

[Emqore Envesecure Private Cap. Trust v. Singh](#)

United States District Court for the District of New Jersey

July 9, 2020, Decided; July 9, 2020, Filed

Civ. No. 20-7324 (KM)(JBC)

Reporter

2020 U.S. Dist. LEXIS 260456 *; 2020 WL 12654314

EMQORE ENVESECURE PRIVATE CAPITAL TRUST, Plaintiff, v. BHAVDEEP SINGH, et al., Defendants.

Subsequent History: Motion denied by [Emqore Envesecure Private Cap. Trust v. Singh, 2022 U.S. Dist. LEXIS 69036, 2022 WL 1115279 \(D.N.J., Apr. 14, 2022\)](#)

Dismissed by [Emqore Envesecure Private Capital Trust v. Singh, 2022 U.S. Dist. LEXIS 162039 \(D.N.J., Sept. 7, 2022\)](#)

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Judges: KEVIN MCNULTY, United States District Judge.

Opinion by: KEVIN MCNULTY

Opinion

MEMORANDUM and ORDER

On June 16, 2020, Plaintiff filed a complaint naming 28 defendants, including 20 defendants who are located outside of the United States. Now before the Court is Plaintiff's motion seeking an order authorizing it to serve these 20 International Defendants pursuant to [Rule 4\(f\)\(3\)](#) via email and Federal Express. The motion is filed on short notice with a requested return date of July 20, 2020 (DE 4); because there is no opposing party to object, I decide it now. For the reasons stated herein, the motion is denied.

In its motion, Plaintiff states that given the COVID-19 pandemic, traditional methods of service present new challenges. For example, Plaintiff states that it anticipates logistical and bureaucratic delays, even beyond those that would have been routine before [*3] the pandemic, if it should attempt to accomplish service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Hague Convention"). Plaintiff therefore requests that this Court permit service pursuant to the "other means" prong of [Fed. R. Civ. P. 4\(f\)\(3\)](#) and asks that this Court authorize it to serve these Defendants via email and Federal Express. To that end, Plaintiff has provided what it says are the current email addresses and business addresses for each of these International Defendants. (See Declaration of Lawrence C. Weiner ("Weiner Decl.") DE 4-2)

[Rule 4\(f\)](#) outlines the requirements for "Serving an Individual in a Foreign Country."

Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

- (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
- (2) if there is no internationally agreed means, or if an international agreement allows but [*4] does not specify other means, by a method that is reasonably calculated to give notice:
 - (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
 - (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
 - (C) unless prohibited by the foreign country's law, by:
 - (i) delivering a copy of the summons and of the complaint to the individual personally; or
 - (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- (3) by other means not prohibited by international agreement, as the court orders.

"Courts have held that there is no hierarchy of the mechanisms listed in [Rule 4\(f\)](#)." [Habas Sinai Ve Tibbi Gazlar Istihsal A.S. v. Int'l Tech. & Knowledge Co., Inc., No. CV 19-608, 2019 U.S. Dist. LEXIS 219724, 2019 WL 7049504, at *2 \(W.D. Pa. Dec. 23, 2019\)](#) (citing [Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014-15 \(9th Cir. 2002\)](#); [Celgene Corp. v. Blanche Ltd., No. CV16501SDWLDW, 2017 U.S. Dist. LEXIS 35126, 2017 WL 1282200, at *2 \(D.N.J. Mar. 10, 2017\)](#) ("Although alternative service under [rule 4\(f\)\(3\)](#) 'is equal to other forms of service,' the plaintiff should still show some difficulty in effecting service by normal means."); [WhosHere, Inc. v. Orun, 2014 U.S. Dist. LEXIS 22084, 2014 WL 670817, at *2 \(E.D. Va. Feb. 20, 2014\)](#)); [I.M. Wilson, Inc. v. Otvetstvennostyou "Grichko", No. CV 18-5194, 2018 U.S. Dist. LEXIS 207639, 2018 WL 6446601, at *2 \(E.D. Pa.](#)

[Dec. 10, 2018](#)) ("Service pursuant to [Rule 4\(f\)\(3\)](#) is 'neither a last resort nor extraordinary relief.... It is merely one means among several which enables service of process on an international defendant.'). Nevertheless, it also "remains the plaintiff's burden to show that [service by] the 'other means' is not prohibited [*5] by international agreement." [Asiacell Communs. PJSC v. Doe, 2018 U.S. Dist. LEXIS 121890, 2018 WL 3496105, at *2 \(N.D. Calif. July 20, 2018\)](#) (citation omitted).

Here, Plaintiff wishes to serve defendants located in India, Malaysia, Hong Kong, Mauritius, Singapore, and the United Kingdom. The United States, India, the United Kingdom, and Hong Kong are signatories to the Hague Convention. Article 2 of the Convention provides that each member State "shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States." See Hague Convention on Service Abroad of Judicial and Extrajudicial Documents art. 2, Nov. 15, 1965, [20 U.S.T. 361, 658 U.N.T.S. 163](#). Article 10 of the Hague Convention allows for service of process through alternative means such as "postal channels" and "judicial officers." *Id.* ("Provided the State of destination does not object, the present Convention shall not interfere with - (a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . .").

Courts however have taken differing approaches on whether an objection to service via "postal channels" would likewise signify an objection to service via email:

there is authority for the proposition that email is indistinguishable from "postal channels" under Article 10 of the Hague [*6] Convention, and, therefore, if countries like Russia object to service through postal channels, a defendant located in Russia cannot be served via email. See e.g., [Agha v. Jacobs, No. 07-CV-1800, 2008 U.S. Dist. LEXIS 109326, 2008 WL 2051061, at *1-2 \(N.D.Cal. May 13, 2008\)](#) (holding that service via email and fax qualified as "postal channels" and accordingly declining to allow service on German defendants by these methods based on Germany's objection to Article 10 of the Hague Convention); see also [Jian Zhang, 293 F.R.D. at 515 n. 2](#) (noting that "there is an argument that service by e-mail, fax, or publication ... would run afoul of the Hague Convention and thus be prohibited" but declining to address the issue). Other courts, however, have held that a country's objection to Article 10 does not preclude service by email so long as the country has not explicitly objected to service by electronic means. See [F.T.C. v. Pecon Software Ltd., No. 12-CV-7186, et al., 2013 U.S. Dist. LEXIS 111375, 2013 WL 4016272, at *5 \(S.D.N.Y. Aug. 7, 2013\)](#) ("Numerous courts have held that service by email does not violate any international agreement where the objections of the recipient nation are limited to those means enumerated in Article 10."); [Gurung v. Malhotra, 279 F.R.D. 215, 220 \(S.D.N.Y.2011\)](#) (explaining that India's "objection to service through postal channels does not amount to an express rejection of service via electronic mail" and noting that "[s]everal other courts have found service by electronic mail appropriate [*7] where a signatory nation has not objected to that specific means of service").

[AMTO, LLC v. Bedford Asset Mgmt., LLC, No. 14-CV-9913, 2015 U.S. Dist. LEXIS 70577, 2015 WL 3457452, at *7 \(S.D.N.Y. June 1, 2015\)](#). Courts in this district have generally followed the Southern District of New York approach and permitted service via email even where a country has objected to the Article 10 means, and mail service in particular, under the Hague Convention. See, e.g., [Celgene Corp. v. Blanche Ltd., No. CV16501SDWLDW, 2017 U.S. Dist. LEXIS 35126, 2017 WL 1282200, at *2 \(D.N.J. Mar. 10, 2017\)](#); [Sec. & Exch. Comm'n v. Dubovoy, No. CV156076MCAMAH, 2016 U.S. Dist. LEXIS 171793, 2016 WL 7217607, at *2 \(D.N.J. Dec. 13, 2016\)](#).

I first consider India, the United Kingdom, and Hong Kong, the countries that are signatories to the Hague Convention.

Service via email is permissible in India, the United Kingdom, and Hong Kong. India, where eleven Defendants are said to be located, has objected to the Article 10 means of service. I am in accord, however, with those courts that have narrowly construed India's objections: "Where a signatory nation has objected to only those means of service listed in Article [10], a court acting under [Rule 4\(f\)\(3\)](#) remains free to order alternative means of service that are not specifically referenced in Article [10]." [F.T.C. v. PCCare247 Inc., No. 12 CIV. 7189 PAE, 2013 U.S. Dist. LEXIS 31969, 2013 WL 841037, at *3 \(S.D.N.Y. Mar. 7, 2013\)](#); see also [Gurung v. Malhotra, 279 F.R.D. 215, 219 \(S.D.N.Y.2011\)](#). The United Kingdom has not objected to Article 10 service via "postal channels." Email service has

been permitted in the United Kingdom. See [Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas](#), 262 F.R.D. 293, 307 (S.D.N.Y. 2009). Both the People's Republic of China and Hong Kong are signatories to the Hague Convention. Hong [*8] Kong has not objected to mail service under Article 10.¹ Given the possibly unsettled state of Hong Kong's autonomy vis-à-vis China,² I therefore consider as well China's stance on Article 10. China's objections are more expansive than Hong Kong's; China has objected to service via postal channels under Article 10. See <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn>. that "China's objection to service by postal channels under Article 10 of the Hague Convention does not encompass service by email and that, further, service by email is not prohibited by any international agreement." [Mattel, Inc. v. Animefun Store, No. 18 CIV. 8824 \(LAP\), 2020 U.S. Dist. LEXIS 77660, 2020 WL 2097624, at *5 \(S.D.N.Y. May 1, 2020\)](#). In sum, I conclude that the Hague Convention does not render email an impermissible form of service in India, the United Kingdom, and Hong Kong.

As to those countries, I also consider the proposal to accomplish service via Federal Express. That proposal raises the issue of whether the objections of India and China to service via "postal channels" would encompass service by commercial carriers. I join the one District of New Jersey court that has decided this issue and hold that FedEx qualifies as a "postal channel" within the scope of the Hague Convention. [*9] See [Evergreen Shipping Agency \(Am.\) Corp. v. Global Shipping Agencies, No. CV 19-4958, 2019 U.S. Dist. LEXIS 195500, 2019 WL 5901506, at *2 \(D.N.J. Nov. 12, 2019\)](#) ("Plaintiff sent the summons and Amended Complaint to Defendants at their principal place of business in Medellin, Colombia via DHL, which the Court finds to be a sufficient 'postal channel' under the Hague Convention."); see also [Int'l Playthings LLC v. Toy Teck Ltd., LLC, No. CIV. 2:11-6832 KM, 2013 U.S. Dist. LEXIS 186779, 2013 WL 8184357, at *13 \(D.N.J. July 23, 2013\)](#) (citing to other districts which have likewise found FedEx to be a permissible postal channel). If FedEx is a permissible postal channel for purposes of service, then consistency requires that an objection to service by postal channels should likewise pertain to FedEx. Accordingly, since India and China have objected to the use of postal channels to execute service, the use of Federal Express will not be authorized.

I turn to Mauritius, Malaysia, and Singapore, countries that have not signed the Hague Convention. See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>. The Hague Convention has no effect on the permissibility of email or postal service in those three nations. I consider, however, whether any other local or international law or agreement would prohibit such service. Plaintiff has not cited any such law. This Court's admittedly brief survey has not uncovered any cases holding suggesting that email service is improper. [*10] See [Elsevier, Inc. v. Siew Yee Chew, 287 F. Supp. 3d 374, 378 \(S.D.N.Y. 2018\)](#) ("Because Malaysia is not a signatory to the Hague Convention. . . service on the Malaysia-based defendants under [Rule 4\(f\)\(1\)](#) is not possible. No other international agreement bars service by email upon the Malaysia-based defendants."); [Assef v. Does 1-10, No. 15-CV-01960-MEJ, 2016 U.S. Dist. LEXIS 41597, 2016 WL 1191683, at *3 \(N.D. Cal. Mar. 28, 2016\)](#) ("Singapore is not a member of the Hague Convention, but the Court is unaware of any international agreement prohibiting service by email there.").

Nevertheless, [Rule 4\(f\)\(3\)](#) states that a Court may order service only by means "not prohibited by international agreement." Particularly in this context—a request for authorization in advance, without the benefit of an adversarial presentation—I will require more of a showing from Plaintiff. The Court is unaware of what international agreements, other than the Hague Convention, might be applicable to Mauritius, Malaysia, and Singapore, or what local laws might restrict the means of service, in the absence of a contrary treaty obligation. I will therefore direct Plaintiff to submit additional evidence regarding service in accordance with [Rule 44.1](#): "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material [*11] or source, including testimony, whether or not submitted by a

¹ Hong Kong has objected only to prongs b and c of Article 10 that relate to the use of judicial officers; therefore, service via postal channels would be permitted under Hong Kong law. China by contrast has objected to all forms of service under Article 10, including via "postal channels."

² See, e.g., <https://www.cfr.org/in-brief/hong-kong-still-autonomous-what-know-about-chinas-new-laws>

party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

Finally, I consider the constitutional due process constraints on permissible service in all of these countries, whether or not signatories to the Hague Convention. I will require a demonstration that the "proposed means of alternative service comports with constitutional notions of due process." [Dubovoy, 2016 U.S. Dist. LEXIS 171793, 2016 WL 7217607, at *3](#) (citing [Marlabs Inc. v. Jakher, 2010 U.S. Dist. LEXIS 39557, 2010 WL 1644041, at *3 \(D.N.J. Apr. 22, 2010\)](#)). Regardless of the manner of service, it must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 \(1950\)](#).

Here, I am not satisfied that the email addresses or the postal addresses supplied by Plaintiff are "reasonably calculated, under all circumstances," to ensure that the defendants are apprised of the pendency of the action. *Id.* Plaintiff states generally that the email and postal addresses provided are current and valid (see Weiner Decl. ¶ 4), but does not state why or how it knows this is so. Particularly where a plaintiff proposes to circumvent the more [*12] usual means of service, I think that due process requires such a showing in the form of affidavits or other evidence.

For example, in [Dubovoy, supra](#), the Court found that due process was satisfied where plaintiff wished to serve the defendants via email. There, however, plaintiff demonstrated that it had successfully communicated with at least one defendant by email and had communicated by other means with the second defendant about the pending action. [2016 U.S. Dist. LEXIS 171793, 2016 WL 7217607, at *3](#). Accordingly, the court was satisfied that the defendants were likely already aware of the action against them and that service using the email addresses was reasonably calculated to alert the defendants to the pendency of the action. Here, however, Plaintiff has not provided any evidence that these many defendants are even generally aware of this action or the possibility of this action. Plaintiff does not appear to have served even those defendants that are located in the US. Nor does Plaintiff relate its efforts to verify these email addresses or to communicate with Defendants using the email addresses provided.

Indeed, the efforts described by Plaintiff here fall short of those found *not* sufficient in *Amirit Techs., Inc. v. HTN Wireless, Inc.*:

[*13] It is Plaintiff's burden to show it took reasonable efforts to try and serve [Defendant], this often includes hiring a private investigator in cases such as this where individuals are domiciled abroad. Plaintiff has not made a sufficient showing that it took measures to explore all service options in the U.S. or that it made appropriate inquiries in Pakistan regarding service. But, most importantly the Court is not convinced that service by email would meet the due process requirements. Sending an email and not having it bounce back, is not on its own enough to indicate email is a valid means of communicating with the Defendant. Courts considering the absence of a bounce back email as a useful fact in the due process inquiry did so in the context of other compelling factors to suggest notice requirements were met. Plaintiff has presented this fact as the single piece of information to show due process requirements would be met.

[No. 217CV0067SRCCLW, 2017 U.S. Dist. LEXIS 73533, 2017 WL 2080418, at *4 \(D.N.J. May 12, 2017\)](#).

Here, Plaintiff has sought too short a shortcut to service of these defendants *en masse*. Plaintiff has not supplied any compelling evidence of efforts to locate reliable contact information, evidence that these email addresses were vetted by an outside source, [*14] or even evidence that these email addresses are currently valid or actively used by these Defendants. Indeed, it is not even clear whether many of the email addresses provided are business email addresses at all, or whether they are in fact associated with the corporate entities Plaintiff seeks to serve. (See

Weiner Decl. ¶ 4) Accordingly, I will deny Plaintiff's motion as presented and direct Plaintiff to supply additional indicia of reliability in accordance with [Rule 4](#) and [Rule 44.1](#).³

ORDER

IT IS THEREFORE this 9th day of July, 2020,

ORDERED that the motion (DE 4) to pre-authorize service by alternative means is **DENIED** without prejudice.

/s/ Kevin McNulty

KEVIN MCNULTY

United States District Judge

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³Whether these alternative means of service are advisable, of course, is a strategic question the court will not consider. Particularly given the lack of an adversarial presentation, any ruling I make is without prejudice to any later challenge to the adequacy of service or the court's personal jurisdiction.