

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PIKE BRANDS LLC,

Plaintiff,

v.

TEEGEM, *et al.*,

Defendants.

Civil Action No. 22-171

(Judge Colville)

**PLAINTIFF’S MOTION TO
(1) AMEND THE ORDER AUTHORIZING ALTERNATIVE SERVICE AND
(2) DEEM SERVICE ACCOMPLISHED UPON DEFENDANTS CHUBBY ZEBRA and
BLESSING BABY**

Plaintiff hereby moves to (1) amend the Court’s February 1, 2022, Order authorizing alternate service of process (ECF No. 17) and (2) deem service accomplished upon CHUBBY ZEBRA AND BLESSING BABY. In support thereof, Plaintiff submits the following:

FACTUAL BACKGROUND

On February 1, 2022, the Court entered an Order granting Plaintiff’s Motion for Alternative Service, authorizing Plaintiff to serve the Summons and Complaint and all future filings upon Defendants via electronic mail and publication. (ECF No. 17) Plaintiff, however, excluded CHUBBY ZEBRA and BLESSING BABY in its Motion for Alternative Service because defendants indicated to Amazon they were shipping the accused product from within the United States. *See Malkin Dec.*¹, ¶ 3, and Motion for Alternative Service (ECF No. 11 at p. 1, n. 2) (“Alternative Service Motion”).

¹ Refers to March 16, 2022 Declaration of Brian Samuel Malkin filed herewith.

Though the Plaintiff requested from Amazon, through the usual information request, the physical address of the Defendants CHUBBY ZEBRA and BLESSING BABY and attempted to serve the Defendants with conventional U.S. certified mail, but the mail came back as undeliverable at the addresses provided. *Id.*, ¶ 4. Thus, despite Plaintiff’s efforts, it has not accomplished conventional service upon CHUBBY ZEBRA and BLESSING BABY. *Id.*, ¶ 4.

However, the Defendants CHUBBY ZEBRA and BLESSING BABY have received notice of this action electronically via electronic mail and its customer service e-mail address provided to Plaintiff in accordance with this Court’s Order. *See* Order Granting, *inter alia*, Motion for TRO (ECF No. 25) (providing that Amazon provide to Plaintiff’s counsel the email addresses for the Defendants). *Id.*, ¶ 5.

On February 11, 2022, all the Defendants including CHUBBY ZEBRA and BLESSING BABY were served with, *inter alia*, a copy of the Summons and Complaint by e-mail to the e-mail addresses provided for these Defendants by Amazon. *Id.*, ¶ 6. None of the emails were bounced back nor returned and/or marked as “undeliverable,” thereby demonstrating the e-mails were delivered and their e-mails are valid and operational. *Id.*

**THE COURT MAY AUTHORIZE SERVICE VIA E-MAIL
PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE**

The unregistered business names under which these Defendants including CHUBBY ZEBRA and BLESSING BABY operate their electronic stores make it difficult to identify the defendants. This sales arrangement between sellers and third party service providers is like that discussed by the Third Circuit in the context of a Shopify seller’s anonymity:

“This enables third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor. There are numerous cases in which neither Shopify [the third party service provider] nor the party injured by a defective product, sold

by Shopify were able to locate the product's third-party vendor or manufacturer.”

Overdorf v Shopify.com, Inc., (No. 18-1041, 3d Cir. July 3, 2019) (*rehearing granted* August, 23, 2019). Under these circumstances, the Court should permit electronic service through the email, regardless of whether the Defendants are located within the United States or in a foreign country.

E-mail is the primary means by which sellers of this nature communicate with the payment processing company and the public. Service in this manner, to a virtual storefront via e-mail, is the modern equivalent of delivering the complaint and summons to a party's business address. In addition, electronic service is the most expeditious manner because online sellers generally check these message inboxes frequently.

If any of the Defendants are located in the United States, under Fed. R. Civ. P. 4(e)(1), service in a federal district court action can be accomplished “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.” Under Pennsylvania law, service on an out of state defendant may be accomplished, *inter alia*, “by any mail in a manner provided by Rule 403. Pa. R. Civ. P. 404. Rule 403 provides that original process may be mailed to the defendant by any form of mail requiring a receipt.” If the mail is returned noting that the defendant “refused to accept the mail”, the plaintiff may serve at the same address by ordinary mail. If the mail is returned as “unclaimed”, the plaintiff “shall make service by another means pursuant to the rules.” Pa R. Civ. P. 403. Rule 430 provides that “if service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service.” Pa. R. Civ. P. 430.

Service by electronic messaging (including e-mail) under Fed. R. Civ. P. 4(e)(1) has

been approved by various courts in numerous cases where conventional service was not able to have been made. *General Nutrition Investment Co. v. Zhang*, No. 19-cv-486, Doc. No. 11 (W.D. Pa. May 29, 2019) (Hornak, J.) (applying New York law and authorizing service by email and Amazon messaging where defendants provided incorrect address); *Doggie Dental, Inc. v Max_Buy*, No. 19-746, Doc. No. 60 (W.D. Pa. October 17, 2019)(Hornak, J)(granting motion to amend order authorizing alternative service and deeming service accomplished on certain defendants served electronically).

CONCLUSION

Given Plaintiff has already served Defendants CHUBBY ZEBRA and BLESSING BABY electronically, Plaintiff respectfully requests that the Court issue an order (1) amending the Court's February 1, 2022, Order authorizing alternate service (Doc. No. 17) and (2) deem service accomplished upon the Defendants CHUBBY ZEBRA and BLESSING BABY .

Respectfully submitted,

/s/ Brian Samuel Malkin

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