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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 State Farm Fire and Casualty Company,

No. CV-17-01994-PHX-JAT

10 Plaintiff,

ORDER

11 v.

12 Amazon.com Incorporated,
13 Wallygadgets (China),
14 Shenzhen Bo Rui Ze Technology Company
(China),
15 LG Shenzhen Technology Company
(China),
16 LG Company (Korea),
17 LG Chem Company (Korea),
18 LG Chem (China), and
19 Super Engine,

20 Defendants.

21 This case was filed on June 23, 2017. On July 31, 2017, this Court issued an order
22 requiring service on all Defendants by September 21, 2017. The Court also required
23 Plaintiff to file a status report regarding service. On August 1, 2017, Plaintiff filed the
24 status report. (Doc. 21). Regarding the Defendants located in China, Plaintiff stated,

25 Plaintiff has contacted an expert in foreign service, Rick Hamilton of ABC
26 Legal and he has reported the following: his company, as well as other
27 foreign service companies, are having problems with China. He has not
28 received a complete service request from China in two (2) years. However,
he indicates that Article 15 of the Hague Convention allows the court to
move forward with the case even if proof of service has not been provided
by the Chinese authorities. Plaintiff's counsel hereby seeks leave of the
Court to lodge for the Court's consideration an order pursuant to Article 15
of the Hague Convention. Plaintiff's counsel will have Mr. Hamilton

1 continue to monitor the situation involving China and let Plaintiff's counsel
2 know if the situation changes.

3 (Doc. 21).

4 The Court is unclear why leave of Court was required to "lodge for the Court's
5 consideration an order pursuant to Article 15 of the Hague Convention." Nonetheless,
6 the Court gave such permission on August 7, 2017.

7 On September 19, 2017, (two days before the deadline to COMPLETE service),
8 Plaintiff filed a request for extension of time to serve the Defendants located in China,
9 stating:

10 Due to the high cost of service in China, prior to expending the money for
11 service in China, Plaintiff's counsel requests an order from this Court
12 extending the deadline for service in China to April 18, 2017 (6 months
13 pursuant to Article 15 of the Hague Convention and an additional month to
14 allow for this motion to be ruled upon), and that if no certificate of service
15 or delivery can be obtained by that date, that the Court pursuant to Article
16 15 of the Hague Convention will enter an order that the Chinese entities are
17 deemed served.

18 (Doc. 31).

19 On September 20, 2017, this Court denied the motion for extension of time,
20 stating:

21 Plaintiff has filed a motion for a 7 month extension of time to serve the
22 Defendants in China. Plaintiff's motion does not address what efforts
23 Plaintiff has taken in the 90 days since this case was filed to complete
24 service.

25 Further, Plaintiff's motion states that "prior to expending money for service
26 in China" but also states "if no certificate of service or delivery can be
27 obtained". (Doc. 31 at 2). These two phrases taken together seem to imply
28 both that Plaintiff will, and will not, attempt service in the requested 7
29 months.

30 Finally, Plaintiff states in 7 months this Court shall enter an Order under
31 Article 15 of the Hague Convention that deems the defendants in China to
32 be served. However, Plaintiff's own recounting of what is required by the
33 Hague Convention states "a period of not less than six months,... has
34 elapsed since the date of transmission of the document;" (Doc. 31 at 2).
35 Plaintiff's motion does not advise the Court when the document was
36 transmitted such that these six months could begin running.

37 (Doc. 37).

38 Following the September 20, 2017 Order, Plaintiff did nothing and the September
21, 2017 deadline to serve passed. On September 29, 2017, this Court issued an Order to
show cause (by October 5, 2017) why the Defendants located in China should not be

1 dismissed for failure to timely serve. (Doc. 42). On October 5, 2017, Plaintiff responded
2 to the Order to Show Cause and stated:

3 Because this Court denied the motion [to extend time], and due to the great
4 cost for even attempting service in China, before undertaking this process,
5 Plaintiff's counsel wanted to make sure that the Court would extend the
6 deadline for service and would consider deeming the Chinese Defendants
7 served after the period of time required pursuant to Article 15 of The Hague
8 Convention. Undersigned counsel did not want to waste his client[s]
9 money on a possible service method that he reasonably knew would not be
10 able to be completed within the service deadline. If this Court will kindly
11 reconsider reasonably extending the deadline for service for an additional
12 eight (8) months (2 months to have the documents translated and
served/communicated, and 6 months for them to be with the Chinese
authorities before this Court can deem them served pursuant to Article 15
of the Hague Convention), then Plaintiff's counsel will move forward and
pay the cost to reasonably attempt to have the Chinese entities served-- and
will file with the Court a Notice letting the Court know when the 6 months
begins to run for purposes of Article 15 of the Hague Convention.
Respectfully, Plaintiff in good faith believes that it has shown good cause
that these Chinese defendants should not be dismissed and that the deadline
for service upon them should be extended. ...

13 (Doc. 48).

14 Based on these multiple efforts by the Court to have Plaintiff clarify how it intends
15 to accomplish service in China, the Court has deduced the following: 1) Plaintiff intends
16 to attempt formal service of process in China; 2) if Plaintiff does not receive proof of
17 service, Plaintiff intends to "count" this attempted formal service as "transmittal" of the
18 documents as required in Article 15 of the Hague Convention; 3) Plaintiff has not even
19 begun the process of attempting formal service/transmittal of the documents; 4) once the
20 documents are served/transmitted, another six months must elapse before a Hague
21 Convention motion can actually be filed; and 5) Plaintiff will not even attempt service
22 unless and until this Court issues an advance opinion promising to enter a the Hague
23 Convention motion when it is filed in the future.

24 Thus, to summarize the proceedings to date regarding serving the Defendants
25 located in China: 1) from whenever Plaintiff became aware of this case (at the latest the
26 filing of the complaint on June 23, 2017) until August 1, 2017, Plaintiff made one phone
27 call to inquire how to accomplish service in China; 2) from August 1, 2017 until
28 September 19, 2017, Plaintiff did nothing; 3) from September 20, 2017 (the denial of the

1 request for extension of time) to October 5, 2017 (the Court's deadline for the show cause
2 response) Plaintiff did nothing; and 4) presumably Plaintiff still has taken no action to
3 begin service in China.

4 Preliminarily, the Court does not find diligence on Plaintiff's part in attempting
5 service in this case. Other than responding to Court orders, since June 23, 2017, all
6 Plaintiff has done is made one phone call asking how to serve in China. Indeed, in
7 Plaintiff's most recent request to extend time to serve, Plaintiff has increased the
8 additional time needed from 7 months to 8 months, because Plaintiff has not had the
9 documents translated to Chinese yet and needs an additional month to do so.

10 Moreover, Plaintiff's position that it will not undertake service unless the Court
11 issues an advance advisory opinion that it will enter a Hague Convention motion is
12 inappropriate. There was no reason that between June 23, 2017, and today Plaintiff could
13 not have attempted formal service in China. If such attempt had been made, Plaintiff
14 could have moved for more time to receive a proof of service back from China, or to
15 allow the six months required by the Hague Convention to run. In other words, Plaintiff
16 never needed an extension of time to **serve**; Plaintiff perhaps would have needed an
17 extension of time to obtain a proof of service. Thus, given that Plaintiff has used all of its
18 original time to serve to do nothing, the Court is not inclined to grant additional time to
19 serve. Further, on this record, the Court is concerned that all that will happen 8 months
20 from now is a further motion for extension of time because Plaintiff encountered some
21 new obstacle that it failed to advise the Court of until it was out of time.

22 Additionally, the Hague Convention has very specific requirements for how
23 service must have been attempted for service to be deemed completed in six months.
24 Obviously before service is even attempted, the Court would have no ability to rule in
25 advance that a Hague Convention motion would be well taken as the Court does not
26 know if the specific requirements will have been met.

27 Although Plaintiff has shown no cause for needing an extension of time to serve
28 (instead hypothesizing that Plaintiff will likely need an extension of time to obtain a

1 proof of service or, failing that, an extension of time to deem service completed without a
2 proof of service), and although Plaintiff has failed to cite any law supporting its argument
3 for seeking more time, the Court will nonetheless consider whether more time should be
4 granted. While the Court notes that time limits of Federal Rule of Civil Procedure 4(m)
5 do not apply to service in a foreign county, this Court may nonetheless set a reasonable
6 deadline for service in a foreign country to manage its cases. *See Inst. of Cetacean*
7 *Research v. Sea Shepherd Conservation Soc'y*, 153 F. Supp. 3d 1291, 1319 (W.D. Wash.
8 2015). In this case, as discussed above, the Court set a 90 day deadline.

9 Plaintiff has never argued that the deadline set by the court was unreasonable.
10 Instead Plaintiff argued that service in China was very expensive and likely to be
11 unsuccessful. For the reasons discussed above, the Court does not find either argument to
12 be good cause for why service has not yet been attempted.

13 Because service is not governed by Rule 4(m), it is instead governed by this
14 Court's Order. For the Court to dismiss the Defendants located in China for failure to
15 comply with a Court Order, the Court must consider the factors in *Henderson v. Duncan*,
16 779 F.2d 1421, 1423 (9th Cir. 1986). The factors are:

- 17 (1) the public's interest in expeditious resolution of litigation;
- 18 (2) the court's need to manage its docket;
- 19 (3) the risk of prejudice to the defendants;
- 20 (4) the public policy favoring disposition of cases on their merits and
- 21 (5) the availability of less drastic sanctions.

22 *Id.*

23 Under Plaintiff's currently pending request, Plaintiff seeks approximately one year
24 to serve. This is not expeditious. As discussed above, the Court set the deadline with
25 which Plaintiff failed to comply because the Court cannot have this case open forever
26 with no service. The risk of prejudice to the existing defendants is high because they will
27 have to repeat the discovery they have already begun to undertake if the new Defendants
28 eventually appear. Moreover, the Defendants in China, to date, have no notice of this

1 litigation and would not have been preserving documents relevant to their defense. The
2 public policy in favor of disposing of cases on their merits typically favors not
3 dismissing; however, this case will reach the merits in some respects because there are
4 other defendants in the case. Further, Plaintiff is seeking an additional 8 months to serve
5 so it can ultimately default the Defendants in China, which is also not a merits resolution.

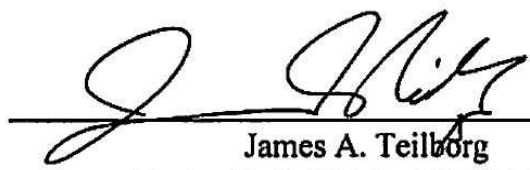
6 As to less drastic sanctions, Plaintiff's own inactions have made this near
7 impossible. For example, the Court cannot simply order service to begin within two
8 weeks because Plaintiff has not even had the relevant documents translated. Further,
9 Plaintiff has not advised whether it has engaged a process server who could begin
10 immediately once translation was complete. Thus, Plaintiff's total inaction in the 3.5
11 months since this case was filed has thwarted the opportunity for a brief extension of time
12 as a less drastic sanction to dismissal. However, the Court will dismiss without
13 prejudice.

14 Based on the foregoing, the Court finds all factors favor dismissal. Accordingly,
15 because Plaintiff has failed to show good cause or excusable neglect to extend time to
16 serve, and has failed to show cause why Plaintiff failed to comply with a Court Order,

17 **IT IS ORDERED** that the Defendants located in China (specifically: (1)
18 Wallygadgets; (2) Shenzhen Bo Rui Ze Technology Company (China) Limited; (2) LG
19 Shenzhen Technology Company (China) Limited; and (4) LG Chem (China) Limited) are
20 dismissed, without prejudice, for failure to serve in accordance with this Court's orders.

21 **IT IS FURTHER ORDERED** that, there being no just reason for delay, the Clerk
22 of the Court shall enter judgment, dismissing these 4 Defendants (only) without
23 prejudice.

24 Dated this 11th day of October, 2017.

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James A. Teilborg
Senior United States District Judge