

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.,

Plaintiff,

-against-

**MATHEW K. HIGBEE, Esq.,
NICK YOUNGSON,
RM MEDIA, LTD.,
and HIGBEE & ASSOCIATES,**

Defendants.

Docket No.: 18-cv-3353 (ADS) (ARL)

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO MOTION TO VACATE DEFAULT AND IN SUPPORT
OF MOTION TO DEEM SERVICE EFFECTUATED**

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, New York 11530-9194
(516) 741-6565**

Attorney for Plaintiff (Pro Se)

TABLE OF CONTENTS

	PAGE(S)
Table of Authorities	ii
Preliminary Statement.....	1
FACTS	4
ARGUMENT	8
I. THE CERTIFICATE OF DEFAULT AGAINST DEFENDANTS YOUNGSON AND RM MEDIA SHOULD NOT BE VACATED DUE TO DEFENDANTS’ OWN MANIPULATIVE AND DECEITFUL CONDUCT	8
II. IN THE ALTERNATIVE, SERVICE OF PROCESS SHOULD BE DEEMED TO HAVE BEEN EFFECTUATED UPON DEFENDANTS, REQUIRING THEM TO APPEAR AND DEFEND THIS ACTION.....	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ackermann v. Levine</i> , 788 F.2d 830 (2d Cir. 1986).....	12
<i>Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas</i> , 262 F.R.D. 293 (S.D.N.Y. 2009)	12
<i>City of New York v. Mickalis Pawn Shop, LLC</i> , 645 F.3d 114 (2d Cir. 2011).....	10
<i>EOI Corp. v. Med. Mktg. Ltd.</i> , 172 F.R.D.133 (D.N.J. 1997).....	12
<i>Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694 (1982).....	10
<i>Richardson v. Clinical Computing PLC</i> , 69 N.E.3d 754 (Ohio 2016).....	12
<i>In re S. African Apartheid Litig.</i> , 643 F.Supp.2d 423 (S.D.N.Y. 2009).....	11, 12
Other Authorities	
FRCP 4(f).....	8
FRCP 4(f)(1).....	8
FRCP 4(h)	8
FRCP 4(m).....	8, 11

Preliminary Statement

Plaintiff Meyer, Suozzi, English & Klein, P.C. (“Plaintiff”) respectfully submits this memorandum of law in opposition to the motion (DE 24) of defendants Nick Youngson (“Youngson”) and RM Media, Ltd. (“RM Media”) to vacate the Certificate of Default entered on February 20, 2019 and in support of Plaintiff’s motion for an order deeming service of process on Youngson and RM Media effective.

As alleged in the Complaint, this action involves the deceitful scheme orchestrated by and among the defendants to abuse the United States Copyright laws to “catch” unsuspecting and innocent victims and thereby extort unjustified payments to settle bogus claims of “copyright infringement” that the purported copyright owners never intended to pursue in any event (DE 1). Defendants Youngson and RM Media claim to have a copyright in a digital photograph, which they have made available on the Internet with a “free license” for use by anyone who locates their photograph through a search of the Internet. Although the photograph is thereby made available through a license without fee, the defendants then troll the Internet to locate anyone who has used the photograph and then claim “copyright infringement” from allegedly using the photograph “without a license.” Defendants Matthew Higbee and his law firm, Higbee & Associates (“Higbee Defendants”), have implemented this scheme by threatening the innocent victims with purported statutory damages of up to \$150,000 for copyright infringement in order to extort thousands of dollars of “settlement” payments from the victims.

Unfortunately, a clerk in Plaintiff’s marketing department unsuspectingly found one such photograph through a search of the Internet and posted it with a blog on the firm’s website. Almost immediately after the photograph was posted, Plaintiff received threatening demands from the Higbee Defendants, falsely and deceptively claiming that the photograph was used *without any license* at all and constituted copyright infringement. Plaintiff then immediately discontinued use

of the photograph. Because the photograph was used pursuant to the “free license,” however, there is no copyright infringement as a matter of law and therefore no exposure to \$150,000 in “statutory damages,” even if Defendants could claim that the terms of the license were not followed, i.e., attribution to the purported author. There are numerous other legal reasons why the purported claim for copyright infringement is invalid as a matter of law.

As further part of their deceptive and fraudulent scheme, the Higbee Defendants specifically threatened to institute an action against Plaintiff for copyright infringement in this Court, the United States District Court for the Eastern District of New York. In fact, the Higbee Defendants prepared a complaint that they sent to Plaintiff and threatened that they would file that Complaint in this Court within 15 days if their extortionate settlement demand was not paid in full. The plaintiff in that lawsuit prepared by the Higbee Defendants was in fact RM Media, and Defendant Youngson was referred to in that complaint as the individual holder of the copyright.

After facing Defendants’ extortionate threats, Plaintiff instituted this action for, among other things, a declaratory judgment declaring that the subject of Defendants’ demands did not constitute copyright infringement. The Higbee Defendants moved to dismiss the Complaint, which motion is now pending.

Defendants Youngson and RM Media allegedly both reside in England, so service upon them by Plaintiff was not as straightforward. Nevertheless, Plaintiff used the address for Defendant Youngson identified in the Copyright Registration that he filed with the United States Copyright Office. Moreover, Plaintiff used the precise address for RM Media that it now claims is its official place of business, but the Official Royal Courts of Justice Group in England returned that service of process request indicating: “Defendant company not known at the address given.”

It is remarkable that Defendants Youngson and RM Media are now seeking to circumvent the jurisdiction of this Court, relying upon technical issues of service of process, especially when

the Higbee Defendants threatened to bring a lawsuit *in this Court* against Plaintiff on behalf of RM Media immediately before this action was instituted by Plaintiff against RM Media.

Consistent with their deceptive and manipulative conduct in abuse of the United States Copyright laws, Defendants are now also trying to manipulate the Court process. First, Defendants had actual knowledge and receipt of service of the Summons and Complaint upon Youngson as far back as *December 3, 2018* (see DE 15, Certificate of Service), and as far back as January 17, 2019 on RM Media (DE 16). Since the Higbee Defendants had appeared in this action, they obviously had direct and immediate access to all filings in this action. Moreover, the Higbee Defendants are admittedly the attorneys for both Youngson and RM Media. Further, the attorney who has appeared in this action for Defendants Youngson and RM Media, Jeanne Weisneck, has worked in the past with the very attorneys who have appeared for the Higbee Defendants in this action from the firm of Higbee & Associates. Despite having such actual knowledge of service of the Summons and Complaint in this action since December and January, Defendants Youngson and RM Media waited until *March 11, 2019* (DE 24) to make this motion – long after the deadline to appear, *after a Certificate of Default had already been issued*, and after Plaintiff had moved for a default judgment (DE 21).

As further discussed below, under these circumstances, Plaintiff respectfully submits that Defendants Youngson and RM Media should be estopped from objecting to jurisdiction over them in this action. Indeed, the United States Supreme Court has made clear that personal jurisdiction, like any other right, is subject to waiver and estoppel. There is no better case for application of that principle than this one. In fact, Plaintiff acted reasonably in its efforts to serve Defendants Youngson and RM Media in England. To the extent they claim that the location where service was effectuated was not their proper address, this was through no fault of Plaintiff, but rather, the deception of Defendants. Moreover, the Second Circuit has acknowledged that service of process

can be effectuated under the Hague Convention through international mail. Thus, as Defendants themselves admit, service of process could be easily effectuated against Defendants. It serves no purpose to require such unnecessary re-service when Defendants have received actual knowledge and copies of the Summons and Complaint.

Thus, Plaintiff respectfully submits that the motion by Defendants Youngson and RM Media to vacate the Certificate of Default be denied. In the alternative, Plaintiff requests that its motion for an order deeming service upon Defendants Youngson and RM Media to have been effectuated be granted.

FACTS

This action was instituted on June 7, 2018 (DE 1). As set forth in the Complaint, the factual background involves a basic digital photograph that a clerk from the marketing department of the Plaintiff law firm found on the Internet through a simple search. This clerk posted the photograph with a blog article written by one of the attorneys of the law firm. Shortly after the photograph and blog were posted, Plaintiff received threatening correspondence, emails and telephone calls from Defendant Matthew Higbee and other representatives of his law firm, Defendant Higbee & Associates. As soon as the first such letter was received by the Plaintiff, it immediately removed the photograph from its website and never used it again. The Higbee Defendants claim that the photograph was copyrighted by their clients, Defendant Youngson and Defendant RM Media. The Higbee Defendants threatened Plaintiff with an action for copyright infringement, claiming statutory damages of \$150,000 under the Copyright laws allegedly because the photo was used without a license.

The allegation of copyright infringement was false as a matter of law, and, therefore, no such statutory damages were available or recoverable. The clerk in Plaintiff's law firm obtained the photograph online, with an accompanying "free license" and, therefore, any use of the

photograph cannot be deemed copyright infringement for which statutory damages are available, even if the alleged attribution required by the license was not posted with the photograph.

Although Plaintiff responded to the Higbee Defendants' demands, and explained the innocent, *de minimis* and non-actionable nature of the use, the Higbee Defendants stepped up their harassment and extortionate tactics, as further detailed in the Complaint. In fact, Plaintiff discovered that the Higbee Defendants had repeatedly employed this deceptive scheme numerous other times across the country, for which many innocent victims had complained. Indeed, there is an Internet website devoted exclusively to the Higbee Defendants' fraudulent and deceptive practices.

As part of Defendants' extortionate demands, Defendant Higbee threatened Plaintiff with a lawsuit for copyright infringement that the Higbee Defendants represented would be filed within 15 days. See the letter dated May 9, 2018 annexed to the Declaration of Kevin Schlosser dated March 25, 2019 ("Schlosser Dec.") submitted herewith, Ex. A. With that letter, the Higbee Defendants enclosed a draft of the Complaint that would be filed, naming RM Media as the plaintiff and the Plaintiff law firm herein as the Defendant. That lawsuit was threatened to be brought *in this Court, in the United States District Court for the Eastern District of New York*. Shortly after receiving the threatening letter from the Higbee Defendants in which they represented that an action would be brought on behalf of RM Media in this Court, Plaintiff commenced the instant action in the same Court. Among other things, Plaintiff sought a declaratory judgment that the subject of the Higbee Defendants' threatening letters did not constitute copyright infringement as a matter of law and did not give rise to statutory damages, especially not the \$150,000 that was asserted by the Higbee Defendants in an effort to extort \$5280 from Plaintiff. Plaintiff named as Defendants in this action, the Higbee Defendants and Defendants Youngson and RM Media.

After filing the Complaint and obtaining the issuance of the Summons, Plaintiff sent an acknowledgment of service by mail. (Schlosser Dec., Ex. B.) Thereafter, the Higbee Defendants moved to dismiss this action (DE 7-9). Plaintiff opposed that motion (DE 10 & 11). After the Court recently struck the Higbee Defendants' reply papers, they were re-filed on March 15, 2019 (DE 27). Plaintiff has requested oral argument of that motion (DE 28).

Based upon the Copyright Registration filed with the United States Copyright Office on behalf of Defendant Youngson, Plaintiff obtained the location of Defendant Youngson in Liverpool, England at 15 Church Road. (Schlosser Dec., Ex. C.) No supplemental registration was ever filed on behalf of Defendant Youngson updating his address as the copyright owner of the subject photograph. (Schlosser Dec., Ex. D.) Plaintiff further identified an address for service of process for RM Media at Suite 11, Stanley Grange Business Village, Ormskirk Road, Knowsley Village, United Kingdom. (This is the precise address that Defendants Youngson and RM Media now claim is purportedly the correct address for service upon RM Media. (DE 24-1, ¶ 2.)) Plaintiff then used the Foreign Process Section of the Royal Courts of Justice Group, Queen's Bench Division to effectuate service of process on Defendants Youngson and RM Media in England. Pursuant to Plaintiff's request, process was thereafter effectuated on Defendant Youngson at the address indicated in the Copyright Registration and the certificate of service was filed in this Court on December 3, 2018 (DE 15).

With respect to Defendant RM Media, the Royal Courts of Justice Group returned the request for service (Ex. E), indicating: "Defendant company not known at the address given." (Schlosser Dec., Ex. F). As a result, Plaintiff requested that the Royal Courts of Justice Group serve RM Media through its designated "CEO" – Defendant Youngson at the same address provided in his Copyright Registration. Thus, the Royal Courts of Justice Group effectuated

service upon RM Media at such address, and proof of such service was filed in this Court on January 17, 2019 (DE 16).

Thereafter, neither the Higbee Defendants nor Defendants Youngson and RM Media responded in any respect, despite the explicit filings in this case of the Certificates of Service of the Summons and Complaint upon Defendants Youngson and RM Media (DE 15 & 16). Obviously, the Higbee Defendants admit that they are attorneys representing Defendants Youngson and RM Media by virtue of their repeated extortionate demands on behalf of such alleged copyright owners. It is inexplicable that the Higbee Defendants would not have notified their own clients of the Certificates of Service of the Summons and Complaint in this matter as and when they were filed in December 2018 and January 2019 respectively (DE 15 & 16).

In view of the failure of Defendants Youngson and RM Media to respond to the Summons and Complaint in any manner, including to challenge the Certificates of Service, after months thereafter, Plaintiff applied for a Certificate of Default against Defendants Youngson and RM Media (DE 17). The Clerk entered such Certificate of Default on February 20, 2019 (DE 18). Nevertheless, thereafter, Defendants Youngson and RM Media still failed to take any action at all. As a result, on March 4, 2019, Plaintiff moved for a default judgment against Defendants Youngson and RM Media (DE 21). Then, suddenly, an attorney appeared on behalf of Defendants Youngson and RM Media (DE 20). This attorney, Jeanne Weisneck, has appeared in previous cases as co-counsel with the Higbee Defendants and their counsel in this matter, Rayminh L. Ngo. (Schlosser Dec., Ex. G.) Thus, there is no question that the Higbee Defendants coordinated the appearance of counsel on behalf of Defendants Youngson and RM Media in March 2019 even though they knew as far back as December 2018 that a Certificate of Service of Process had been filed. In any event, it is undisputed, at this point, that Defendants Youngson and RM Media have

received actual notice and copies of the Summons and Complaint, as confirmed in their attorney's motion to vacate the Certificate of Default (DE 24).

Under the circumstances, Plaintiff respectfully submits that the motion by Defendants Youngson and RM Media to vacate the Certificate of Default should be denied in the interests of justice. Defendants Youngson and RM Media should not be allowed to register a purported copyright under United States Copyright laws, threaten innocent victims with a lawsuit in this very Court, and then try to dodge service and circumvent this Court's jurisdiction over the very subject matter of the extortionate threats made on behalf of these Defendants. Alternatively, Plaintiff respectfully submits that the Court grant its motion to deem service of process effectuated on Defendants Youngson and RM Media.

ARGUMENT

I.

THE CERTIFICATE OF DEFAULT AGAINST DEFENDANTS YOUNGSON AND RM MEDIA SHOULD NOT BE VACATED DUE TO DEFENDANTS' OWN MANIPULATIVE AND DECEITFUL CONDUCT

Federal Rule of Civil Procedure ("FRCP") 4(f) governs service on an individual in a foreign country. (Under FRCP 4(m), there is no deadline for service of process in a foreign country under FRCP 4(f) or 4(h).) More specifically, FRCP 4(f)(1) allows service of process upon a foreign individual "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Plaintiff used the assistance of the Royal Courts of Justice Group, Queen's Bench Division of the Royal Courts of Justice, Strand, London to effectuate service pursuant to the Hague Convention. (Schlosser Dec., Exs. E & F.) The address that was used by the Royal Courts of Justice was the very same address identified by Defendant Youngson in his

Copyright Registration filed in the United States Copyright Office, which he never changed in any supplemental registration after its initial filing.

Plaintiff requested that service of process be effectuated on Defendant RM Media at the very address now claimed by Defendant RM Media to be its correct address for service of process – Suite 11, Stanley Grange Business Village, Ormskirk Road, Knowsley Village, United Kingdom. (See DE 24-1, ¶ 2.) Notwithstanding this request, Plaintiff received back from the Royal Courts of Justice Group a Certificate indicating that process had not been served because: “Defendant company not known at the address given.” (Schlosser Dec., Ex. F.) Thus, as a result thereof, Plaintiff requested that service of process upon RM Media be effectuated by virtue of service on its reported CEO, Defendant Youngson, at the same address indicated in his Copyright Registration. Thus, the Royal Courts of Justice Group effectuated service upon Defendant RM Media at that location (DE 16).

Under the circumstances, especially in view of the fact that Defendants Youngson and RM Media have obviously received actual notice of the Summons and Complaint in this action, Plaintiff respectfully submits that service of process upon Defendants Youngson and RM Media be deemed effective by virtue of the Certificates of Service filed in this action (DE 15 & 16), and that their motion to vacate the default be denied.

In addition to the foregoing, there are other compelling reasons for deeming service of process effective as indicated above. Under the egregious circumstances of this case, Defendants Youngson and RM Media *should be estopped* from contesting service of process and this Court’s jurisdiction over them in this action. There is clear legal authority for estopping Defendants under these circumstances. The United States Supreme Court has firmly held that the strict requirements of *in personam* jurisdiction can be waived or forfeited by a Defendant: “Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be

waived. ... A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. ... Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. ... The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.” *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-05 (1982). As recognized by the Second Circuit, relying upon the Supreme Court decision in *Ins. Corp. of Ireland*: “There are ‘various [additional] reasons a defendant may be estopped from raising the issue [of lack of personal jurisdiction].” *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 133-34 (2d Cir. 2011).

Here, Defendants should estopped from denying personal jurisdiction where service of process was made upon the address they identified in their Copyright Registration, which was never updated through any supplemental registration. Moreover, the address Defendant RM Media claims is proper was found by the Royal Courts of Justice to be ineffective. Furthermore, and most egregious, is Defendants’ abuse of the United States Copyright laws to assert bogus claims of copyright infringement and threaten suit in this very Court, while thereafter trying to evade personal jurisdiction over them over the very subject of their extortionate and deceptive copyright claim in the same court they threatened to bring their action. We respectfully submit that Defendants’ manipulative conduct should not be condoned.

As such, Plaintiff respectfully requests that Defendants’ motion to vacate the Certificate of Default be denied.

II.

IN THE ALTERNATIVE, SERVICE OF PROCESS SHOULD BE DEEMED TO HAVE BEEN EFFECTUATED UPON DEFENDANTS, REQUIRING THEM TO APPEAR AND DEFEND THIS ACTION

If the Court is not inclined to deny the motion to vacate the default, service of process should be deemed effectuated in any event. In arguing to vacate the Certificate of Default entered against them, Defendants Youngson and RM Media repeatedly represent to this Court that there would be no prejudice to Plaintiff because service of process could be re-effectuated upon them, and that the case is in its early stages, having no discovery proceedings to date. See DE 24-17, at pp. 5, 6 & 10. For the very same reason, in view of the fact that Defendants Youngson and RM Media have indisputably received actual notice of the Summons and Complaint, requiring any further “service” upon them would cause unnecessary inconvenience and expense with no justification. Indeed, courts are loathe to endorse the manipulative dodging of service of process when there is no substantive prejudice to the defendant.

Here, the circumstances justify deeming process effectuated upon Defendants Youngson and RM Media. As noted above, FRCP 4(m) does not impose any deadline upon service of process upon foreign individuals or entities. As observed by the Court in *In re S. African Apartheid Litig.*, 643 F.Supp.2d 423, 433 (S.D.N.Y. 2009): “Although the Hague Convention ‘carefully articulates the procedure which a litigant must follow in order to perfect service abroad...it does not prescribe the procedure for the forum Court to follow should an element of the procedure fail.’” Where a plaintiff ‘attempted in good faith to comply with the Hague Convention’ and the defendant does ‘not dispute having received the complaint in this action...there is no prejudice to him [or her].’” The Court continued: “Even when nations have expressly agreed on a means of service [FRCP] 4(f)(3) provides that a defendant may be served ‘by other means not prohibited by international agreement, as the court orders.’ ‘A court is “afforded wide discretion in ordering service of process

under [FRCP] 4(f)(3).” *Id.* Thus, it is within this Court’s discretion to deem service to have been effectuated on Defendants Youngson and RM Media or condition vacating the Certificate of Default entered against them upon their acceptance of service of process and appearing and defending in this action.

There is yet another reason why the actual notice and receipt of the Summons and Complaint in this action should be deemed effective service on Defendants Youngson and RM Media. The Second Circuit has made clear that service by international mail can be effectuated in compliance with the Hague Convention. As the court in *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, 262 F.R.D. 293 (307-08) (S.D.N.Y. 2009) observed, the Second Circuit has endorsed service of process by international registered mail as satisfying both the Hague Convention and constitutional due process. See *Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986). Courts have explicitly recognized that service of process by international mail to residents of *England* complies with the Hague Convention by virtue of England’s failure to object thereto. See, e.g., *EOI Corp. v. Med. Mktg. Ltd.*, 172 F.R.D.133, 139, 140-41 (D.N.J. 1997); *Richardson v. Clinical Computing PLC*, 69 N.E.3d 754, 760 (Ohio 2016).

In view of the fact that service of process can be made by international mail in compliance with the Hague Convention, it would be unjust under the circumstances to require yet another mailing of the Summons and Complaint to Defendants Youngson and RM Media given all of the circumstances described above and the fact that they have already received the Summons and Complaint. As Defendants Youngson and RM Media assert themselves, there will be no prejudice to anyone if they were re-served – it would simply be an unnecessary, unfortunate and inappropriate waste of time and resources.

Accordingly, Plaintiff respectfully submits that in the alternative, in the event the Court declines to uphold the Certificate of Default entered against Defendants Youngson and RM Media,

