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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEFF FEYKO, individually and on behalf of all others similarly situated,)	Case No. CV 11-05511 DDP (PJWx)
)	
)	ORDER GRANTING IN PART AND
Plaintiff,)	DENYING IN PART LEAD PLAINTIFF'S
)	MOTION TO AUTHORIZE SERVICE ON
v.)	INDIVIDUAL DEFENDANTS LOCATED
)	ABROAD BY SERVING DEFENDANT YUHE
YUHE INTERNATIONAL, INC.,)	INTERNATIONAL, INC.'S U.S.
GAO ZHENTAO and HU GANG.,)	COUNSEL PURSUANT TO FEDERAL RULE
)	OF CIVIL PROCEDURE 4(f)(3)
)	
Defendants.)	[Docket No. 141]
_____)	

I. Background

Lead Plaintiff has sued Yuhe, a Nevada company headquartered in China that traded on the NASDAQ, three of its officers, its outside auditor, and the underwriters of its secondary stock offering. (Second Consolidated Amended Complaint ("SCAC") ¶¶ 18-28, Docket No. 133.) All defendants have entered appearances in this case other than the three Yuhe officers named as defendants: Chief Executive Officer Zhentao Gao ("Gao"), Chief Accounting Officer Jiang Yingjun ("Yingjun"), and former Chief Financial Officer Hu Gang ("Gang") (collectively the "Individual Defendants"). The Individual Defendants are alleged to have

1 violated Sections 10(b) and 20(a) of the Securities Exchange Act of
2 1934 (the "Exchange Act") and Sections 11 and 15 of the Securities
3 Act of 1933 (the "Securities Act"). (See generally SCAC.) Yuhe
4 states, and Lead Plaintiff does not dispute, that Gao and Yingjun
5 remain at Yuhe, but Gang resigned in July 2012. (Docket No. 145 at
6 2:21-25.) These Individual Defendants signed various 10-Ks, 10-Qs
7 and secondary offering documents that Lead Plaintiff has alleged
8 contain false statements of material fact regarding Yuhe's alleged
9 purchase of thirteen breeder farms from Dajiang. (SCAC ¶¶ 51, 54,
10 56, 58, 59, 63, 66 and 68.) Sidley Austin LLP ("Sidley")
11 represents Yuhe in this action. Presently before the Court is Lead
12 Plaintiff's Motion to Authorize Service on Individual Defendant
13 Yuhe International, Inc.'s U.S. Counsel Pursuant to Federal Rule of
14 Civil Procedure 4(f)(3).

15 **II. Legal Standard**

16 Rule 4(f)(3), permits service in a place not within any
17 judicial district of the United States "by ... means not prohibited
18 by international agreement, as the court orders." The Ninth
19 Circuit has held:

20 As obvious from its plain language, service under Rule
21 4(f)(3) must be (1) directed by the court; and (2) not
22 prohibited by international agreement. No other
23 limitations are evident from the text. In fact, as long
24 as court-directed and not prohibited by an international
25 agreement, service of process ordered under Rule 4(f)(3)
26 may be accomplished in contravention of the laws of the
27 foreign country.

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1 Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014
2 (9th Cir. 2002) (emphasis added). District Courts have the
3 discretion to "determin[e] when the particularities and necessities
4 of a given case require alternate service of process under Rule
5 4(f)(3)." Id. at 1016. Service should not offend due process,
6 which requires that "the method of service crafted by the district
7 court must be reasonably calculated, under all the circumstances,
8 to apprise interested parties of the pendency of the action and
9 afford them an opportunity to present their objections." Id.
10 (internal quotation marks and citation omitted).

11 **III. Analysis**

12 Yuhe first argues that Lead Plaintiff should have attempted to
13 serve the Individual Defendants pursuant to the Hague Convention.
14 Many district courts disagree. See, e.g., Brown v. China
15 Integrated Energy, Inc., 285 F.R.D. 560, 564-65 (C.D. Cal. 2012)
16 ("These courts rejected contentions . . . that the Hague Convention
17 provided the only means to effect service on a defendant residing
18 in China.") (citing cases). The Ninth Circuit's holding in Rio
19 Properties supports these district courts. Although the defendants
20 in Rio Properties were located in a country that was not a
21 signatory to the Hague Convention, Rio Properties 284 F.3d at 1015
22 n. 4, this distinction makes no difference. Rule 4(f)(1)
23 specifically permits service pursuant to the Hague Convention, and
24 the Ninth stated in Rio Properties stated that "court-directed
25 service under Rule 4(f)(3) is as favored as service available under
26 Rule 4(f)(1) or Rule 4(f)(2)." Id. at 1015. The Circuit's
27 conclusion follows from the plain language of Rule 4(f)(3), which
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1 only requires that service "be (1) directed by the court; and (2)
2 not prohibited by international agreement." Id. at 1014.

3 For similar reasons the Court rejects Yuhe's argument that
4 Lead Plaintiff should have made other efforts to serve the
5 Individual Defendants, before filing this Motion. As an initial
6 matter, it is unclear what Yuhe could have done besides initiating
7 service pursuant to the Hague Convention. Regardless, other courts
8 have approved a Rule 4(f)(3) service when, "plaintiffs have shown
9 the difficulty of serving the unserved defendants located abroad"
10 and "[d]efense counsel have refused to accept service on behalf of
11 the unserved defendants on the ground that they do not represent
12 the international defendants." In re LDK Solar Sec. Litig., No. C
13 07-05182 WHA, 2008 WL 2415186, at *3 (N.D. Cal. June 12, 2008).
14 Both conditions are present here, as Yuhe's counsel has refused to
15 accept service and Lead Plaintiff has demonstrated the lengthy,
16 costly, and uncertain nature of serving individuals in China.
17 (Brody Decl. Exs. B, C; see generally Kim Decl.); see Vanleeuwen v.
18 Keyuan Petrochemicals, Inc., No. CV 11-9495 PSG JCGX, 2012 WL
19 5992134 (C.D. Cal. Nov. 30, 2012) ("While it may be possible for
20 Plaintiffs to serve Tao in China through ordinary procedures, doing
21 so may be an unproductive and unnecessary exercise. As such, in
22 the present circumstances, the Court finds it appropriate to permit
23 alternative service [of counsel or the registered agent of the
24 corporation for which Tao was CEO].")

25 Yuhe also argues that Sidley is not authorized to accept
26 service of the Individual Defendants, and therefore granting this
27 Motion would be improper under Jimena v. UBS AG Bank, which held
28 "service of process on an attorney is ineffective unless the

1 attorney has specific authority to accept service in the action.”
2 No. CV-F-07-367 OWW/SKO, 2010 WL 2465333, at *7 (E.D. Cal. June 10,
3 2010). However, Jimena recognized that the authority-to-accept-
4 service requirement does not necessarily apply in the Rule 4(f)(3)
5 context. Indeed, the whole point of a 4(f)(3) motion is to decide
6 whether the Court, not anyone else, should authorize service. See
7 In re China Educ. Alliance, Inc. Sec. Lit., CV 10-9239 CAS JCX,
8 2011 WL 6846214 (C.D. Cal. Dec. 29, 2011) (“[A]uthorizing service”
9 of individual defendants via their company’s counsel).

10 Yuhe also states that authorizing service in this case
11 violates due process. However, this Court joins the others that
12 have found that due process permits authorizing service on counsel
13 for the company that employs foreign individual defendants. Id. at
14 *3; Brown, 285 F.R.D. at 566 (C.D. Cal. 2012) (“Even if the
15 individual defendants are not actively involved in directing the
16 litigation, their close connection to China Integrated makes it all
17 but certain that when Gao, Li, and Guo are served through the
18 company’s counsel or its agent, they will receive notice of the
19 suit.”); Vanleeuwen, 2012 WL 5992134 at *3. Thus, there are no due
20 process concerns with granting Lead Plaintiff’s Motion as to Gao
21 and Yingjun.

22 However, Gang is different because he resigned from Yuhe over
23 a year ago. In circumstances such as Gang’s, some courts in this
24 district have authorized Rule 4(f)(3) service and some have not.
25 Rose v. Deer Consumer Products, Inc., CV 11-03701 DMG MRWX, 2011 WL
26 6951969 (C.D. Cal. Dec. 29, 2011) (authorizing service); In re
27 China Educ. Alliance, Inc. Sec. Litig., No. CV 10-9239 CAS, 2011 WL
28 3715969 (C.D. Cal. Aug. 22, 2011) (not authorizing service). This

1 Court finds service of Gang is inappropriate. As the In re China
2 Educ. Alliance court held:

3 [I]t would be difficult to ensure compliance with due
4 process concerns. It is irrelevant whether it would be
5 "easy" for CEU's agent to deliver process to each
6 individual; the inquiry is whether the service is
7 constitutionally "reasonably calculated" to reach these
8 defendants, and without any apparent affiliation between
9 the individuals and CEU, this Court cannot simply rely on
10 the agent to deliver the summons and complaint.

11 2011 WL 3715969, at *3. Thus, the Court DENIES the Motion as to
12 Gang on due process grounds.

13 **IV. Conclusion**

14 For the reasons stated herein, Lead Plaintiff's Motion is
15 GRANTED as to Gao and Yingjun, but DENIED as to Gang.

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17 IT IS SO ORDERED.

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20 Dated: September 12, 2013


DEAN D. PREGERSON
United States District Judge

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