process standards  
20 articulated in *Mullane*. See 339 U.S. at 314.

21 **2. Emailing Process to Guthmiller’s Business Email Account**

22 The second prong of Plaintiff’s motion for alternative service is to email the  
23 Summons, Complaint, and this Order to Guthmiller’s business email account. The Ninth  
24 Circuit Court of Appeals has held due process requires “nothing more” than service of  
25 process by email when that was the only means reasonably calculated to apprise the  
26 defendant of the lawsuit. *Rio Props., Inc.*, 284 F.3d at 1018. In *Rio*, the Ninth Circuit  
27 prefaced the dangers of email service of process by noting that “there is no way to  
28 confirm receipt of an email message” but ultimately left the decision to allow service of

1 process by email “to the discretion of the district court.” 284 F.3d at 1018. Courts have  
2 subsequently allowed alternative service by email even when there are other means of  
3 communication available. *See, e.g., Johnson v. Mitchell*, 2012 WL 1413986, at \*5 (E.D.  
4 Cal. Apr. 23, 2012) (allowing both email service of process in addition to mail delivery of  
5 process).

6 This Court acknowledges the limitations of email service identified by the Ninth  
7 Circuit and outlined above. However, because a previous court-approved email service to  
8 Guthmiller’s business email address resulted in actual notice to Guthmiller, (Doc. 11-1 at  
9 25-30), service to Guthmiller’s business email address would reasonably apprise him of  
10 this lawsuit. Additionally, potential technological issues arising from email service will  
11 be mitigated by requiring the additional service by first-class mail, as outlined above, and  
12 through service to Guthmiller’s bankruptcy counsel, as outlined below.

13 **3. Mailing and Emailing Process to Guthmiller’s Bankruptcy Counsel.**

14 The third prong of Plaintiff’s motion for alternative service proposes “mailing and  
15 emailing [the Summons, Complaint, and this Order] to Guthmiller’s bankruptcy counsel  
16 of record.” (Doc. 11 at 5). Courts analyze the communications between a defendant and  
17 defendant’s counsel in deciding whether, as a method of alternative service, a defendant’s  
18 counsel may accept process that he would otherwise be unauthorized to accept. *See Rio*  
19 *Props.*, 284 F.3d at 1017 (authorizing service on defendant’s lawyer, but noting the  
20 attorney “had been specifically consulted by [the defendant] regarding this lawsuit.”);  
21 *Inter123 Corp. v. Ghaith*, No. CV-14-00463-PHX-DGC, 2014 WL 1763280, at \*6 (D.  
22 Ariz. May 5, 2014) (authorizing service on defendant’s lawyer because defendant was  
23 “clearly aware of [the] action as shown by his retention of counsel.”); *FMAC Loan*  
24 *Receivables v. Dagra*, 228 F.R.D. 531, 536 (E.D. Va. 2005) (authorizing service on  
25 defendant’s lawyer, but noting that the defendant had been “in constant communication  
26 with his attorney.”).

27 Plaintiff has taken several steps to apprise Guthmiller of this action including  
28 multiple attempts to have Guthmiller’s current bankruptcy counsel accept service. (Doc.

1 11 at 2). Additionally, conversations between Plaintiff's counsel and Guthmiller's  
2 bankruptcy counsel about this case took place in Guthmiller's physical presence. (Doc.  
3 11-1 at 12-13). Given these facts, the Court concludes that allowing Plaintiff to serve  
4 Guthmiller's current bankruptcy counsel via email and first-class mail would clearly  
5 apprise Guthmiller of the pendency of this action and afford him the opportunity to  
6 present his objections. *See Mullane*, 339 U.S. at 314. Plaintiff may effect service, in  
7 conjunction with the two prongs discussed above, by sending the Summons, Complaint,  
8 and this Order to Defendant's counsel via first-class mail and email.

9 **IV. CONCLUSION**

10 For the foregoing reasons,

11 **IT IS ORDERED** that Plaintiff's *Ex Parte* Motion for an Order Permitting  
12 Alternate Service of Performance Audio Video, Inc. (Doc. 11) is granted.

13 **IT IS FURTHER ORDERED** that Plaintiff's counsel shall file an affidavit upon  
14 completion of service specifying the date and details on which alternative service has  
15 been accomplished.

16 Dated this 9th day of June, 2014.

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James A. Teilborg  
Senior United States District Judge