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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUN GROUP U.S.A. HARMONY CITY,
INC.,

Plaintiff,

v.

CRRC CORPORATION LTD,

Defendant.

Case No. [17-cv-02191-SK](#)

**ORDER REGARDING APPLICATION
OF HAGUE CONVENTION**

Regarding Docket Nos. 132, 135, 144

Defendant CRRC Corporation Ltd (“Defendant”) argues that Plaintiff Sun Group U.S. A. Harmony City, Inc. (“Plaintiff”) must submit its request for documents located in China in accordance with the procedures proscribed by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”). Plaintiff argues that Defendant must provide documents pursuant to the Federal Rules of Civil Procedure and that the Hague Convention does not apply here.¹

The Court may regulate the conduct of discovery and require the use of the Hague Convention procedures. *See St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 104 F. Supp. 3d 1150, 1160 (D. Or. 2015) (citing *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987)); *see also Autodesk, Inc. v. ZWCAD Software Co.*, 2015 WL 1928184, at *1 (N.D. Cal. Mar. 27, 2015) (“When a conflict exists between the discovery authorized under the Federal Rules of Civil Procedure and sovereign interests implicated by such discovery, a court may direct parties to conduct discovery under the Hague Convention. . . .). In determining whether to require a party to follow the Hague Convention protocol to obtain

¹ The Court GRANTS Plaintiff’s and Defendant’s requests to file additional evidence and briefs. (Dkt. Nos. 135, 144.)

1 discovery requires “scrutiny in each case of the particular facts, sovereign interests, and likelihood
2 that resort to those procedures will prove effective.” *Aerospatiale*, 482 U.S. at 544.

3 The parties agree that the determination of whether to require the application of the Hague
4 Convention procedures involves a two-step inquiry. First, Defendant must prove that Chinese law
5 bars it from producing the discovery that Plaintiff seeks. *EFG Bank AG v. AXA Equitable Life Ins.*
6 *Co.*, 2018 WL 1918627, at *1 (S.D.N.Y. Apr. 20, 2018). Second, Defendant must demonstrate
7 that the particular facts of this case, including the sovereign interests at stake, warrant the
8 requiring the application of the Hague Convention. *Aérospatiale*, 482 U.S. at 544.

9 **A. Whether Chinese Law Prohibits Defendant from Providing Documents Located in
10 the People’s Republic of China.**

11 Defendant argues that Article 277 of the Chinese Civil Procedure Law bars it from
12 collecting and producing documents located in the People’s Republic of China (“PRC” or
13 “China”) unless it complies with the procedures under the Hague Convention.

14 Article 277 provides the following:

15 Request for and to provide judicial assistance shall be made through
16 channels prescribed by international treaties concluded or acceded to
by the People’s Republic of China; or in the absence of such a treaty,
shall be made through diplomatic channels.

17 A foreign embassy or consulate to the People’s Republic of China
18 may serve process on and investigate and collect evidence from its
citizens but shall not violate the laws of the People’s Republic of
China and shall not take compulsory measures.

19 Except for the circumstances in the preceding paragraph, no foreign
20 authority or individual shall, without permission from the competent
21 authorities of the People’s Republic of China, serve process or
conduct investigation and collection of evidence within the territory
22 of the People’s Republic of China.

23 (Dkt. 132-12 (Declaration of Xiaoyi Chen), ¶ 5.) Defendant’s Legal Expert, Jinhua Wei, is a
24 lawyer who has practiced law in the PRC since 2004, and he opines that parties requesting
25 evidence for civil litigation in the United States must proceed through the Hague Convention
26 procedures for documents located in the PRC and no person, organization or institution may
27 provide evidence at his, her or its own volition for use in civil proceedings abroad. (Dkt 132-13
28 (Declaration of Jinhua Wei), ¶¶ 1, 8(b). 8(c).) Wei explains that Article 277 prohibits foreign

1 entities or individuals from serving documents, investigating and/or conducting discovery in the
2 PRC. (*Id.*, ¶ 10.)² Defendant states that because the Chinese government has a controlling
3 ownership interest in Defendant, Defendant does not have the discretion to violate Chinese law.
4 (Dkt. 132-12, ¶ 4.)

5 Defendant wrote to the Chinese Ministry of Justice and asked the following question:

6 Since you are the central organ designated by China under the Hague
7 Evidence Convention, CRRC would like to learn from your office that
8 whether [*sic*] CRRC can directly produce the above-mentioned
9 CRRC's documents located in the territories of China to the U.S.
10 Court and [Plaintiff] Sun Group without abiding by the stipulated
11 path(s) in the Hague Evidence Convention?

12 (Dkt. 134-2 (Reply Declaration of Teresa H. Michaud, Ex. A.)) In response, the International
13 Legal Cooperation Center of the People's Republic of China Ministry of Justice stated in a letter
14 dated August 16, 2019:

15 As provided by the Civil Procedure Law of the People's Republic of
16 China, any foreign judicial department(s) under international treaties
17 to collect evidence within Chinese territories shall be conducted
18 through channels prescribed by the rules of the international treaty . .
19 ..

20 (Dkt. 132-2 (Declaration of Teresa H. Michaud, Ex. A.)) The letter further states that

21 When a foreign country intends to propound discovery in the PRC, it
22 shall submit its request to the Ministry of Justice of the People's
23 Republic of China through the channels in accordance to the rules set
24 forth in the Evidence Convention.

25 (*Id.*)

26 Plaintiff argues that Defendant has not demonstrated that Article 277 bars the production
27 of documents located in China. Instead, Plaintiff contends that Article 277 merely prohibits non-
28 Chinese persons from physically performing tasks in China. Plaintiff submits a declaration from
its expert, Donald J. Lewis, a professor of Chinese and Hong Kong law. (Dkt. 133-2.) Lewis
states that Defendant's voluntary compliance with a discovery order does not implicate or violate

² An attorney practicing law in the PRC submitted a declaration in another case, *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 249 (S.D.N.Y. 2010), in which the attorney opined that pursuant to Article 263, the former identical version of Article 277, complying with a discovery request to produce documents located in the PRC would violate China's Civil Procedure Law.

1 Article 277. (Dkt. 133-2, ¶ 7.) Plaintiff does not submit any evidence to address or contest the
2 letter from the Chinese Ministry of Justice.

3 In light of Wei’s declaration and the letter by the Chinese Ministry of Justice on this
4 specific issue, the Court finds that Defendant has demonstrated that producing documents located
5 in the PRC in response to Plaintiff’s discovery requests would violate Article 277. Therefore, the
6 Court will proceed to the second part of the inquiry.

7 **B. Whether Plaintiff is Required to Obtain Documents Located in the PRC Through the
8 Hague Convention.**

9 Defendant must demonstrate that the particular facts of this case, including the sovereign
10 interests at stake, warrant the application of the Hague Convention. The Supreme Court has
11 endorsed the balancing test set forth in the Restatement of Foreign Relations Law of the United
12 States to guide this analysis. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468,
13 1475 (9th Cir. 1992) (citing *Aérospatiale*, 482 U.S. at 544 n.28). Under that test, courts consider
14 the following five factors:

15 the importance to the investigation or litigation of the documents or
16 other information requested; the degree of specificity of the request;
17 whether the information originated in the United States; the
18 availability of alternative means of securing the information; and the
19 extent to which noncompliance with the request would undermine
20 important interests of the United States, or compliance with the
21 request would undermine important interests of the state where the
22 information is located.

23 *Richmark*, 959 F.2d at 1475 (citing *Aérospatiale*, 482 U.S. at 544 n. 28). These factors are not
24 exhaustive. *Id.* In addition, courts consider the extent and nature of the hardship on the
25 responding party. *Id.*

26 **1. First and Second Factors.**

27 The first two factors, the relevance or importance of the discovery requests and the
28 generalized nature of the requests, weigh in favor of requiring compliance with the Hague
Convention procedures. “Where the outcome of litigation does not stand or fall on the present
discovery order, or where the evidence sought is cumulative of existing evidence, courts have
generally been unwilling to override foreign [blocking] laws.” *Richmark*, 959 F.2d at 1475
(internal quotation marks and citation omitted). On the other hand, “[w]here the evidence is

1 directly relevant, . . . we have found this factor to weigh in favor of disclosure. *Id.*

2 Additionally, “[g]eneralized searches are discouraged.” *Id.* Here, Plaintiff’s discovery
3 requests are very broad and go beyond what is necessary to litigate the disputed issues in this case.
4 For example, despite the fact that remaining claims concern an agreement made in April 2014,
5 Plaintiff defines the “relevant time period” for its requests for production of documents as January
6 1, 2010 to the present and defines the relevant agreements to include agreements signed in 2011
7 and 2013. (Dkt. 132-4.) Additionally, despite the fact that the Court held that Plaintiff only pled
8 facts sufficient to allege that CRRC MA is the *alter ego* of Defendant, Plaintiff defines “CRRC
9 Entities” to include Defendant, CRRC MA, CRRC Sifang America, CRRC Qingdao Sifang, TRC,
10 and CRRC Tangshan and requests documents related to the corporate structure of all of these
11 entities. (*Id.*)

12 **2. Third Factor.**

13 The third factor, the location of the evidence, also weighs in favor of the requiring use of
14 Hague Convention procedures to the extent the responsive documents are in the PRC. *Richmark*,
15 959 F.2d at 1475 (“The fact that all the information to be disclosed . . . are located in a foreign
16 country weighs against disclosure . . .”).

17 **3. Fourth Factor.**

18 The fourth factor, the availability of alternative means of securing the information, weighs
19 in favor of requiring compliance with the Hague Convention procedures as well. The Ninth
20 Circuit requires that “the alternative means must be ‘substantially equivalent’ to the requested
21 discovery.” *Id.* Here, Plaintiff has propounded discovery requests on Defendant’s subsidiary
22 CRCC MA. Plaintiff may be able to obtain a substantial portion of its requested documents from
23 CRCC MA. Moreover, although using the Hague Convention procedures may cause some delay,
24 it is not yet clear whether it would be effective. *See Salt River Project Agric. Improvement &*
25 *Power Dist. v. Trench France SAS*, 303 F. Supp. 3d 1004, 1008 (D. Ariz. 2018) (finding use of
26 Hague Convention procedures to be a substantially equivalent alternative). However, if Plaintiff is
27 not actually able to obtain documents necessary to litigate its claims, then this factor would shift
28 towards favor of disclosure through the Federal Rules of Civil Procedure.

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4. Fifth Factor.

The fifth factor, the balancing of national interests, is the most important factor. *Richmark*, 959 F.2d at 1476. Courts “must assess the interests of each nation in requiring or prohibiting disclosure, and determine whether disclosure would ‘affect important substantive policies or interests’ of either the United States or the PRC.” *Id.* at 1476 (quoting *Restatement (Third) of Foreign Relations Law* § 442 comment c). The United States has a “substantial” interest in “vindicating the rights of American plaintiffs,” *id.* at 1477, and an “overriding interest in the just, speedy, and inexpensive determination of litigation in [its] courts.” *Aerospatiale*, 482 U.S. at 542-43 (internal quotation marks and citation omitted). However, this is a generalized interest that would be present in any civil litigation in the United States. Additionally, if Plaintiff is able to obtain documents necessary to litigate its claims, then requiring use of the Hague Convention procedures would not undermine these interests. *Salt River Project*, 303 F. Supp. 3d at 1009 (noting that if the procedures were ultimately ineffective, the court retained the power to order discovery under the Federal Rules of Civil Procedure).

These interests must be weighed against the interests of China. In evaluating the interests of foreign nations, courts look to “expressions of interest by the foreign state, the significance of disclosure in the regulation of the activity in question, and indications of the foreign state’s concern for confidentiality prior to the controversy.” *Richmark*, 959 F.2d at 1476 (quotation marks and alterations omitted). Here, Defendant only points to Article 277, China’s interest in the subject matter of this litigation and how the contract is interpreted, and the current trade war between the United States and China. However, Article 277 is a general civil statute. As the Supreme Court has made clear, a foreign statute barring discovery within its borders “is relevant to the court’s particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material.” *Aerospatiale*, 482 U.S. 522, 544 n. 29. Moreover, the current trade war as well as China’s interest in a favorable interpretation of the contract do not provide a basis for preventing disclosure of documents located in China. Therefore, the Court finds that this factor is neutral at this time. However, if Plaintiff is not able to obtain documents necessary to litigate its claims, the balance

1 would tip towards weighing in favor of full discovery through the Federal Rules of Civil
2 Procedure. The Court is concerned that an entity funded by the Chinese government is pursuing
3 business in the United States but then seeking and obtaining assistance from the Chinese
4 government to evade discovery that arises out of that business in the United States.

5 **5. Additional Factors – Hardship.**

6 Finally, the Court considers the hardship to Defendant if required to provide responses to
7 Plaintiff’s discovery requests. Facing criminal prosecution “constitutes a ‘weighty excuse’ for
8 nonproduction.” *Richmark*, 959 F.2d at 1477 (quoting *Societe Internationale Pour Participations*
9 *Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 211 (1958)). Here, Defendant does
10 not present any evidence to show that it is likely to be prosecuted or that any adverse action will
11 occur. It argues that it has no discretion to violate Chinese law given its status as a state-
12 controlled corporation but does not state what consequences it would suffer. (Dkt. 132 (Mot.) at
13 1.) In light of the absence of any threat of criminal sanctions and the lack of evidence of any
14 history of civil penalties, this factor only weighs slightly in favor of requiring Plaintiff to utilize
15 the Hague Convention procedures.

16 On balance, the Court finds that the factors weigh in favor of requiring use of the Hague
17 Convention procedures. However, this balancing might shift if Plaintiff is not actually able to
18 obtain documents necessary to litigate its claims through the Hague Convention procedures and
19 through Defendant’s subsidiaries.

20 **C. Producing Documents Accessible by CRRC North America Inc.**

21 The Hague Convention procedures only applies to discovery of materials located in China.
22 With respect to electronically stored documents, the Court finds that such documents are not
23 actually “located” in China. In making this determination, the Court finds useful analysis from
24 courts determining that producing records electronically stored in data centers outside of the
25 United States was not an extraterritorial reach of the Stored Communications Act. As the dissent
26 of the one court which ruled the opposite way pointed out, “electronic data are not stored on disks
27 in the way that books are stored on shelves or files in cabinets. Electronic ‘documents’ are
28 literally intangible: when we say they are stored on a disk, we mean they are encoded on it as a

1 pattern.” *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by*
2 *Microsoft Corp.*, 855 F.3d 53, 61 (2d Cir. 2017) (Jacobs, J., dissenting). As another Justice
3 reasoned:

4 Electronic “documents,” however, are different. Their location on a
5 computer server in a foreign country is, in important ways, merely
6 virtual. *See* Orin S. Kerr, *The Next Generation Communications*
7 *Privacy Act*, 162 U. Pa. L. Rev. 373, 408 (2014) (explaining that “the
8 very idea of online data being located in a particular physical ‘place’
9 is becoming rapidly outdated,” because computer files can be
10 fragmented and dispersed across many servers). Corporate
employees in the United States can review those records, when
responding to the “warrant” or subpoena or court order just as they
can do in the ordinary course of business, and provide the relevant
materials to the demanding government agency, without ever leaving
their desks in the United States. The entire process of compliance
takes place domestically.

11 *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft*
12 *Corp.*, 829 F.3d 197, 229 (2d Cir. 2016) (Lynch, J., concurring). The vast majority of courts to
13 consider this issue, including those in this District, agreed with these dissenting opinions from the
14 Second Circuit. *See Matter of Search of Content Stored at Premises Controlled by Google Inc.*,
15 2017 WL 3478809, at *5 (N.D. Cal. Aug. 14, 2017); *In re Search of Content That is Stored at*
16 *Premises Controlled by Google*, 2017 WL 1487625, at *1 (N.D. Cal. Apr. 25, 2017).

17 The Court agrees with their reasoning and finds that electronic documents are not actually
18 located in China. Therefore, to the extent Defendant or CRRC North America Incorporated can
19 access Defendant’s electronically stored documents from computers located in the United States
20 which are responsive to Plaintiff’s discovery requests, Defendant is obligated to do so pursuant to
21 the Federal Rules of Civil Procedure. Even if documents are electronically stored on servers
22 located in China, their location is merely virtual. Such an effort by Defendant to obtain electronic
23 documents is not extraterritorial and does not implicate Article 277 of the Chinese Civil Procedure
24 Law.

25 **D. Producing Documents Held by Subsidiaries.**

26 Plaintiff requests documents related to the following subsidiaries of Defendant: CRRC
27 MA, CRRC Sifang America, CRRC Qingdao Sifang, TRC, and CRRC Tangshan. Federal Rule of
28 Civil Procedure 34(a) allows courts to order production of documents or items as long as those

1 documents or items are in the possession, custody, or control of a party to the litigation. *In re*
2 *Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999); *United States v. Int'l Union of Petroleum*
3 *& Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989). "Control" is defined as "the legal right to
4 obtain documents on demand." *Int'l Union*, 870 F.2d at 1452. The party seeking production bears
5 the burden of demonstrating *actual* control; proof of theoretical control is insufficient to meet this
6 burden. *Int'l Union*, 870 F.2d at 1454. Defendant proffers that it does not "possess the legal right
7 to obtain CRRC MA's documents 'on demand.'" (Dkt. No. 142 at 3.) At this time, the Court will
8 not order Defendant to demand documents from CRRC MA. Plaintiff should proceed with its
9 third-party discovery against CRRC MA. However, if Plaintiff is unable to obtain sufficient
10 documents from CRRC MA or from Defendant, Plaintiff may pursue discovery to determine
11 whether Defendant has sufficient control over CRRC MA to require Defendant to produce CRRC
12 MA's documents to Plaintiff.

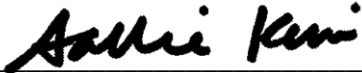
13 **CONCLUSION**

14 The Court GRANTS Plaintiff's administrative motion to provide additional evidence.
15 (Dkt. 135.) The Court FURTHER ORDERS that the parties must proceed through the Hague
16 Convention to obtain physical documents located in China. However, this Order is without
17 prejudice to the Court revisiting this issue if Plaintiffs do not actually receive documents necessary
18 to litigate its claims. The Court HEREBY SCHEDULES a further Case Management Conference
19 at 1:30 p.m. on February 10, 2020. The parties shall include a detailed update regarding the status
20 of the discovery in their further case management statement.

21 At the hearing, Defendant argued that some of Plaintiff's discovery requests were overly
22 broad and seek protection under the Federal Rules of Civil Procedure. If the parties have a
23 discovery dispute that they are unable to resolve on their own, they should address it to the Court
24 in a joint letter brief.

25 **IT IS SO ORDERED.**

26 Dated: November 19, 2019

27 

28 SALLIE KIM
United States Magistrate Judge