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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**

13 **VICTOR HANNAN**, individually and on
 14 behalf of a class of similarly situated
 15 persons,

16 Plaintiff,

17 v.

18 **THE TULVING COMPANY, INC.**, a
 19 California Corporation; and **HANNES**
 20 **TULVING, JR.**, a California resident,

21 Defendants.

Case No. 5:14-cv-01054-EJD

**PLAINTIFF’S NOTICE OF EX PARTE
 MOTION AND EX PARTE MOTION
 FOR LEAVE TO SERVE DEFENDANT
 HANNES TULVING, JR. BY
 ALTERNATIVE MEANS;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Date: In Chambers
 Time: In Chambers
 Ctrm: 4, 5th Flr.
 Judge: The Hon. Edward J. Davila
 Filed: April 9, 2014

KRONENBERGER ROSENFELD

150 Post Street, Suite 520, San Francisco, CA 94108



1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that at a date and time to be determined by the Honorable
3 Edward J. Davila, in his Honor’s chambers located at 280 South 1st Street, Courtroom 4 –
4 5th Floor, San Jose, CA 95113, Plaintiff Victor Hannan will and hereby does move for an
5 order authorizing service by alternative means on Defendant Hannes Tulving, Jr.

6 The Court should authorize service by alternative means because alternative
7 service is allowed under federal and California law and because despite Plaintiff’s diligent
8 efforts, Plaintiff has not been able to serve Mr. Tulving.

9 This motion is based on this notice of motion and motion, the memorandum of
10 points and authorities below, the supporting declaration of Karl S. Kronenberger, the
11 Court’s files in this action, and any other matter that the Court may properly consider.

12
13 Respectfully submitted,

14 DATED: April 9, 2014

KRONENBERGER ROSENFELD, LLP

By: s/ Karl S. Kronenberger
Karl S. Kronenberger

Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND BACKGROUND**

3 Defendant Hannes Tulving, Jr. (“Tulving”) knows that he has been named as a
4 defendant in this lawsuit. Rather than defending the suit, he has sought to avoid service.
5 Because Tulving is evading service and Plaintiff cannot ascertain Tulving’s whereabouts,
6 Plaintiff requests that the Court authorize alternative service pursuant to Federal Rule of
7 Civil Procedure 4 and California Code of Civil Procedure §413.30.

8 This case arises out of a massive fraud perpetrated by The Tulving Company, Inc.
9 (“The Tulving Company”), under the direction of Tulving, who is the President of The
10 Tulving Company. Defendants were in the business of buying and selling precious
11 metals, including gold, silver, platinum, and palladium. (Complaint ¶2.) In the fall of 2013,
12 however, Defendants stopped shipping orders to customers who had ordered precious
13 metals and who had wired payment to Defendants. (Complaint ¶33.) Defendants failed to
14 ship precious metals to hundreds of customers, resulting in losses of millions of dollars for
15 customers. (Complaint ¶34.) Since the filing of the complaint on March 6, 2014, over 190
16 of Defendants’ customers have contacted Plaintiff’s counsel, providing details of their
17 unfulfilled orders and unreturned payments, which collectively exceed \$6 million.
18 (Declaration of Karl S. Kronenberger in Support of Plaintiff’s *Ex Parte* Motion for Leave to
19 Serve Defendant by Alternative Means (“Kronenberger Decl.” ¶3.)

20 Over the last month, Plaintiff has diligently attempted to serve Tulving at multiple
21 residential and business addresses associated with Tulving. (Kronenberger Decl. ¶¶5-15
22 & Exs. A-C.) Additionally, over the last month, Plaintiff has conducted significant
23 research, including by speaking with multiple knowledgeable witnesses, about Tulving’s
24 location. (Kronenberger Decl. ¶4.) Despite these efforts, Plaintiff has not been able to
25 serve Tulving. (Kronenberger Decl. ¶¶4-15 & Exs. A-C.) A summary of Plaintiff’s
26 attempts to serve Tulving follows:

- 27
- On March 7, 2014, at 10:30 a.m., Plaintiff attempted to personally serve
28 Tulving at Defendants’ last known business address, located at 750 W. 17th



1 Street #A, in Costa Mesa, CA 92627. The business address was gated and
2 appeared deserted and the following note had been posted at the address:
3 “THE TULVING COMPANY IS CLOSED. MORE INFORMATION THE WEEK
4 OF MARCH 10TH.” (Kronenberger Decl. ¶5 & Ex. A.)

- 5 • On March 10, 2014, at 4:55 pm., Plaintiff attempted to personally serve Tulving
6 at a restaurant Tulving frequented at 2100 W. Oceanfront, in Newport Beach,
7 CA 92663. The process server was unable to locate Tulving, but an employee
8 of the restaurant confirmed that Tulving lived down the street but had moved
9 two to three weeks ago, and that “everybody is looking for him.”
10 (Kronenberger Decl. ¶6 & Ex. A.)
- 11 • On March 10, 2014, at 5:30 p.m., Plaintiff attempted to personally serve
12 Tulving at his last known residential address, located at 2112 1/2 W.
13 Oceanfront, in Newport Beach, CA 92663. The process server was unable to
14 gain access to the building and could not detect Tulving at the premises.
15 (Kronenberger Decl. ¶7 & Ex. A.)
- 16 • On March 11, 2014, at 5:00 p.m., Plaintiff attempted to personally serve
17 Tulving at another residential address associated with Tulving, located at
18 27692 Niguel Village Road, in Laguna Niguel, CA 92677. This address turned
19 out to be the residential address of Tulving’s parents, who stated that Tulving
20 did not live at that location and that they did not know of his whereabouts.
21 (Kronenberger Decl. ¶8 & Ex. A.)
- 22 • On March 17, 2014, at 4:00 p.m., Plaintiff again attempted to personally serve
23 Tulving at his last known business address. The business address was gated,
24 appeared deserted, and had a different note posted this time, which read:
25 “THE TULVING COMPANY IS IN CHAPTER 11.” (Kronenberger Decl. ¶9 &
26 Ex. A.)
- 27 • On March 17, 2014, at 4:30 p.m., Plaintiff attempted to personally serve
28 Tulving at another residential address associated with Tulving, located at 35

1 Harbor Ridge Drive, in Newport Beach, CA 92660. This address is located
2 within a guard-gated community. The process server spoke with the guard at
3 this community, who stated that Tulving was a former resident who had moved
4 out six years ago. (Kronenberger Decl. ¶10 & Ex. A.)

- 5 • On March 17, 2014, Plaintiff's counsel attempted to personally serve Tulving at
6 a deposition that Tulving was noticed to attend, located at the Clinebell Law
7 Firm, 110 E. Avenida Palizada, Suite 201, in San Clemente, CA 92672.
8 Tulving did not appear for his deposition, and Plaintiff was unable to effect
9 service. (Kronenberger Decl. ¶11.)
- 10 • On March 14, 2014, Plaintiff's counsel contacted Defendants' counsel in the
11 case of *Stach v. The Tulving Company, Inc., et al.*, pending in Orange County
12 Superior Court, Case No. OSCS 30-2014-00699829, and requested that
13 Defendants' counsel in that case either accept service on behalf of Tulving or
14 otherwise facilitate service of process on Tulving. Defendants' counsel in that
15 action did not respond to Plaintiff's request. (Kronenberger Decl. ¶12.)
- 16 • On March 11, 2014, Plaintiff contacted bankruptcy counsel for The Tulving
17 Company in a matter recently initiated by The Tulving Company in the United
18 States Bankruptcy Court for the Central District of California, Case No. 8:14-bk-
19 11492-ES. Significantly, Tulving signed the bankruptcy petition in this matter
20 on behalf of The Tulving Company, Inc. The Tulving Company's bankruptcy
21 counsel stated that he did not represent Tulving and declined to accept service
22 or otherwise facilitate service of Tulving. (Kronenberger Decl. ¶13.)
- 23 • On March 10, 11, and 17, 2014, Plaintiff served Tulving with documents in this
24 action to email addresses associated with Tulving, including the email accounts
25 that Tulving used for his business dealings at issue in this case. Plaintiff did
26 not receive a response to these emails. (Kronenberger Decl. ¶14 & Ex. B.)
- 27 • On April 3, 2014, Plaintiff sent a Notice of Acknowledgement of Receipt, along
28 with the summons, complaint, and TRO, by registered mail to Tulving at his last



1 known business address and to the attorney representing The Tulving
 2 Company in the bankruptcy proceeding. To date, Plaintiff has received no
 3 response from Tulving to these mailings. (Kronenberger Decl. ¶15 & Ex. C.)

4 Based on these facts, one must conclude that Tulving has learned about this
 5 lawsuit but is evading service. To wit, it is not credible that Tulving has not learned about
 6 this lawsuit from The Tulving Company's bankruptcy attorney (especially considering
 7 The Tulving Company listed Plaintiff as a creditor on its bankruptcy petition; see
 8 Kronenberger Decl. Ex. D) or Tulving's parents, or that Tulving has not received the U.S.
 9 mail containing the summons and complaint.

10 Federal Rule of Civil Procedure 4(e) allows service of the summons and
 11 complaint by following the laws of the state in which service is being made. In turn,
 12 California law allows a plaintiff to apply to the Court to authorize service on a defendant
 13 by alternative means where personal service has proved impracticable. Plaintiff's
 14 counsel has exhausted the options currently available to locate Tulving and to personally
 15 serve him with the summons and complaint. Moreover, Plaintiff possesses credible
 16 evidence of Tulving's valid email address and Tulving's attorneys' address, such that
 17 delivering the summons and complaint to these addresses will necessarily inform Tulving
 18 of this action. Based on these facts, the Court should authorize alternative service on
 19 Tulving.

20 ARGUMENT

21 **A. California law allows alternative service when personal service is not** 22 **practicable.**

23 Federal Rule of Civil Procedure 4(e) authorizes service of a summons and
 24 complaint on an individual by following state law for service in the state where the
 25 district court is located. The goal of Rule 4 is to "to provide maximum freedom and
 26 flexibility in the procedures for giving all defendants . . . notice of commencement of the
 27 action and to eliminate unnecessary technicality in connection with service of process."
 28 *Elec. Specialty Co. v. Road & Ranch Supply, Inc.*, 967 F.2d 309, 314 (9th Cir.1992)



1 (citation omitted). The Ninth Circuit has authorized email service where service cannot
2 be made by other means, and the email does not bounce back and therefore is
3 presumably received. *See Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018
4 (9th Cir. 2002).

5 California Code of Civil Procedure §413.30, the relevant state law here, states
6 that “[w]here no provision is made in this chapter or other law for the service of
7 summons, the court in which the action is pending may direct that summons be served
8 in a manner which is reasonably calculated to give actual notice to the party to be
9 served and that proof of such service be made as prescribed by the court.” Federal
10 courts in California have authorized alternative service under section 413.30 where
11 personal service or mail service is not practicable. *See United Health Servs., Inc. v.*
12 *Meyer*, C 12-6197 CW, 2013 WL 843698, *2 (N.D. Cal. Mar. 6, 2013) (“The Court finds
13 that, in this case, service by email to Defendant's email address is reasonably
14 calculated to provide her with actual notice of this action. [¶] Accordingly, the Court
15 GRANTS Plaintiff's motion to serve Defendant by email”); *Carson v. Griffin*, 13-CV-0520
16 KAW, 2013 WL 2403601, *3 (N.D. Cal. May 31, 2013) (authorizing email service under
17 section 413.30 where plaintiff was unable to serve defendant by mail because
18 addresses defendant had provided were fraudulent); *Facebook, Inc. v. Banana Ads,*
19 *LLC*, C-11-3619 YGR, 2012 WL 1038752, *3 (N.D. Cal. Mar. 27, 2012) (finding that
20 email was reasonably calculated to give actual notice to defendants of the filing of the
21 lawsuit and “would be the best method for providing actual notice to these
22 [d]efendants.”)

23 Courts have found that alternative service is appropriate where a defendant
24 conceals himself to avoid service of the summons, and a plaintiff is unable to find the
25 defendant after due and diligent searches. *See Miller v. Superior Court In & For Los*
26 *Angeles County*, 195 Cal. App. 2d 779, 785-86 (1961). Under section 413.30, actual
27 notice is not required, “only a method reasonably certain” to give notice. *See Evans v.*
28 *Department of Motor Vehicles*, 21 Cal. App. 4th 958, 967 (1994).



1 **B. The facts in this case warrant alternative service under Civ. Proc. Code**
2 **§413.30.**

3 Plaintiff has tried to serve Tulving on multiple occasions, at various times, and at
4 multiple addresses where Tulving is known to reside, work, or otherwise frequent. In
5 each instance, Plaintiff's efforts were frustrated, and Plaintiff has been unable to
6 ascertain Tulving's current whereabouts.

7 These facts demonstrate that Tulving has concealed his whereabouts and is
8 evading service. These facts also demonstrate that Tulving would be reasonably put on
9 notice of this lawsuit by the proposed alternative service. Thus, alternative service is
10 justified in this case under section 413.30.

11 **1. Plaintiff has diligently tried to serve Tulving, but Tulving has concealed**
12 **his whereabouts and evaded service.**

13 The Court should grant Plaintiff's motion for service by alternative means
14 because despite Plaintiff's diligent service efforts, Tulving has evaded service and
15 concealed his whereabouts. While Plaintiff attempted personal service on Tulving at
16 three residential addresses associated with Tulving, Plaintiff could neither effect service
17 at these houses nor ascertain Tulving's whereabouts from these attempts.
18 (Kronenberger Decl. ¶¶7-8, 10) Plaintiff also attempted personal service on Tulving's
19 last known business address on multiple occasions. (Kronenberger Decl. ¶¶5, 9.) While
20 Tulving was not present at this address, he had left notes on the gate demonstrating that
21 he continued to visit the premises after the filing of this suit.

22 Plaintiff also attempted to effect service through The Tulving Company's
23 attorneys. However, both sets of attorneys declined to accept service or otherwise
24 facilitate service of the summons and complaint. (Kronenberger Decl. ¶¶12-13.) Plaintiff
25 also attempted to serve Tulving documents to the email addresses used by Tulving to
26 carry out his business transactions. (Kronenberger Decl. ¶14.) Finally, Plaintiff
27 attempted to serve Tulving by mailing a notice and acknowledgement of receipt to
28 Tulving's last known business address and to the attorney representing The Tulving



1 Company in the bankruptcy proceeding. (Kronenberger Decl. ¶15.) Plaintiff has not
2 received any response from Tulving to these mailings. (Kronenberger Decl. ¶15.) These
3 service attempts reflect a genuine and diligent effort by Plaintiff to serve Tulving.

4 Based on the seriousness of this lawsuit, and based on Plaintiff's diligent service
5 efforts, one must conclude that Tulving is evading service, and as a result, traditional
6 means of service are impracticable. Thus, alternative service is warranted under section
7 413.30.

8 **2. Plaintiff's proposed method of service would reasonably inform Tulving**
9 **of this lawsuit.**

10 The Court should grant Plaintiff's motion for service by alternative means
11 because Plaintiff's proposed method of service would provide reasonable notice to
12 Tulving of this lawsuit. Plaintiff possesses evidence of several means of service that
13 would inform Tulving of the need for him to defend this suit.

14 First, evidence shows that The Tulving Company's bankruptcy attorney is in
15 contact with Tulving because the bankruptcy attorney filed documents executed by
16 Tulving after the filing of this suit. (Kronenberger Decl. ¶13 & Ex. D.) Thus, service of
17 the summons and complaint on The Tulving Company's bankruptcy attorney would
18 apprise Tulving of this lawsuit.

19 Second, Plaintiff possesses an active email address that Tulving used to conduct
20 business transactions. (Kronenberger Decl. ¶14.) Service of the summons and
21 complaint to this email address would also apprise Tulving of this lawsuit.

22 Third, Plaintiff has evidence of Defendant's business address, where Defendant
23 has posted notices about the status of The Tulving Company after the filing of the
24 lawsuit. (Kronenberger Decl. ¶¶5, 9.) Service of the summons and complaint to this
25 business address by U.S. mail would also inform Tulving of this lawsuit.

26 //

27 //

28 //



1 Thus, Plaintiff proposes alternative service of the summons, complaint, and TRO
2 by:

- 3 • Mailing copies of the summons, complaint, and TRO to the bankruptcy
- 4 attorney for The Tulving Company;
- 5 • Emailing copies of the summons, complaint, and TRO to Tulving’s email
- 6 address; and
- 7 • Mailing copies of the summons, complaint, and TRO to The Tulving
- 8 Company’s business address.

9 There is no reason to believe that service at one of these addresses—let alone all
10 three of them—would not apprise Tulving of this lawsuit. Accordingly, the Court should
11 grant Plaintiff’s motion and grant Plaintiff leave to serve Tulving by alternative means.

12 **CONCLUSION**

13 For the foregoing reasons, the Court should grant Plaintiff’s motion for leave to
14 serve Tulving by alternative means.

15
16 Respectfully submitted,

17 DATED: April 9, 2014

KRONENBERGER ROSENFELD, LLP

18
19 By: s/ Karl S. Kronenberger
Karl S. Kronenberger

20 Attorneys for Plaintiff

21 Of Counsel:

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