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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 TAKE-TWO INTERACTIVE SOFTWARE,
INC.,

12 Plaintiff,

13 v.
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15 ANGELO PAPENHOFF, a/k/a AAP, an
individual; THEO MORRA, an individual;
ERAY ORÇUNUS, an individual; ADRIAN
16 GRABER, an individual; DOE 1 a/k/a ASH R.
and ASH 735, an individual; and DOES 2
17 through 10, inclusive,

18 Defendants.
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CASE NO. 3:21-CV-6831-TSH

The Honorable Thomas S. Hixson

**ADMINISTRATIVE MOTION OF
PLAINTIFF TAKE-TWO INTERACTIVE
SOFTWARE, INC. FOR ALTERNATIVE
SERVICE ON THEO MORRA, ADRIAN
GRABER AND ERAY ORÇUNUS**

[Declaration of Karin G. Pagnanelli and
[Proposed] Order filed concurrently herewith]

1 Pursuant to Civil Local Rule 7-11, Plaintiff Take-Two Interactive Software, Inc. (“Take-
 2 Two” or “Plaintiff”) hereby requests the Court’s permission to serve Defendants Theo Morra,
 3 Adrian Graber and Eray Orçunus (collectively, “Defendants”) by alternative means. Specifically,
 4 Take-Two wishes to serve Defendant Orçunus by post and email, and Defendants Graber and
 5 Morra by post. Service by those means is appropriate because Defendants each voluntarily agreed
 6 to accept service of process from Take-Two as part of their submission of a “counter notification”
 7 under Section 512(g)(3) of the Digital Millennium Copyright Act (“DMCA”), and each
 8 Defendant’s counter notification identified a postal and/or email address at which they may be
 9 served. Accordingly, no due process issues are implicated; Take-Two merely seeks the Court’s
 10 formal approval to complete service on Defendants via the contact information provided when
 11 Defendants submitted their counter notifications. *See* 17 U.S.C. § 512(g)(3)(D).

12 **I. THE DMCA’S “NOTICE AND TAKE-DOWN” AND “COUNTER**
 13 **NOTIFICATION” PROCEDURES.**

14 The DMCA’s statutory “notice and take-down” procedure gives copyright holders an
 15 informal means of stopping the dissemination of allegedly infringing content. *See* 17 U.S.C.
 16 512(c). Under the DMCA, when an internet service provider (ISP) receives a formal notice of
 17 infringement, the ISP may limit its liability if, “upon notification of [the] claimed infringement ...
 18 [the ISP] responds expeditiously to remove, or disable access to, the material that is claimed to be
 19 infringing or to be the subject of infringing activity.” 17 U.S.C. § 512(c)(1)(C). The DMCA also
 20 provides a procedure through which the user who uploaded the content may send the ISP a
 21 “counter notification” which, under certain circumstances, permits the ISP to reinstate the content
 22 without risk of liability. 17 U.S.C. § 512(g). However, to be valid, a counter notification must:

23 be a written communication provided to the service provider’s
 24 designated agent that includes substantially the following: ... The
 25 subscriber’s name, address, and telephone number, and a statement
 26 that *the subscriber consents to the jurisdiction of Federal District*
 27 *Court* for the judicial district in which the address is located, or if
 the subscriber’s address is outside of the United States, *for any*
judicial district in which the service provider may be found, and
that the subscriber will accept service of process from the person
who provided notification under subsection (c)(1)(C) or an agent of
 such person.

1 17 U.S.C. § 512(g)(3)(D) (emphasis added). In other words, the alleged infringer may have the
2 content “put back” if that person or entity consents to jurisdiction and service of process, so that
3 the copyright owner may have the dispute expeditiously heard by a U.S. federal court.

4 **II. BACKGROUND**

5 Take-Two is the publisher of the enormously popular *Grand Theft Auto* (“GTA”) series of
6 video games, including *Grand Theft Auto III* (“GTA3”) and *Grand Theft Auto: Vice City* (“Vice
7 City”) (collectively the “Games”). Compl. ¶¶ 17-18. Released in 2001 and 2002, respectively,
8 GTA3 and Vice City were highly influential, received significant acclaim, and sold over 30
9 million copies combined. *Id.* The Games, re-released in 2011 for updated and new platforms,
10 continue to be available for sale on Windows PCs, video game consoles, and mobile devices. *Id.*

11 Defendants are among the organizers of projects known as “re3” (short for “reverse-
12 engineered GTA3”) and “reVC” (short for “reverse-engineered Vice City”) and are developers of
13 derivative software code created and distributed as part of those projects. Compl. ¶ 21. The stated
14 purpose of re3 and reVC is to fully re-create the underlying software code for the Games with
15 purported “changes and improvements,” including compatibility with handheld consoles. Compl.
16 ¶ 22. Defendants and those working with them have created publicly available source code
17 “repositories” on GitHub.com (a website that allows members of the public to post, collaborate on,
18 and distribute source code). *Id.* Over time, Defendants have supplemented, refined, and updated
19 these repositories, which now contain a full set of derivative software files for the Games. *Id.*

20 On or about February 19, 2021, prior to filing suit, Take-Two submitted a statutorily
21 compliant DMCA notice and takedown to GitHub for, among others, the repository located at
22 <https://github.com/GTAmodding/re3>. Declaration of Karin G. Pagnanelli (“Pagnanelli Decl.”) ¶ 2,
23 Ex. 1. On or shortly after that date, GitHub removed and disabled the materials available at that
24 location from its site. Pagnanelli Decl. ¶ 2. On or about June 6, 2021, Defendant Orçunus
25 submitted to GitHub a Section 512(g)(2)(b) counter notice stating, under penalty of perjury, that
26 the repository was removed and disabled by GitHub by mistake because “[t]he code in this repo
27 was developed by reverse engineering object code that is not contained in this repo. We believe

1 that any code in this repo that is similar to code or other content owned by Take-Two is either
2 unprotected by copyright or is permitted under fair use.” Pagnanelli Decl. ¶ 3, Ex. 2. The counter
3 notice also states “I consent to the jurisdiction of Federal District Court for the judicial district in
4 which my address is located (if in the United States, otherwise the Northern District of California
5 where GitHub is located), and I will accept service of process from the person who provided the
6 DMCA notification or an agent of such person.” *Id.* Orçunus’ counter notice identified a postal
7 address in Turkey and email address at which he could be contacted. *Id.*

8 On or about February 19, 2021, prior to filing suit, Take-Two submitted a statutorily
9 compliant DMCA notice and takedown to GitHub for, among others, the repository located at
10 <https://github.com/td512/re3>. Pagnanelli Decl. ¶ 2, Ex. 1. On or shortly after that date, GitHub
11 removed and disabled the materials available at that location from its site. Pagnanelli Decl. ¶ 2.
12 On or about April 8, 2021, Defendant Morra sent to GitHub a Section 512(g)(2)(b) counter notice
13 stating, under penalty of perjury, that the repository was removed and disabled by GitHub “as a
14 result of a mistake or misidentification of the material to be removed or disabled.” Pagnanelli
15 Decl. ¶ 4, Ex. 3. The counter notice also states “I consent to the jurisdiction of Federal District
16 Court for the judicial district in which my address is located (if in the United States, otherwise the
17 Northern District of California where GitHub is located), and I will accept service of process from
18 the person who provided the DMCA notification or an agent of such person.” *Id.* Morra’s counter
19 notice identified a postal address in New Zealand at which he could be contacted. *Id.*

20 On or about February 19, 2021, prior to filing suit, Take-Two submitted a statutorily
21 compliant DMCA notice and takedown to GitHub for, among others, the repository located at
22 <https://github.com/AGraber/re3-nx>. Pagnanelli Decl. ¶ 2, Ex. 1. On or shortly after that date,
23 GitHub removed and disabled the materials available at that location from its site. Pagnanelli
24 Decl. ¶ 2. On or about May 13, 2021, Defendant Graber sent to GitHub a Section 512(g)(2)(b)
25 counter notice stating, under penalty of perjury, that the repository was removed and disabled by
26 GitHub “as a result of a mistake or misidentification of the material to be removed or disabled.”
27 Pagnanelli Decl. ¶ 5, Ex. 4. The counter notice also states “I consent to the jurisdiction of Federal

1 District Court for the judicial district in which my address is located (if in the United States,
2 otherwise the Northern District of California where GitHub is located), and I will accept service of
3 process from the person who provided the DMCA notification or an agent of such person.” *Id.*

4 Graber’s counter notice identified a postal address in Germany at which he could be contacted. *Id.*

5 **III. SERVICE ON DEFENDANTS VIA POST AND EMAIL IS APPROPRIATE.**

6 Rule 4(f)(3) states: “Unless federal law provides otherwise, an individual ... may be
7 served at a place not within any judicial district of the United States: ... by other means not
8 prohibited by international agreement, as the court orders.” A plaintiff need not attempt service by
9 traditional means before seeking leave under FRCP 4(f)(3); they must only “demonstrate that the
10 facts and circumstances ... necessitate[] the district court’s intervention.” *Rio Props. v. Rio Int’l*
11 *Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002). “[S]ervice under Rule 4(f)(3) must be (1) directed
12 by the court; and (2) not prohibited by international agreement. No other limitations are evident
13 from the text.” *Id.* at 1014. “[T]he method of service crafted by the district court must be
14 reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of
15 the action and afford them an opportunity to present their objections.” *Id.* at 1016 (citations and
16 quotations omitted). Where this requirement is met, “trial courts have authorized a wide variety of
17 alternative methods of service including publication, ordinary mail, mail to defendant’s last known
18 address, delivery to the defendant’s attorney, telex, and most recently email.” *Id.* at 1018. *See*
19 *also St. Francis Assisi v. Kuwait Fin. House*, 2016 WL 5725002, *1 (N.D. Cal. Sep. 30, 2016)
20 (service via Twitter satisfied due process); *FTC v. PCCare247 Inc.*, 2013 WL 841037,*6
21 (S.D.N.Y. Mar. 7 2013) (service via email and Facebook satisfied due process).

22 As the foregoing makes clear, the purpose of the counter notification scheme is to permit
23 ISPs who store content at the direction of users (*e.g.*, GitHub) to continue distributing allegedly
24 infringing content as long as a complainant may sue users who have contested removal without
25 facing procedural hurdles. Here, Defendants provided Take-Two (and GitHub) with their postal
26 addresses (and Orçunus his email address) and agreed to accept service. Accordingly, this Court
27 should allow Take-Two to serve Defendants as provided in the counter notifications.

1 No due process issues are implicated. First, Defendants *agreed* to accept service when
 2 they sent counter notifications to GitHub, a U.S. ISP, and provided contact information. *See* 17
 3 U.S.C. § 512(g)(3)(D).¹ Second, service via post and/or email under these circumstances is not
 4 prohibited by international agreement. Third, both methods are reasonably calculated to give
 5 notice, because the contact information was provided by Defendants.² And fourth, there is no
 6 prejudice to Defendants because they will be sent copies of the summons and complaint and have
 7 proper notice of this lawsuit, giving them an opportunity to present objections.

8 **IV. SERVICE ON GRABER AND MORRA VIA EMAIL IS ALSO APPROPRIATE.**

9 If Take-Two cannot serve Graber and Morra at their postal addresses, Take-Two requests
 10 leave to serve them by email. When other methods prove futile, courts allow service by email.
 11 *See, e.g., Xcentric Ventures, LLC v. Karsen, Ltd.*, 2011 WL 3156966, *1 (D. Ariz. July 26, 2011)
 12 (“By filing the counter-notice, defendant expressly agreed to accept service of process at its
 13 Russian address. Plaintiff attempted to perform service there but was unsuccessful.... In the
 14 absence of a correct address, plaintiff cannot personally serve defendant in Russia. It seems the
 15 only medium effective at reaching defendant is email.”). Here, Graber’s and Morra’s GitHub
 16 pages on which their infringing repositories were located direct viewers to websites and/or email
 17 addresses through which they may be contacted. Pagnanelli Decl. ¶¶ 8, 10, 11, Exs. 7, 9, 10.

18 **V. CONCLUSION**

19 Take-Two respectfully requests that the Court grant its administrative motion.
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25 ¹ All Defendants read and write in English and submitted their respective counter notices in
 English. *See* Pagnanelli Decl. ¶¶ 3-11, Exs. 2-10.

26 ² Graber’s and Morra’s GitHub pages identify their email addresses and/or direct to personal
 27 websites containing email addresses at which they may be contacted. *Gurung v. Malhotra*, 279
 F.R.D. 215, 220 (S.D.N.Y. 2011) (“Where, as here, a plaintiff demonstrates that service via
 28 electronic mail is likely to reach the defendant, due process is satisfied.”).

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DATED: September 8, 2021

Respectfully Submitted,

KARIN G. PAGNANELLI
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