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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

GERARDO DE NICOLAS GUTIERREZ,
CARLOS JAVIER MOCTEZUMA VELASCO, RAMON LAFARGA BATIZ,
AND NOE CORRALES REYES,

Defendants.

Case No.: 17cv2086-JAH (JLB)

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO EFFECT ALTERNATIVE SERVICE

INTRODUCTION

Pending before the Court is Plaintiff United States Securities and Exchange Commission's ("Plaintiff" or "SEC") Motion for Leave to Effect Alternative Service ("Motion") of the complaint and summons on Defendants Gerardo de Nicolàs Gutierrez ("de Nicolàs"), Carlos Javier Moctezuma Velasco ("Moctezuma"), and Ramon Lafarga Batiz ("Lafarga") (collective "Defendants")¹ via the prescribed methods described below.

¹ Defendant Noe Corrales Reyes ("Corrales") has properly been served via the Hague Convention of 15 November 1965 on the service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").

1 *See* Doc. No. 7. Plaintiff contends that despite repeated efforts, he has been unable to
2 service Defendants. *See* Doc. No. 7 at 3-6. For the reasons articulated below, Plaintiff’s
3 Motion for Alternative Service is **GRANTED**.

4 **BACKGROUND**

5 On October 10, 2017, Plaintiff filed the complaint in this action against Defendants
6 alleging violations of federal securities laws. *See* Doc. No. 1. On October 26, 2017,
7 Plaintiff filed an amended complaint. *See* Doc. No. 4. On January 5, 2018, Plaintiff filed a
8 notice stating that Defendants “have either not agreed to a waiver of service of process or
9 otherwise declined to respond to the SEC’s multiple requests for such waiver.” *See* Doc.
10 No. 5. The notice further informed the Court that Plaintiff would serve Defendants in
11 accordance with the Hague Service Convention. *Id.*

12 Plaintiff’s attempts in serving Defendants pursuant to the Hague Convention have
13 been unsuccessful with all but one of the Defendants- Noe Corrales Reyes. To date, the
14 remaining foreign Defendants reside in Mexico and have yet to be properly served. Plaintiff
15 has moved for an order authorizing alternative service. *See* Doc. No. 7. There have been
16 no oppositions filed as to Plaintiff’s Motion.

17 **LEGAL STANDARD**

18 Under Rule 4(f)(3), service upon an individual defendant may be affected at a place
19 not within any judicial district of the United States “by other means not prohibited by
20 international agreement, as the court orders.” Fed. R. Civ. P 4(f)(3). “Service of process
21 under Rule 4(f)(3) is neither a ‘last resort’ nor ‘extraordinary relief.’ It is merely one means
22 among several which enables service of process on an international defendant.” *Rio*
23 *Properties, Inc., v. Riol Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002). A party “need
24 not have attempted every possible means of service of process before petitioning the court
25 of alternative relief. Instead, [a party] need[] only to demonstrate that the facts and
26 circumstances of the present case necessitate[] the district court’s intervention.” *Id.* at 1016.
27 However, “[e]ven if facially permitted by Rule 4(f)(3), a method of service of process must
28 also comport with constitutional notions of due process.” *Rio*, 284 F.3d at 1016.

1 **DISCUSSION**

2 Plaintiff requests a court order under Rule 4(f)(3) authorizing service on Lafarga via
3 email service. In addition, Plaintiff requests permitting service of process upon de Nicolàs
4 and Moctezuma’s United States based counsel.

5 **A. Email Service**

6 Requests for alternative service by email is amply supported by case law. *See Rio*,
7 284 F.3d at 1016 (recognizing that under Rule 4(f)(3) “trial courts have authorized a wide
8 variety of alternative methods of service including publication, ordinary mail, mail to the
9 defendant’s last known address, delivery to the defendant’s attorney, telex, and most
10 recently, email.”); *Tatung Company Ltd. v. Hsu*, SA CV 13-1743-DOC (ANx) 2015 WL
11 11089492, at *2 (C.D. Cal. May 18, 2015) (“Courts routinely authorize email service under
12 Rule 4(f)(3)”) (citing cases).

13 Plaintiff seeks to serve Lafarga via his personal email account under Rule 4(f)(3).²
14 Plaintiff has made good faith efforts to serve the foreign Defendant through the Hague
15 Convention, based upon previously known addresses, but has been unsuccessful. (Brutlag
16 Decl. at ¶ 22). On November 14, 2017, Plaintiff contacted Lafarga’s employment
17 organization and obtained Lafarga’s personal email address and direct office telephone
18 number. (*Id.* at ¶ 30). Plaintiff has now been attempting service through authorized
19 channels for several months and the Court is in agreement that substituted service is
20 warranted on Lafarga. Furthermore, the Court determines the proposed method of service
21 comports with the constitutional notions of due process. Service through Lafarga’s
22 confirmed email address is “reasonably calculated, under all the circumstances, to apprise
23 [defendant] of the pendency of the action and afford [him] an opportunity to present [his]
24 objections.” *Rio*, 284 F.3d at 1017.

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27 ² This Court previously granted Plaintiff’s motion, pursuant to Rule 4(f)(3), to serve Lafarga via a
28 Facebook account as a means of alternative service. (*Acosta v. Homex et al.*, Case No. 17-cv-02163,
Doc. No. 7 at 2).

1 **B. Service on Defendant’s Counsel**

2 Courts have held that the Hague Convention does not prohibit service on a foreign
3 Defendant through counsel based in the United States. *Brown v. China Integrated Energy,*
4 *Inc.*, 285 F.R.D. 560, 565 (C.D. Cal. 2012); *Richmond Techs., Inc. v. Aumtech Bus. Sols.*,
5 No. 11-CV-02460-LHK, 2011 WL 2607158, at *13 (N.D. Cal. July 1, 2011); *In re LDK*
6 *Solar Sec. Litig.*, No. 07-CV-05182-WHA, 2008 WL 2415186, at *3 (N.D. Cal. June 12,
7 2018). Specifically, courts have allowed service “upon a foreign defendant’s United States-
8 based counsel” to prevent further delays in litigation. *Richmond*, 2011 WL 2607158, at
9 *13; *Brown*, 285 F.R.D. at 566. In fact, “[s]ervice upon a foreign defendants United States-
10 based counsel is a common form of service ordered under Rule 4(f)(3)” (citing cases).
11 *Richmond*, 2011 WL 2607158, at *13. Whether to authorize service under Rule 4(f)(3) is
12 left to the “sound discretion” of the trial court, when it determines that the “particularities
13 and necessities of a given case” require alternative service. *Rio*, 284 F.3d at 1016.

14 Plaintiff has attempted to serve de Nicolàs and Moctezuma through the Hague
15 Convention and has been unsuccessful. The Mexican Central Authority attested that
16 service could not be completed. (Brutlag Decl. at ¶ 20, 21). Plaintiff contends that service
17 through Defendants’ U.S. counsel is appropriate because of the substantial time and
18 difficulty in serving the foreign defendants in Mexico. Paul Alfieri, an attorney in the New
19 York office of Reed Smith LLP, represents de Nicolàs in connection with this action. Mr.
20 Alfieri affirms he is not authorized to accept or waive service on behalf of de Nicolàs
21 (Brutlag Decl. at ¶ 8). Upon receiving Plaintiff’s motion, Mr. Alfieri informed Plaintiff he
22 is no longer representing de Nicolàs and is unaware if a substitute U.S.- based counsel has
23 been obtained. (Brutlag Decl., Ex. 2). G. Robert Gage, Jr., an attorney at Gage Spencer &
24 Fleming LLP, represents Moctezuma in connection with this action. Mr. Gage affirms he
25 is also not authorized to accept or waive service on behalf of Moctezuma (Brutlag Decl. at
26 ¶ 15).

27 The Court finds that Plaintiff’s proposed means of service are not prohibited by
28 international agreement even taking into account Mexico’s objection to certain articles of

1 the Hague Convention- Article 10, service through “postal channels, directly to persons
2 abroad” or “judicial officers.” Service on Defendants’ U.S.-based attorney is permissible
3 because the Hague Convention does not bar this type of service, regardless if the other
4 country has objected. *Carrico v. Samsung Elecs. Co.*, No. 15-CV-02087-DMR, 2016 WL
5 2654392, at *4 (N.D. Cal. May 10, 2016) (finding that “[n]othing in the Hague Convention
6 bars Plaintiffs’ requested service on [the defendant] through [his] attorney.”). The Court
7 finds that the “particularities and necessities” of this case warrant the requested method of
8 alternative service.

9 Having concluded that the form of service plaintiff requests is not prohibited by
10 international agreement, the Court must determine if the “method of service of process []
11 also comport[s] with [the] constitutional notion of due process.” *Rio*, 284 F.3d at 1016. Mr.
12 Alfieri and Mr. Gage argue that service of process would be improper because either they
13 no longer represent the foreign individual defendants or that they have not been authorized
14 to accept service on the defendant’s behalf. These arguments are unavailing. Due process
15 does not require that individuals served on behalf of a foreign defendant have represented
16 them in the past or have been authorized to accept service. Rather, “[t]he reasonableness
17 and hence the constitutional validity of any chosen method may be defendant on the ground
18 that it is in itself reasonably certain to inform those affected.” *Mullane v. Cent. Hanover*
19 *Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). It appears that both de Nicolàs and Moctezuma
20 have been in communication with their U.S.-based counsel, and that service on their U.S.-
21 based counsel will provide the requisite notice of the pending action and an opportunity to
22 respond.

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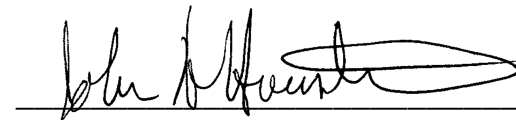
1 **CONCLUSION**

2 Based on the foregoing, Plaintiff's Motion for Alternative service is **GRANTED**. It
3 is hereby ordered:

- 4 1. Plaintiff shall serve defendant de Nicolàs via e-mail and overnight delivery to de
5 Nicolàs' U.S.-based counsel, Paul Alfieri, Esq. of Reed Smith LLP.
6 2. Plaintiff shall serve defendant Moctezuma via email and overnight delivery to
7 U.S.-based counsel, G. Robert Gage, Jr., Esq., of Gage Spencer & Fleming LLP.
8 3. Plaintiff shall serve defendant Lafarga via email.

9 **IT IS SO ORDERED.**

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12 DATED: March 19, 2020

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15 Hon. John A. Houston
16 United States District Judge
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