

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez**

Civil Action No. 17-cv-0692-WJM-KLM

ADSCEND MEDIA LLC,

Plaintiff,

v.

D.K., a minor, by and through his guardian and natural parent, Stephanie Auton Klose (a/k/a Stephanie Auton);
STEPHANIE AUTON KLOSE, individually; and,
JOHN AND JANE DOES 1–10,

Defendants.

ORDER DIRECTING SERVICE

This matter is before the Court on Plaintiff Adscend Media LLC's (Plaintiff, or "Adscend") Motion to Extend Temporary Restraining Order and for Alternative Service of Summons and Complaint (ECF No. 15 (the "Motion")), along with Adscend's Memorandum in Support (ECF No. 16), the supporting Declarations (ECF Nos. 16-1 & 16-2), and Adscend's previously-filed Status Report as to Service, together with its supporting materials (ECF Nos. 14, 14-1, 14-2), all of which pertain to effecting service of process upon Defendants, including service of the Court's previously-entered Temporary Restraining Order ("TRO") (ECF No. 12), which the Court has extended by prior order (ECF No. 17).

I. SERVICE VIA E-MAIL AND/OR TEXT

Adscend requests that the Court permit it to effectuate service of the Summons and the Complaint upon Defendant Klose (and, through her, upon Defendant D.K.) by means of e-mail and by sending Ms. Klose via text message a link to a website at which the summons and complaint have been posted. (See ECF No. 16 at 4.)

Adscend does not cite any federal rule, statute, or other authority authorizing service of process by such means. To the contrary, Rule 4(e) provides that “[u]nless federal law provides otherwise,” individuals living in a judicial district of the United States may be served a Summons by the following means:

(1) 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; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e). This provision does not contemplate “alternative service” or service via electronic means, as proposed by Adscend.

Adscend cites *Liberty Media Holdings, LLC v. Sheng Gan*, 2012 WL 122862, at *2 (D. Colo. Jan. 17, 2012) and *United States v. The Pub. Warehousing Co.*, 2017 WL 661580, at *2 (N.D. Ga. Feb. 17, 2017). Both of these cases addressed service on defendants in foreign countries, a situation specifically addressed by Rule 4(f), but not

relevant here. See *Blumedia Inc. v. Sordid Ones BV*, 2011 WL 42296, at *3 (D. Colo. Jan. 6, 2011) (“if the Court assumes that Defendants are located within the United States, Plaintiff’s Motion [seeking service by e-mail] must be denied”).¹

Adscend does not specifically argue for allowing service “following state law,” Fed. R. Civ. P. 4(e)(1), nor invoke Colorado’s provisions for “substituted service,” as set out in Colorado Rule of Civil Procedure 4(f). Moreover, such “substituted service,” even when allowed, provides only for service “to be *mailed* to the address(es) of the party.” C.R.C.P. 4(f)(2) (emphasis added). Here, the materials filed with Adscend’s motion indicate that Defendants have moved away from their last known address and Adscend has not shown that mailing the Summons to any other address would be “reasonably calculated to give actual notice.” C.R.C.P. 4(f). Given these circumstances, and in light of the mandatory service of the TRO provided by Federal Rule of Civil Procedure 4.1(a) and addressed below, the Court does not at this time authorize any “substituted service” under C.R.C.P. 4(f), nor take up the question of whether that rule can ever authorize service via e-mail.

In sum, since no provision of either Colorado or federal law provides for the relief that Adscend requests, Adscend’s request, as filed, is denied.

II. SERVICE BY UNITED STATES MARSHAL

Notwithstanding the foregoing, the Court has issued and now renewed a TRO, but Adscend has been unable to effect service of the Summons, the TRO, or any other

¹ In addition, although Adscend’s supporting filings reflect that Defendant Klose has responded to certain e-mails and texts, the affidavits and other filings to date do not clearly establish that Defendant Klose has actually received any court documents or attachments sent by these means. Even if the Court found that it had authority to approve service of process via e-mail, text, or other electronic means, the Court would, at a minimum, require such delivery by means that returned a definitive confirmation or “receipt” of delivery, such as by a secure FTP service providing delivery confirmation.

documents. Since Adscend has not effected service of the Summons under Rule 4, Defendants also have not received effective service of any of the Court's Orders or other filings, either under Rule 5 or otherwise. As a consequence, it appears that Defendants, either because they are unaware of the TRO or are acting in defiance of it, may have persisted in the conduct which the Court ordered them to cease. Indeed, from the materials filed, it appears that Defendants may be evading service in order to avoid compliance with the Court's Orders. (See *generally* ECF Nos. 14, 15-1, 15-2.)

The Court will therefore order that service of the TRO and other Court filings be effected by a United States Marshal or Deputy Marshal, pursuant to Federal Rules of Civil Procedure 4.1(a) and 4(c)(3). Rule 4.1(a) provides in mandatory terms that all process other than a summons or a subpoena "must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose." This provision applies to temporary restraining orders. See 4A Charles A. Wright *et al.*, *Federal Practice & Procedure* § 1090 (4th ed., Jan. 2017 update) ("*Wright & Miller*") ("Types of process falling under Rule 4.1 would include temporary restraining orders [and] injunctions"); 1-4.1 *Moore's Federal Practice – Civil* § 4.1.02 (2016 ed.) ("[o]ther process that may fall within the coverage of Rule 4.1 includes a temporary restraining order"); see also, e.g., *Sharabati v. Sharabati*, 2015 WL 4665276, at *1 (N.D. Miss. Aug. 6, 2015). Accordingly, the Court orders that the U.S. Marshal or a Deputy Marshal shall effect service of the Court's Temporary Restraining Order and the Court's subsequent Order extending that TRO, pursuant to Rule 4.1(a).

Further, since the Marshal will effect service of the TRO, and since the Court also construes Adscend's Motion in the alternative as a request for the Marshal to

simultaneously effect service of the Summons and Complaint, the Court grants that construed request and orders the Marshal to serve the Summons, the Complaint, and certain other docket filings, as set out below. Fed. R. Civ. P. 4(c)(3); see also, e.g., *Associated Wholesale Grocers, Inc. v. Affiliated Foods Sw., Inc.*, 2004 WL 1088784, at *1 (D. Kan. Apr. 28, 2004) (“[a]lthough [Rule] 4.1 does not require the marshal’s office to serve the complaint and summons or documents other than the temporary restraining order . . . the court finds it appropriate for copies of all docket entries filed to date to be provided to defendant”). The Court notes, however, that its Order directing service by the U.S. Marshal does not alleviate Adscend of all responsibility to effectuate service, to provide the Marshal with Plaintiff’s address, to comply and cooperate with the Marshal’s procedures, and to remedy any defects in service of which Plaintiff is made aware. See generally 4A *Wright & Miller* § 1090, at n.5 & accompanying text.

III. CONCLUSION

For the reasons stated above, the Court ORDERS as follows:

1. That Portion of Plaintiff’s Motion to Extend Temporary Restraining Order and For Alternative Service of Summons and Complaint (ECF No. 15) which seeks “alternative service” by electronic means is DENIED.
2. Adscend’s request for “alternative service” is CONSTRUED in the alternative as a request for service by the U.S. Marshal or a Deputy Marshal. As so construed, this Portion of the Motion is GRANTED, as follows:
 - a. Pursuant to Federal Rules of Civil Procedure 4.1(a) and 4(c)(3), the United States Marshal or a Deputy Marshal SHALL EFFECT SERVICE upon

Defendant Stephanie Auton Klose and, through her, upon Defendant D.K., of all of the following documents:

- i. The Court's Order Granting Motion For Temporary Restraining Order (ECF No. 12);
 - ii. The Court's Order Extending Temporary Restraining Order (ECF No. 17);
 - iii. The Complaint (ECF No. 1);
 - iv. The Summons (ECF No. 9);
 - v. Plaintiff's Memorandum of Law in Support of its Motion for Temporary Restraining Order (ECF No. 4), along with the supporting Declaration of Fehzan Ali (ECF No. 5) and its exhibits (ECF Nos. 5-1 through 5-5);
 - vi. Plaintiff's Status Report as to Service (ECF No. 14), along with its supporting filings (ECF Nos. 14-1 & 14-2);
 - vii. Plaintiff's Memorandum of Law in Support of its Motion to Extend Temporary Restraining Order and for Alternative Service, along with its supporting filings (ECF Nos. 16, 16-1, 16-2).
- b. To effect the foregoing, Plaintiff is DIRECTED to contact and cooperate with the U.S. Marshals Service in this District to initiate and complete the Marshal's procedures for effecting service. Plaintiff must submit the Marshal's [USM-285 form](#), together with all of the documents identified above and all other supporting documents and information required by the Marshal. See generally <https://www.usmarshals.gov/process/usm285.htm>. Plaintiff shall further provide the Marshal's office with all information in Plaintiff's

possession regarding Defendants' last known address(es), other contact information, and Plaintiff's attempts at service to date.

- c. Since Plaintiff has already deposited a bond with the Court in support of the Temporary Restraining Order (see ECF No. 13), and to minimize any additional delay, the Court also Orders that prepayment of the Marshal's fees and costs by Plaintiff is hereby WAIVED. Plaintiff's previously-deposited bond shall not be released until Plaintiff has fully paid the Marshal's final Billing Statement(s), after completion of all services.
3. Nothing in this Order prevents Plaintiff from otherwise effecting service.
4. Plaintiff shall promptly file a status report informing the Court when service is accomplished, or of any material change in the relevant circumstances.

Dated this 5th day of April, 2017.

BY THE COURT:



William J. Martínez
United States District Judge