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 Libyan Jamahiriya Broadcasting Corporation

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 11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

14 Libyan Jamahiriya Broadcasting  
 15 Corporation,

16 Plaintiff,

17 vs.

18 Abdalla Saleh,

19 Defendant.

Civil Action No. 5:10-CV-03713-JF PVT

*EX PARTE* APPLICATION FOR ORDER  
 AUTHORIZING ALTERNATE SERVICE  
 OF PROCESS ON DEFENDANT PURSUANT  
 TO F.R.C.P. 4(f)(3); MEMORANDUM OF  
 POINTS AND AUTHORITIES IN SUPPORT  
 THEREOF

[Filed concurrently the Declarations of Al Duncan  
 and John Fuisz as well as an [proposed] Order]

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 21  
 22  
 23  
 24 **EX PARTE APPLICATION**

1 Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) seeks an order  
2 authorizing service of the Summons and Complaint in this matter upon Defendant Abdalla Saleh  
3 via e-mail, pursuant to Federal Rule of Civil Procedure 4(f)(3).

4 Such application is made upon the grounds that LJBC has not been able to locate Defendant  
5 despite reasonable diligence because Defendant is purposefully concealing his location.

6 Moreover, the Defendant has already consented to the jurisdiction of this district in his 17 U.S.C.  
7 §512 counter-designation in which he stated under penalty of perjury:

8 I hereby consent to the jurisdiction of the Federal District Court for the district in  
9 which I reside (or if my address is outside of the United States, the judicial district  
10 in which YouTube is located, and will accept service of process from the  
11 claimant.)

12 Declaration of John R. Fuisz at ¶3 (Exhibit B).

13 Such application is based upon this Application, the Memorandum of Points and  
14 Authorities hereto, the Declarations of Al Duncan and John R. Fuisz, and exhibits thereto, filed  
15 concurrently herewith, and the complete files and records of this action, and other such matters  
16 that may be considered by the Court.

17  
18  
19 Dated: September 27, 2010

**The Fuisz Law Firm**

20  
21 /s/ John R. Fuisz  
John R. Fuisz (*pro hac vice*)

22  
23 **Banie & Ishimoto LLP**

24  
25 /s/ Jennifer Ishimoto  
Jennifer Ishimoto (SBN 211845)

26 *Attorneys for Plaintiff*  
27 *Libyan Jamahiriya Broadcasting Corporation*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. NOTICE**

3 As explained in detail below and in the accompanying Declarations of Al Duncan, Private  
4 Investigator, and John R. Fuisz, counsel for Plaintiff Libyan Jamahiriya Broadcasting Corporation  
5 (“LJBC”), Plaintiff has not been able to locate the Defendant Abdalla Saleh who is subject to this  
6 *Ex Parte* Application. Civil Local Rule 7-10 allows the *ex parte* application as long as the  
7 application is permitted by another statute or rule. Here, California Rule of Court Rule 3.1204(b)  
8 permits an application for an *ex parte* order to proceed without notice upon a showing that the  
9 applicant in good faith attempted to inform the opposing party but was unable to do so. Because  
10 Plaintiff has not been able to locate Defendant, Plaintiff has resorted to filing this *Ex Parte*  
11 Application for an order authorizing service of the Summons and Complaint in this matter upon  
12 Defendant.

13  
14 **II. INTRODUCTION**

15 Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) initiated this action  
16 against Defendant Abdalla Saleh, for copyright infringement (Counts 1-4). Pursuant to Federal  
17 Rule of Civil Procedure 4(f)(3), Plaintiff requests an order allowing service of process on the  
18 Defendant via email. Email service is appropriate and necessary in this case because Defendant  
19 (1) provided YouTube LLC an incorrect physical address and (2) used a yahoo.com email  
20 account to communicate with YouTube LLC and appears to rely on email for communication.  
21 Notwithstanding the Defendant’s concealment of his physical location, Plaintiff still has the  
22 ability to contact Defendant directly and provide notice of Plaintiff’s claims against him.

23 Absent the ability to serve the Defendant by email, Plaintiff will almost certainly be left  
24 without the ability to pursue a remedy.

1 **II. STATEMENT OF FACTS**

2 Plaintiff alleges and can demonstrate that an individual identified as “abdoellibie” posted  
3 videos that contain the un-authorized use and un-authorized alteration, including removal of  
4 names and authors of the copyrighted materials.

5 Plaintiff LJBC provided YouTube LLC with Notification under the United States Digital  
6 Millennium Copyright Act (“DMCA”), 17 U.S.C. §512 that an individual with the user name  
7 “abdoellibie” posted materials that infringed upon one or more LJBC copyrights. Declaration of  
8 John R Fuisz at ¶2 (Exhibit A).

9 Defendant, “abdoellibie,” using the email address [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com) filed a counter-  
10 designation. In the counter-designation, “abdoellibie” identified himself as

11 Name, address, and telephone number:

12 Abdallah Saleh,

13 20 Shallmar Blvd, Toronto ON

14 Tel.: 6476286321

15 E-mail: [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com)

16 YouTube user Account Name: Abdoellibie

17 Decl. of Fuisz at ¶3 (Exhibit B). In addition, Defendant stated under penalty of perjury:

18 I hereby consent to the jurisdiction of the Federal District Court for the district in  
19 which I reside (or if my address is outside of the United States, the judicial district  
20 in which YouTube is located, and will accept service of process from the  
21 claimant.)

22 Decl. of Fuisz at ¶3 (Exhibit B).

23 YouTube LLC is located at 901 Cherry Ave, San Bruno, California 94066. Decl. of Fuisz  
24 at ¶4.

25 On August 20, 2010 this lawsuit was filed. That same day, 17 U.S.C. §512(g) Notice of  
26 this lawsuit was provided to YouTube LLC via fax and email (fax 650.872.8513 and email  
27 [copyright@youtube.com](mailto:copyright@youtube.com)) and by email to Abdalla Saleh (email [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com)). Decl.  
28 of Fuisz at ¶5 (Exhibit C).

1 On August 21, 2010, the Civil Cover Sheet, Complaint, Summons, Certification of  
2 Interest, Application for Pro Hac Vice, Order Setting Initial Case Management Conference and  
3 ADR Deadlines, Civil Standing Orders for Magistrate Judge Joseph C. Spero, Notice of Rule  
4 Discontinuing Mail Service, Notice of Assignment of Case and Order of Chief Judge In Re:  
5 Electronic Filing was sent by U.S. Post Office Global Express to Abdalla Saleh, 20 Shallmar Blvd,  
6 Toronto ON, Canada. Decl. of Fuisz at ¶6 (Exhibit D). The address 20 Shallmar is an apartment  
7 building and requires an apartment number for delivery, such that the August 21, 2010 package  
8 has not been able to be delivered. Decl. of Fuisz at ¶6 (Exhibit E).

9 Private Investigator, Al Duncan, was retained to find a proper address for Defendant. As  
10 of September 13, 2010, Abdalla Saleh does not have an Ontario driver's license or phone records  
11 under his name at 20 Shallmar Blvd. Defendant has no property records or liens registered under  
12 his name. All available reporting services to the Private Investigator reveal no information under  
13 Defendant's name. Declaration of Al Duncan.

14 On or about September 14, 2010, Plaintiff noticed that Defendant has begun to remove the  
15 accused videos. For example, the posting on blip.tv identified at Paragraph 11 of the Complaint  
16 has been removed by the poster. It is unknown whether the Defendant is keeping evidence or  
17 destroying the evidence in this case or whether Defendant will re-post the infringing material  
18 while continuing to evade this Court.

### 19 **III. ARGUMENT**

#### 20 **A. The Court may Authorize Service via Email pursuant to FRCP 4(f)(3)**

21 Federal Rule of Civil Procedure 4(f)(3) allows this Court to authorize service of process to  
22 be made on an individual in a foreign country by any means not prohibited by international  
23 agreement as the Court directs. *Rio Properties Inc. v. Rio International Interlink*, 284 F.3d 1007,  
24 1014 (9th Cir. 2002). "By its plain language, service under Rule 4(f)(3) must be (1) directed by  
25 the Court; and (2) not prohibited by international agreement. No other limitations are evident  
26 from the text." *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 561 (E.D.  
27 Tenn. 2004)(Decl. of Fuisz at ¶7 (Exhibit F)). Rule 4 does not require a party to attempt service

1 of process by those methods enumerated in 4(f) subsections (1) and (2) before petitioning for  
2 alternative relief under Rule 4(f)(3). *Rio Properties Inc.*, 284 F.3d at 1015.

3 In *Rio Properties*, the Ninth Circuit offered a detailed analysis of service of process under  
4 Rule 4(f):

5 By all indications, court-ordered service under Rule 4(f)(3) is a favored as service  
6 available under Rule 4(f)(1) and Rule 4(f)(2). Indeed, Rule 4(f)(3) is one of three  
7 separately numbered subsections in Rule 4(f), and each subsection is separated  
8 from the one previous merely by the simple conjunction “or.” Rule 4(f)(3) is not  
9 subsumed within or in any way dominated by Rule 4(f)’s other subsections; it  
10 stands independently, on equal footing. Moreover, no language in Rules 4(f)(1) or  
4(f)(2) indicate their primacy, and certainly Rule 4(f)(3) includes no qualifiers or  
limitations which indicate its availability only after attempting service of process  
by other means.

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11 Thus, examining the language and structure of Rule 4(f) and the accompanying  
12 advisory committee notes, we are left with the inevitable conclusion that service of  
13 process under Rule 4(f)(3) is neither a “last resort” nor “extraordinary relief.” It is  
14 merely one means among several which enables service of process on an  
international defendant.

15 *Rio Properties*, 284 F.3d at 1015. (citations omitted).

16 No matter the method of service of process selected, such process must satisfy the  
17 constitutional requirement of due process. “To meet this requirement, the method of service  
18 crafted by the district court must be ‘reasonably calculated, under all the circumstances, to apprise  
19 interested parties of the pendency of the action and afford them an opportunity to present their  
20 objections.” *Rio Properties*, 284 F.3d at 1016. A number of Courts have held that alternate  
21 forms of service pursuant to Rule 4(f)(3), including email service, are appropriate and may be the  
22 only means of effective service of process “when faced with an international e-business scofflaw,  
23 playing hide-and-seek with the federal court, email may be the only means of effecting service of  
24 process.” *Rio Properties*, 284 F.3d at 1018. *See also Williams-Sonoma, Inc. v. FriendFinder*,  
25 2007 WL 4973848 (N.D. Cal. 2007) (Decl. of Fuisz at ¶8 (Exhibit G)). Plaintiff submits that  
26 allowing email service in the present case is appropriate and comports with constitutional notions  
27

1 of due process, particularly given the Defendant’s decision to conduct their activity based on  
2 Internet anonymity.

3 Here, service of process by email on Defendant will satisfy due process by apprising him  
4 of the action and giving him the opportunity to answer Plaintiff’s claims. As set forth in the  
5 Declarations of John Fuisz and Al Duncan, Defendant communicated with YouTube to file a  
6 counter-designation and provided an address and phone number that are not valid. The Defendant  
7 has communicated bywith email. Email service on the Defendant is appropriate and  
8 constitutionally acceptable in a case such as this, where LJBC is unable to personally serve the  
9 Defendant at a physical address and has proven that email is the most effective means for  
10 providing the defendant notice of the litigation. See *Rio Properties*, 284 F.3d at 1017 (“[N]ot  
11 only that service of process by email was proper – that is, reasonably calculated to apprise [the  
12 defendant] of the pendency of the action and afford it an opportunity to respond – but in this case,  
13 it was the methods of service most likely to reach [the defendant].”). See also *Popular*  
14 *Enterprises*, 225 F.R.D. at 562 (Decl. of Fuisz at ¶7 (Exhibit F)) (“Under the facts and  
15 circumstances presented here, Rule 4(f)(3) clearly authorizes the court to direct service upon  
16 defendant by email. The rule is expressly designed to provide courts with broad flexibility in  
17 tailoring methods of service to meet the needs of particularly difficult cases. Such flexibility  
18 necessarily includes the utilization of modern communication technologies to effect service when  
19 warranted by the facts.”).

22  
23 **B. Email Service is Not Prohibited by International Agreement**

24 As set forth in the Declarations of Al Duncan and John R Fuisz, prior to the filing of this  
25 application, LJBC diligently investigated the Defendant’s address, without success. Thus, as a  
26 result of Defendant’s own effort to conceal his location, LJBC is unable to determine Defendant’s  
27

1 physical whereabouts. Based on Defendant’s counter-designation, good cause exists for believing  
2 that Defendant resides in Canada.

3           The United States and Canada are both signatories to the Hague Convention on the  
4 Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (the  
5 “Convention”) Decl. of Fuisz at ¶12. “Compliance with the Convention is mandatory in all cases  
6 to which it applies.” *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 705 (1988). However,  
7 according to Article 1 of the Convention, the “Hague Convention does not apply in cases where  
8 the address of the foreign party to be served is unknown. 20 U.S.T. 361 (U.S.T. 1969).” *BP*  
9 *Products of North America, Inc. v. Dagra*. 236 F.R.D. 270, 271 (E.D. Va. 2006) (Decl. of Fuisz at  
10 ¶9 (Exhibit H)); *Popular Enterprises*, 225 F.R.D. at 562 (Decl. of Fuisz at ¶7 (Exhibit F)). As  
11 the address of the Defendant is not known, LJBC respectfully submits that the Convention does  
12 not apply in this case.  
13

14           Email service has been previously used with Canadian defendants. In *MPS IP Services*  
15 *Corp. v. Modis Communications, Inc.*, 2007 WL 723841 (M.D. Fla. 2007)(Dkt. 11) (Decl. of  
16 Fuisz at ¶10 (Exhibit I)), the Court approved email service to a defendant located in Canada.  
17 Regardless, though the Convention does not expressly authorize email service, the Convention  
18 does not preclude it either, and thus, is no bar to the court-directed email service under Rule  
19 4(f)(3). In fact, U.S. Courts have routinely authorized international service and email service  
20 notwithstanding the applicability of the Convention. *See, e.g. Brockmeyer v. May*, 383 F.3d 798,  
21 800 (9<sup>th</sup> Cir. 2004)(service of process by international mail); *Nanya Technology Corp. v. Fujitsu*  
22 *Ltd.*, 2007 WL 269087 (D. Guam 2007)(Decl. of Fuisz at ¶11 (Exhibit J))(email service).  
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1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3  
4 Libyan Jamahiriya Broadcasting  
Corporation,

5 Plaintiff,

6 vs.

7 Abdalla Saleh,

8 Defendant.

Civil Action No. 5:10-CV-03713-JF PVT

[PROPOSED] ORDER

9  
10 WHEREAS Plaintiff Libyan Jamahiriya Broadcasting Corporation (“LJBC”) filed its Ex  
11 Parte Application for Order Authorizing Alternate Service of Process on Defendants Pursuant to  
12 Federal Rules of Civil Procedure 4(f)(3) (“Plaintiff’s Application”);

13  
14 WHEREAS Plaintiff has shown good cause why leave should be granted allowing service  
15 of the Summons and Complaint in this matter upon Defendant Abdalla Saleh via email;

16 The Court, having read and considered the pleadings, declarations and exhibits on file in  
17 this matter and having reviewed such evidence as was presented in regards to Plaintiff’s  
18 Application, hereby grants Plaintiff’s Application and grants leave to Plaintiff to serve the  
19 Summons and Complaint upon Defendant by email at the electronic mail address

20 [abdoellibie@yahoo.com](mailto:abdoellibie@yahoo.com).

21  
22 **IT IS SO ORDERED**

23  
24 DATED: 10/12/10

25   
26 UNITED STATES DISTRICT JUDGE