

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,)	No. CV-F-07-367 OWW/SKO
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO SERVE SUMMONS AND
vs.)	THIRD AMENDED COMPLAINT TO
)	CLIVE STANDISH'S ATTORNEY
)	WITHOUT PREJUDICE (Doc. 157)
)	
UBS AG BANK, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiff Carl L. Jimena, proceeding *in pro per*, has filed a motion to serve a summons and the Third Amended Complaint on Suhana S. Han, Sullivan & Cromwell, New York City, who Plaintiff asserts "represents Clive Standish in the United States District Court for the Southern District of New York, Civil Case No. 07 CV 11225 (RHS) ECF case together with the other defendants UBS AG, Peter S. Wuffli, David S. Martin."

After the motion was filed and noticed for hearing, Plaintiff filed a "Notice of Letter Received from Clive Standish Attorney." (Doc. 177). In this letter dated November 2, 2009,

1 Suhana S. Han states:

2 I am in receipt of your letters dated October
3 13 and October 19, 2009. Even if these
4 letters and their enclosed documents were
5 sufficient to effect proper service on Mr.
6 Clive Standish in the above-captioned action,
7 I neither represent Mr. Standish nor am
8 authorized to accept service on his behalf in
9 that action. In light of this, please
10 withdraw your 'Motion to Serve Summons and
11 3rd Amended Complaint to Clive Standish's
12 Attorney.'

13 Along with this letter, I am returning your
14 letters and the enclosed documents.

15 UBS AG opposes this motion. Submitted with its opposition
16 is the Declaration of Suhana S. Han:

17 1. I am an attorney and a member of Sullivan
18 & Cromwell LLP. and am admitted to practice
19 in Massachusetts, New York, the United States
20 District Courts for the Southern and Eastern
21 Districts of New York, the United States
22 Courts of Appeal for the Second and Eleventh
23 Circuits, and the United States Supreme
24 Court. I have personal knowledge of the
25 matters set forth herein, and if called,
26 could and would competently testify thereto,
under oath. This declaration is submitted in
support of UBS AG's Response to Plaintiff's
'Motion to Serve Summons and Complaint [sic]
to Clive Standish [sic] Attorney.'

27 2. I received by priority U.S. mail the
28 following documents from Carl L. Jimena dated
29 October 5, 2009: (i) a 'Notice of Motion,
30 Motion to Serve Summons and 3rd Amended
31 Complaint to Clive Standish's Attorney'; and
32 (ii) a 'Motion to Serve Summons and 3rd
33 Amended Complaint to Clive Standish's
34 Attorney'; and (iii) 'Memorandum of Law on
35 Motion to Serve Summons and 3rd Amended
36 Complaint to Clive Standish Attorney.'

37 3. I also received by priority U.S. mail a
38 document from Mr. Jimena dated October 16,
39 2009 and entitled 'Notice of Errata,' which
40 included as an exhibit a notice of appearance

1 that I filed for Mr. Standish in *In re UBS*
2 *Securities Litigation*, No. 07 CV 11225
3 (RJS) (S.D.N.Y.). Neither set of documents
4 that I received from Mr. Jimena contained a
5 complaint.

6 4. I, along with other lawyers at Sullivan &
7 Cromwell LLP, represent UBS AG in *In re UBS*
8 *Securities Litigation*, a putative securities
9 fraud class action concerning UBS's portfolio
10 of mortgage-backed and auction rate
11 securities and its U.S. cross-border
12 business. In connection with that case, I
13 have filed notices of appearance on behalf of
14 numerous current and former UBS AG directors
15 and officers who were named as individual
16 defendants, including Mr. Standish.

17 5. Thus, while I do represent Mr. Standish
18 in a case pending in the Southern District of
19 New York, neither I nor any lawyer from
20 Sullivan & Cromwell LLP representing UBS AG
21 in *In re UBS Securities Litigation* represents
22 or is authorized to accept service on behalf
23 of Mr. Standish in the *Jimena* litigation.
24 Indeed, I have never communicated with Mr.
25 Standish about this lawsuit or any other
26 matter.

1 In opposing this motion, UBS AG acknowledges that its counsel
2 does not represent Clive Standish in this litigation, but
3 "provides this response to Plaintiff's motion because of UBS AG's
4 interest in the speedy resolution of this frivolous case, which
5 has already dragged on for nearly three years and has
6 unnecessarily consumed both UBS AG's and the Court's resources."

7 Plaintiff objects to UBS AG's opposition to this motion,
8 contending that it does not have standing, making UBS AG's
9 response "a mere scrap of paper that cannot be recognized and is
10 a scandalous matter that should be stricken under Rule 12(f)
11 FRCP."

1 Plaintiff initially filed this as on August 18, 2009, as an
2 "Ex Parte Motion to Serve Summons and 3rd Amended Complaint to
3 Clive Standish's Attorney." (Doc. 152). By Order filed on
4 September 30, 2009, the Court ordered Plaintiff to file a notice
5 of motion, setting the motion on the Court's civil law and motion
6 calendar. While UBS AG technically may not have standing to
7 oppose this motion, there is no prejudice to Plaintiff in
8 considering UBS AG's contentions, especially since Plaintiff
9 responds to them in his reply brief.

10 Clive Standish is named as a defendant in this action. In
11 the Memorandum Decision and Order filed on June 8, 2007 (Doc.
12 18), the Court noted at footnote 7:

13 The third defendant in this lawsuit,
14 individual defendant Clive Standish, a United
15 Kingdom citizen and Swiss resident, has not
16 been served and no attorney has made an
17 appearance for him. Plaintiff appears to
18 contend that he served Mr. Standish by
19 sending an email to the Yahoo email address
20 used by the impersonators who defrauded
21 plaintiff by pretending to be Mr. Standish.
22 California does not provide for service by
23 email, and even if it did, such service could
24 not have been effective as to the real Mr.
25 Standish, a stranger to the Yahoo email
26 address used by Plaintiff.

21 On June 25, 2007, Plaintiff filed a motion to order Yahoo,
22 Inc. "to make a disclosure on the two email accounts you contend
23 belong to an imposter of Clive Standish." (Doc. 29). In this
24 motion, Plaintiff contended that he was dealing with the real
25 Clive Standish and that the two email addresses,
26 clive_standish@yahoo.com is Mr. Standish's personal email address

1 and customerservices@privateclientssubs.cjb.net is Mr. Standish's
2 office email. Plaintiff asserted that he is in possession of an
3 email from Clive Standish wherein Mr. Standish admits that these
4 two email addresses are his and asserted that a disclosure by
5 Yahoo, Inc. will confirm his position. It appears from the
6 docket that this motion was denied by Magistrate Judge Goldner by
7 minute order filed on July 24, 2007. (Doc. 41).

8 In his instant motion, Plaintiff asserts:

9 2. On March 9, 2007 before Plaintiff had any
10 knowledge of the notice of removal which was
11 received on March 12, 2007, plaintiff served
12 defendant Clive Standish three times in
13 succession with the summons and amended
14 complaint by email on his two email address
15 [sic], namely: 'clive_standish@yahoo.com' his
16 personal email address and
17 'customerservices@privateclientssubs.cjb.net'
18 his office email address. This is shown by
19 the proof of service signed by a notary
20 public, Salman Ejaz, attached as Annex 7 to
21 Exhibit C of plaintiff's motion to declare
22 notice of removal void or for remand, (Doc.
23 8).

24 3. The Superior Court of California
25 recognized the above service as valid service
26 under California's Code of Civil Procedure,
rule 410.10 ... as shown by the Register of
Actions of the Superior Court of California
copy attached as Exhibit G to Doc. 8, motion
to declare notice of removal void. In view
of the difficulty of [sic] finding Clive
Standish, plaintiff is not waiving the
validity of the first service on March 9,
2007.

27 4. Plaintiff (without waiving the validity of
28 the first service on March 9, 2007 by email
29 as stated in paragraph two above) be
30 authorized to serve Clive Standish's attorney
31 ... by certified priority airmail with return
32 receipt requested, the same manner UBS AG and
33 UBS FS were served before.

1 Plaintiff's attempt to serve Clive Standish by email on March 9,
2 2007 occurred after the action was removed to this Court on March
3 6, 2007.

4 With regard to Plaintiff's contention that the Kern County
5 Superior Court recognized the email service of summons and
6 complaint on March 9, 2007 to the two email addresses listed by
7 Plaintiff, Exhibit G to Doc. 8 does not substantiate Plaintiff's
8 contention. Exhibit G to Doc. 8 is a copy of a document
9 captioned "Civil Case Information - Register of Actions/Case
10 Docket" generated by the Kern County Superior Court in this
11 action prior its removal to this Court. For the date March 14,
12 2007, the docket entry states:

13 PROOF OF SERVICE-SUMMONS/COMPLAINT
14 WHAT SERVED: SUMMONS; AMENDED COMPLAINT
15 WHO SERVED: CLIVE STANDISH
16 HOW SERVED: CERTIFIED
17 DATE SERVED: 3/9/07

18 Although Plaintiff argued to the Kern County Superior Court that
19 service of the summons and complaint on Clive Standish by email
20 was allowed under the law and facts, no such order from the Kern
21 County Superior Court is submitted by Plaintiff. A docket entry
22 by an unknown individual, which docket entry does not refer to
23 email service of summons and complaint, instead stating
24 "certified," is not supportive of Plaintiff's position. Attached
25 to Plaintiff's reply brief as Exhibit 1 is a copy of the Kern
26 County Superior Court docket. The entry for February 5, 2007 in
connection with an order to show cause, which states in pertinent
part:

1 COURT DECLINES TO GRANT EX-PARTE APPLICATION
2 TO CLERK RE: REQUEST FOR SERVICE IN
3 SWITZERLAND, WITHOUT PREJUDICE.

4 The entry for February 22, 2007 states:

5 RULING ON: DECLARATION OF COMPLIANCE FILED
6 2/8/07

7 PARAGRAPH 5: THIS COURT CAN NOT WAIVE ANY
8 REQUIREMENTS OF THE HAGUE CONVENTION. FINAL
9 'IN VIEW ...' PARAGRAPH: THE COURT DOES NOT
10 WAIVE OBJECTIONS TO ANY SERVICE MADE IN
11 COMPLIANCE WITH APPLICABLE LAW.

12 Plaintiff cites *Rio Properties, Inc. v. Rio International*
13 *Interlink*, 284 F.3d 1007 (9th Cir.2002), in support of his
14 contention that service of the summons and Third Amended
15 Complaint on Ms. Han as counsel for Clive Standish in another
16 civil action is appropriate.

17 In *Rio Properties, Inc.*, Las Vegas hotel and casino operator
18 Rio Properties, Inc. (RIO) sued Rio International Interlink
19 (RII), a foreign internet business entity, asserting various
20 statutory and common law trademark infringement claims. The
21 District Court entered default judgment against RII for failing
22 to comply with discovery orders. RII appealed the sufficiency of
23 service of process, effected via email and regular mail pursuant
24 to Rule 4(f)(3), Federal Rules of Civil Procedure.

25 To initiate suit, RIO attempted to locate RII in the United
26 States. RIO discovered that RII claimed an address in Miami,
Florida when it registered the allegedly infringing domain names.
However, that address housed only RII's international courier,
IEC, which was not authorized to accept service on RII's behalf.

1 IEC agreed, however, to forward the summons and complaint to
2 RII's Costa Rican courier. After sending a copy of the summons
3 and complaint through IEC, RIO received a telephone call from Los
4 Angeles attorney John Carpenter, inquiring about the lawsuit.
5 Apparently, RII received the summons and complaint from IEC and
6 subsequently consulted Carpenter about how to respond. Carpenter
7 indicated that RII provided him with a partially legible copy of
8 the complaint and asked RIO to send him a complete copy. RIO
9 agreed to resend the complaint and, in addition, asked Carpenter
10 to accept service for RII; Carpenter declined. Carpenter did
11 request that RIO notify him upon successful completion of service
12 of process on RII. *Id.* at 1013.

13 RIO then investigated the possibility of serving RII in
14 Costa Rica. RIO searched international directory databases
15 looking for RII's address in Costa Rica. The investigator
16 learned that RII preferred communications through its email
17 address, and received "snail mail," including payment for
18 services, at the IEC address in Florida. *Id.*

19 Unable to serve RII by conventional means, RIO filed an
20 emergency motion for alternate service of process. RII opted not
21 to respond to RIO's motion. The District Court granted RIO's
22 motion, and pursuant to Rule 4(h)(2) and 4(f)(3), ordered service
23 of process on RII through the mail on Carpenter and IEC and via
24 RII's email address. *Id.*

25 Rule 4(f) provides:

26 Unless federal law provides otherwise, an

1 individual ... may be served at a place not
2 within any judicial district of the United
States:

3 (1) by any internationally agreed means of
4 service that is reasonably calculated to give
5 notice, such as those authorized by the Hague
Convention on the Service Abroad of Judicial
and Extrajudicial Documents;

6 (2) if there is no internationally agreed
7 means, or if an international agreement
8 allows but does not specify other means, by a
method that is reasonably calculated to give
notice:

9 (A) as prescribed by the
10 foreign country's law for service in that
11 country in an action in its courts of general
jurisdiction;

12 (B) as the foreign authority
13 directs in response to a letter rogatory or
letter of request; or

14 (C) unless prohibited by the
foreign country's law, by:

15 (i) delivering a
16 copy of the summons and of the complaint to
the individual personally; or

17 (ii) using any form
18 of mail that the clerk addresses and sends to
19 the individual and that requires a signed
receipt; or

20 (3) by other means not prohibited by
international agreement, as the court orders.

21 In *Rio Properties, Inc.*, the Ninth Circuit held that
22 "service under Rule 4(f)(3) must be (1) directed by the court;
23 and (2) not prohibited by international agreement." 284 F.3d at
24 1014. "[S]o long as court-directed and not prohibited by an
25 international agreement, service of process ordered under rule
26 4(f)(3) may be accomplished in contravention of the laws of the

1 foreign country." *Id.* The Ninth Circuit rejected RII's
2 argument that Rule 4(f) creates a hierarchy of preferred methods
3 of service of process:

4 RII's interpretation would require that a
5 party attempt service of process by those
6 methods enumerated in rule 4(f)(2), including
7 by diplomatic channels and letters rogatory,
8 before petitioning the court for alternative
9 relief under Rule 4(f)(3). We find no
10 support for RII's position. No such
11 requirement is found in the Rule's text,
12 implied by its structure, or even hinted at
13 in the advisory committee notes.

14 *Id.* at 1014-1015. The Ninth Circuit ruled:

15 Contrary to RII's assertions, RIO need not
16 have attempted every permissible means of
17 service of process before petitioning the
18 court for alternative relief. Instead, RIO
19 needed only to demonstrate that the facts and
20 circumstances of the present case
21 necessitated the district court's
22 intervention. Thus, when RIO presented the
23 district court with its inability to serve an
24 elusive international defendant, striving to
25 evade service of process, the district court
26 properly exercised its discretionary powers
to craft alternate means of service. We
expressly agree with the district court's
handling of this case and its use of Rule
4(f)(3) to ensure the smooth functioning of
our courts of law.

27 *Id.* at 1016. The Ninth Circuit then addressed whether the method
28 of service of process ordered by the District Court comported
29 with constitutional notions of due process. To meet this
30 requirement, the method of service crafted by the district court
31 must be "reasonably calculated, under all the circumstances, to
32 apprise interested parties of the pendency of the action and
33 afford them an opportunity to present their objections.'" *Id.*

1 The Ninth Circuit ruled that the alternate service ordered by the
2 District Court was constitutionally acceptable. After discussing
3 service by mail on IEC, the Ninth Circuit addressed service on
4 the attorney, Carpenter, and on RII by email:

5 Service upon Carpenter was also appropriate
6 because he had been specifically consulted by
7 RII regarding this lawsuit. He knew of RII's
8 legal positions, and it seems clear that he
9 was in contact with RII in Costa Rica.
Accordingly, service to Carpenter was
reasonably calculated in these circumstances
to apprise RII of the pendency of the present
action.

10 Finally, we turn to the district court's
11 order authorizing service of process on RII
12 by email at email@betrio.com. We acknowledge
13 that we tread upon untrodden ground. The
14 parties cite no authority condoning service
15 of process over the Internet or via email,
16 and our own investigation has unearthed no
17 decisions by the United States Courts of
18 Appeals dealing with service of process by
19 email and only one case anywhere in the
20 federal courts. Despite this dearth of
21 authority, however, we do not labor long in
reaching our decision. Considering the facts
presented by this case, we conclude not only
that service of process by email was proper -
this is, reasonably calculated to apprise RII
of the pendency of the action and afford it
an opportunity to respond - but in this case,
it was the method of service most likely to
reach RII.

21 ...

22 Although communication via email and over the
23 Internet is comparatively new, such
24 communication has been zealously embraced
25 within the business community. RII
26 particularly has embraced the modern e-
business model and profited immensely from
it. In fact, RII structured its business
such that it could be contacted *only* via its
email address. RII listed no easily
discoverable street address in the United

1 States or in Costa Rica. Rather, on its
2 website and print media, RII designated its
3 email address as its preferred contact
4 information.

5 Unlike the Iranian officials in *New England*
6 *Merchants*, RII had neither an office nor a
7 door; it had only a computer terminal. If
8 any method of communication is reasonably
9 calculated to provide RII with notice, surely
10 it is email - the method of communication
11 which RII utilizes and prefers. In addition,
12 email was the only court-ordered method of
13 service aimed directly and instantly at RII,
14 as opposed to methods of service effected
15 through intermediaries like IEC and
16 Carpenter. Indeed, when faced with an
17 international e-business scofflaw, playing
18 hide-and-seek with the federal court, email
19 may be the only means of effecting service of
20 process. Certainly in this case, it was a
21 means reasonably calculated to apprise RII of
22 the pendency of the lawsuit, and the
23 Constitution requires nothing more.

24 Citing *WAWA, Inc. v. Christensen*, ... 1999 WL
25 557936, at *1 ... (E.D.Pa, July 29, 1999)
26 ..., RII contends that email is never an
approved method of service under Rule 4. We
disagree. In *WAWA*, the plaintiff attempted
to serve the defendant via email absent a
court order. Although RII is correct that a
plaintiff may not generally resort to email
service on his own initiative, in this case,
as in *International Telemedia Associates*,
email service was properly ordered by the
district court using its discretion under
Rule 4(f)(3).

Despite our endorsement of service of process
by email in this case, we are cognizant of
its limitations. In most instances, there is
no way to confirm receipt of an email
message. Limited use of electronic
signatures could present problems in
complying with the verification requirements
of Rule 4(a) and Rule 11, and system
capability problems may lead to controversies
over whether an exhibit or attachment was
actually received. Imprecise imaging
technology may even make appending exhibits

1 and attachments impossible. We note,
2 however, that, except for the provisions
3 recently introduced into Rule 5(b), email
4 service is not available absent a Rule
5 4(f)(3) court decree. Accordingly, we leave
6 it to the discretion of the district court to
7 balance the limitations of email service
8 against its benefits in any particular case
9 ...

10 *Id.* at 1017-1018.

11 Plaintiff's request that he be allowed to serve the summons
12 and Third Amended Complaint on Clive Standish by serving his
13 attorney in another civil action in another district is
14 problematic.

15 First, service of process on an attorney is ineffective
16 unless the attorney has specific authority to accept service in
17 the action. See *Pochiro v. Prudential Ins. Co. of America*, 827
18 F.2d 1246, 1248-1249 (9th Cir.1987). However, in *Forum Financial*
19 *Group v. President and Fellows of Harvard College*, 199 F.R.D. 22
20 (D.Me.,2001), the plaintiffs brought suit against the defendants,
21 including Jonathan Hay, an American residing in Russia, involving
22 Hay's business dealings in Russia. The plaintiffs moved for a
23 court-directed service of process by certified mail to Spiegel,
24 an attorney who had recently accepted service of process on Hay's
25 behalf in another federal case that also involved Hay's business
26 dealings in Russia. The District Court addressed Spiegel's
contention that service on a party through an attorney who is not
authorized to accept such service is generally inappropriate
because it risks adversely affecting the attorney-client
relationship. *Id.* at 24. Acknowledging the general rule that

1 service of process on an attorney is not effective unless the
2 attorney is authorized to accept service, the District Court
3 ruled:

4 Those cases are distinguishable, however,
5 because they do not involve court-directed
6 service as is requested here, but only the
7 parties' own attempts at service without
8 prior court authorization ... Where, as here,
9 a party moves for court-directed service
10 under Rule 4(f)(3), the court's decision to
11 grant or deny the motion after careful
12 consideration of the particular facts of the
13 case can safeguard the attorney-client
14 relationship against any unwarranted
15 intrusion ... In this case, based upon the
16 representations made at this point in the
17 proceedings,⁵ I conclude that service of
18 process via Spiegel is appropriate given
19 Hay's efforts to evade service in Russia and
20 Speigal's recent acceptance of service on
21 Hay's behalf in a case also involving Hay's
22 business dealings in Russia ... Such service
23 via Attorney Spiegel is likely to fulfill the
24 due process requirement of being reasonably
25 calculated to give Hay notice of the case and
26 an opportunity to be heard ... Notably,
Attorney Spiegel does not argue that sending
service to him would fail to give Hay fair
notice, nor does he assert that he is not in
contact with Hay.

⁵Employing local counsel in Russia, the
plaintiffs have attempted to serve Hay by
certified mail and by hand, at both his home
and business addresses. Chizhikova Decl. ¶
7. The plaintiffs' legal counsel asserts
that Hay has actively evaded her efforts to
serve him, *id.*, that he is now living under
an assumed name, and that she cannot find
him. Supplemental Chizhikova Decl. ¶ 4. The
plaintiffs also assert that they would be
prejudiced if forced to attempt to serve Hay
by letter rogatory because the attempt would
not be successful but would take between six
months and one year to complete. Pls. Reply
to Opp'n to Mot. for Court-Directed Service
at 5.

1 199 F.R.D. at 24-25 & n.5.

2 However, the record in this action does not mirror the
3 circumstances in *Forum Financial Group*. Ms. Han and the law firm
4 Sullivan and Cromwell are not authorized to accept service of
5 process on behalf of Clive Standish in this action. The action
6 against Clive Standish and others in the United States District
7 Court for the Southern District of New York is a class action
8 alleging securities fraud by plaintiffs who purchased or acquired
9 securities issued by UBS AG on worldwide stock exchanges from
10 August 13, 2003 to February 23, 2009. Although both actions
11 involve allegations of fraud, there the similarities cease.
12 Further, in *Forum Financial Group* and *Rio Properties*, the
13 opinions noted the extent to which evasion of service occurred
14 and, in *Rio Properties*, the Ninth Circuit expressly noted that no
15 international treaty service requirements were involved. Here,
16 Plaintiff makes no showing that he is not bound by the
17 requirements of the Hague Convention.

18 In addition, there is a real issue in this action whether
19 the Clive Standish emailed by Plaintiff is the Clive Standish,
20 formerly Chief Financial Officer for UBS AG. As noted, Standish
21 is represented to be a citizen of Great Britain and a resident of
22 Switzerland. Plaintiff makes no showing in his motion of any
23 efforts other than the March 9, 2007 emails, to accomplish
24 service of process on Clive Standish. Annex 1 to Exhibit C to
25 Doc. 8, is a copy of "Plaintiff's Explanation on Order to Show
26 Cause on March 22, 2007" filed in the Kern County Superior Court

1 on March 14, 2007, wherein Plaintiff asserts:

2 5. The only defendant not served is
3 defendant Clive Standish who can only be
4 served in accordance with the 1964 Hague
5 Convention on service of Judicial and
6 Extrajudicial Documents abroad. (Kott v.
7 Superior Court, 45 Cal.App.4th 1126, 1135-
8 1136) and this Court declined service of the
9 papers to him.

10 Plaintiff gives no explanation for the Kern County Superior
11 Court's ruling, if such in fact was the ruling, and what is meant
12 by "this Court declined service of the papers to him."

13 Plaintiff asserts in his reply brief:

14 Clive Standish presumably resides in
15 Switzerland. Plaintiff while this case was
16 in the Superior Court of California prepared
17 all the papers for service thru proper
18 channels in Switzerland. Plaintiff requested
19 the California Superior Court for permission
20 to serve the papers thru international
21 channels but it was rejected by the
22 California ... With no alternative left,
23 plaintiff resorted to California's Long Arm
24 Statute, Sec. 410.10, California Code of
25 Civil Procedure and served Clive Standish by
26 email which was accepted by the California
Superior Court. Then this case was removed
to this District Court. Plaintiff continued
to search the internet bi-weekly or monthly
for any clue as to the whereabouts of Clive
Standish but to no avail until plaintiff came
across a news [sic] in the internet that a
William Wesner filed suit against Clive
Standish. Plaintiff searched the court files
of the Southern District of New York and
found Atty. Suhana Han. Plaintiff is on \$600
monthly social security income and cannot
afford to hire an investigator in Switzerland
to find Clive Standish. The only tool
available to plaintiff to make a search in
[sic] the internet.

27 As noted, the record does not establish that the Kern County
28 Superior Court accepted or approved of the emailed service of

1 process. Attached to Plaintiff's reply brief as Exhibit 1 is a
2 copy of the Kern County Superior Court docket. The entry for
3 February 5, 2007 in connection with an order to show cause, which
4 states in pertinent part:

5 COURT DECLINES TO GRANT EX-PARTE APPLICATION
6 TO CLERK RE: REQUEST FOR SERVICE IN
SWITZERLAND, WITHOUT PREJUDICE.

7 The entry for February 22, 2007 states:

8 RULING ON: DECLARATION OF COMPLIANCE FILED
9 2/8/07

10 PARAGRAPH 5: THIS COURT CAN NOT WAIVE ANY
11 REQUIREMENTS OF THE HAGUE CONVENTION. FINAL
12 'IN VIEW ...' PARAGRAPH: THE COURT DOES NOT
WAIVE OBJECTIONS TO ANY SERVICE MADE IN
COMPLIANCE WITH APPLICABLE LAW.

13 Plaintiff's briefs in support of this motion provide no
14 explanation of the Superior Court's February 5, 2007 ruling and
15 why he could not then proceed to serve Standish in his country of
16 residence, because the denial was without prejudice. Plaintiff
17 does not submit copies of his pleadings filed in the Superior
18 Court regarding service of process on Clive Standish. At the
19 hearing, Plaintiff stated that the Superior Court provided no
20 explanation for its ruling and that he did not again attempt
21 service of process on Clive Standish pursuant to the Hague
22 Convention because he expected the Superior Court to make the
23 same ruling.

24 *Rio Properties* notes:

25 A federal court would be prohibited from
26 issuing a Rule 4(f)(3) order in contravention
of an international agreement, including the
Hague Convention referenced in Rule 4(f)(1).

1 The parties agree, however, that the Hague
2 Convention does not apply in this case
3 because Costa Rica is not a signatory.

3 284 F.3d at 1015 n.4. Switzerland is a signatory with
4 declarations to the Convention on the Service Abroad of Judicial
5 or Extrajudicial Documents in Civil or Criminal Matters (the
6 "Hague Convention"). Article 10 of the Hague Convention states:

7 Provided the State of destination does not
8 object, the present Convention shall not
9 interfere with -

9 (a) the freedom to send judicial
10 documents, by postal channels,
11 directly to persons abroad,

11 (b) the freedom of judicial
12 officers, officials or other
13 competent persons of the State of
14 origin to effect service of
15 judicial documents directly through
16 the judicial officers, officials or
17 other competent persons of the
18 State of destination,

15 (c) the freedom of any person
16 interested in a judicial proceeding
17 to effect service of judicial
18 documents directly through the
19 judicial officers, officials or
20 other competent persons of the
21 State of destination.

19 However, Switzerland declared its reservations that "In
20 accordance with Article 21, second paragraph (a), Switzerland
21 declares that it is opposed to the use in its territory of the
22 method[] of transmission provided for in Article[] ... 10."
23 Further, "[i]n accordance with Article 21, first paragraph (a),
24 Switzerland designates the cantonal authorities as Central
25 Authorities referred to in Articles 2 and 18 of the Convention.
26

1 Requests for service of documents may also be addressed to the
2 Federal Justice and Police Department in Bern, which will forward
3 them to the appropriate Central Authority." See
4 www.hcch.net/index_en.php?actconventions.authorities&cid17.

5 Therefore, direct mail to a Swiss resident is not an
6 "internationally agreed means" permitted by Rule 4(f) and the
7 Hague Convention. However, there are indications in the record
8 that Plaintiff does not know the address of Clive Standish or
9 whether he is in fact a resident of Switzerland. Article I of
10 the Hague Convention provides that "[t]his Convention shall not
11 apply where the address of the person to be served is not known."
12 However, Plaintiff provides no information of his efforts to
13 ascertain Standish's address in Switzerland, except to state that
14 he cannot afford to conduct an appropriate investigation.

15 Plaintiff makes no showing that Clive Standish is attempting
16 to evade service of process. The only attempted service by
17 Plaintiff was the email service in March 2007; Plaintiff provides
18 no evidence that he has otherwise attempted service of process
19 since that date through the Hague Convention. See *U.S. Aviation*
20 *Underwriters, Inc. v. Nabtesco Corp.*, 2007 WL 3012612 at *2
21 (W.D.Wash., Oct. 11, 2007), citing *Rio Properties*:

22 Based on this authority [*Rio Properties*],
23 plaintiff's request to use Rule 4(f) (3)
24 simply because it 'will be much faster, thus
25 moving this case forward in an expeditious
26 and cost-effective manner,' ... by itself is
not sufficient justification for the Court to
authorize service by alternative method.
Plaintiff cites no reason what the methods
specified by Fed.R.Civ.P 4(f) (1) and (2)

1 would be ineffective, unlike *Rio Properties*
2 where the defendant was 'elusive' and
3 'striving to evade service of process.' *Rio*
4 *Properties*, 284 F.3d at 1016. Because the
5 requirements for due process and respect for
international law outweigh plaintiff's desire
to proceed expeditiously, the Court finds
insufficient cause to authorize service by
alternative means.

6 Plaintiff's real explanation for this motion is his contention
7 that he cannot afford to investigate the local address for Clive
8 Standish in order to serve him via the Hague Convention
9 procedures applicable to Switzerland. Plaintiff asserts that
10 evasion of service is not a prerequisite to court-directed
11 service of process on Standish's attorney in another case, citing
12 *Forum Financial Group, supra*, 199 F.R.D. at 23-24:

13 Attorney Spiegel ... contends that court-
14 directed service under Rule 4(f)(3) is not
15 generally available unless attempts at
16 service by means authorized by any applicable
17 international agreement have proven
18 unsuccessful. He asserts that court-directed
19 service is 'extraordinary relief' that is
20 inappropriate in this case because the
21 plaintiffs have not attempted to serve Hay by
22 letter rogatory. He asserts that the latter
23 method is allowed under a 1985 agreement
24 between the United States and the Union of
25 Soviet Socialist Republics ... Contrary to
26 these assertions, nothing in Rule 4(f) or its
advisory committee notes indicates that
court-directed service under Rule 4(f)(3) is
'extraordinary relief.' By its plain
language and syntax, Rule 4(f)(3)'s plain
language unambiguously indicates that the
only limit it imposes on court-directed
service under Rule 4(f)(3) is that the means
must not be prohibited by international
agreement ... Moreover, the 1985 Agreement
between the United States and U.S.S.R. - if
it is even applicable - merely sets forth
procedures for executing letters rogatory; it
does not prohibit other means of service.

1 Because no international agreement prohibits
2 me from directing service on Hay via
3 certified mail to Spiegel, neither does Rule
4 4(f) (3) .

5 Plaintiff further asserts that, even if it is first necessary for
6 Plaintiff to establish that Clive Standish has evaded service of
7 process:

8 Plaintiff has no direct evidence that Clive
9 Standish is actually evading service because
10 he is presumably in Switzerland while
11 Plaintiff is in California. Plaintiff has no
12 eyes and ears in Switzerland. But the
13 circumstantial evidence that he is evading
14 service is when he was served by email at his
15 office address he did not answer. His office
16 email address
17 customerservice@privateclientssubs.cjb.net is
18 a good email address because plaintiff say
19 that before in UBS AG's website,
20 <http://www.ubs.com/> Defendants now say that
21 email address is an imposter address - this
22 is sham and false. Plaintiff personally saw
23 that email address at www.ubs.com many times
24 before this case was filed. Another
25 circumstantial evidence of evading service is
26 that plaintiff could not find any clue in the
internet other than his case pending in
Southern [sic] District of New York.
Apparently he has withdrawn himself from the
public scene in view of the fraud cases he
got involved. [sic] Defendants say plaintiff
'has not made a good faith effort to serve
Mr. Standish through traditional means.' ...
Plaintiff already explained this above that
he prepared all papers for service under
international law but the California Superior
Court rejected it.

27 Again, Plaintiff provides no explanation for the Superior
28 Court's ruling and his contention that the email address for
29 Clive Standish is correct is unproven as yet. Further, the cases
30 emphasize evasion of service of process. Merely because Clive
31 Standish's personal address is not available via the internet

1 does not mean he evaded service of process.

2 UBS AG cites *Rio Properties, supra*, 284 F.3d at 1016, that
3 "we hold that Rule 4(f)(3) is an equal means of effecting service
4 of process under the Federal Rules of Civil Procedure, and we
5 commit to the sound discretion of the district court the task of
6 determining when the particularities and necessities of a given
7 case require alternate service of process under Rule 4(f)(3)."

8 UBS AG argues that the "particularities and necessities" of this
9 case weigh against granting Plaintiff's motion. Plaintiff has
10 filed a motion for judgment on the pleadings in which he asserts
11 that this action is ripe for summary adjudication and UBS AG has
12 filed a motion for summary judgment:

13 If, as UBS AG believes, its motion should
14 dispose of this case, this is particularly
15 inopportune time to bring in an additional
16 defendant, sued on the same frivolous legal
theory, who will need to expend time and
money to get up to speed on this years' long
litigation.

17 This action was commenced in the Kern County Superior Court
18 in February 2007 and removed to this Court on March 6, 2007. The
19 Memorandum Decision and Order denying Plaintiff's motion to
20 remand was filed on June 8, 2007, in which the Court noted at
21 footnote 7:

22 The third defendant in this lawsuit,
23 individual defendant Clive Standish, a United
24 Kingdom citizen and Swiss resident, has not
25 been served and no attorney has made an
26 appearance for him. Plaintiff appears to
contend that he served Mr. Standish by
sending an email to the Yahoo email address
used by the impersonators who defrauded
plaintiff by pretending to be Mr. Standish.

1 California does not provide for service by
2 email, and even if it did, such service could
3 not have been effective as to the real Mr.
Standish, a stranger to the Yahoo email
address used by Plaintiff.

4 Although Plaintiff filed a request for entry of default against
5 Clive Standish on June 15 and 20, 2007, (Docs. 20 & 22), the
6 request was denied by the Clerk on June 15 and 22, 2007 because
7 there is no valid proof of service on file with the Court. (Docs.
8 21 & 23). Plaintiff did not file the instant motion until
9 October 8, 2009. Although Rule 4(m), Federal Rules of Civil
10 Procedures's 120 day limit on service of process does not apply
11 to service in a foreign country under Rule 4(f), Plaintiff
12 delayed for years, with no apparent effort at service after the
13 case was removed, before bringing this motion.

14 CONCLUSION

15 For the reasons stated, Plaintiff's motion to serve a
16 summons and the Third Amended Complaint on Clive Standish's
17 attorney is DENIED WITHOUT PREJUDICE. There is no showing why
18 Plaintiff has waited three years to effect service on Clive
19 Standish or that statutorily authorized means of service will not
20 be effective.

21 IT IS SO ORDERED.

22 Dated: June 10, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE