LCX AG v 1.274M U.S. Dollar Coin
2022 NY Slip Op 32834(U)
August 25, 2022
Supreme Court, New York County
Docket Number: Index No. 154644/2022
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LCX AG,

Plaintiff,

- v -

1.274M U.S. DOLLAR COIN, CIRCLE INTERNET FINANCIAL, LLC, CENTRE CONSORTIUM, LLC, and JOHN DOE,

Defendants.

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INDEX NO. 154644/2022

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 46, 47, 53, 58, 59, 60, 61, 62, 66, 67, 78, 79, 80, 81

were read on this motion to/for ALTERNATE SERVICE.

Upon the foregoing documents, it is

Plaintiff LCX AG (LCX), a virtual asset service provider in Liechtenstein, alleges that approximately $8 million worth of virtual assets, all based on the Ethereum blockchain, were wrongfully taken from plaintiff on January 8, 2022. (NYSCEF Doc. No. [NYSCEF] 2, Complaint ¶ 11.)[1] This case was initiated when the stolen funds, stored in Ethereum Wallets 0x29875 and 0x5C41 since January 2022, were swapped on May 9, 2022 into US Dollar Coin at wallet 02x29875 maintained by Centre Consortium LLC, a US Company located in New York. (NYSCEF 6, Metzger[2] Aff ¶¶ 5, 8, 11.) Swapping

[1] Since the issue here is service of process of the complaint, the court disregards the amended complaint, though it will become the operative complaint if the court finds it has jurisdiction over defendants which will be determined on the Doe Defendants' motion to dismiss (motion seq. no. 004). (NYSCEF 22, Amended Complaint [filed June 22, 2022].)

[2] Monty C.M. Metzger is LCX's Chief Executive Officer. (NYSCEF 6, Metzger Aff ¶ 1.)

occurred using Tornado Cash. (NYSCEF 29, June 21, 2022 Expert Report of Jonelle Still ¶ 2 at 13/25.[3])

In motion sequence number 002, plaintiff moves to confirm that alternate service of the pleadings on the Doe defendants 1-25 (Doe Defendants) using a cryptocurrency token (Service Token) constitutes good service. Plaintiff also moves to disclose the identity of the Doe Defendants. Specifically, plaintiff asks the court to order the Sharova law firm, which represents the Doe Defendants, to identify the Doe Defendants, including their names and contact information. Otherwise, plaintiff requests that the Sharova law firm be ordered to withdraw as counsel for Doe Defendants in this proceeding. (NYSCEF 46, June 30, 2022 OSC.)

Alternate Service of Process

As to motion 002, the court finds that service is good for the reasons stated on the record on July 22, 2022. Although defendants effectively had no opposition to this portion of the motion, the court reiterates its reasoning here as this is a matter of first impression.

Given that this case involves cryptocurrency, plaintiff requested service using cryptocurrency. Specifically, plaintiff would deliver a small amount of new crypto coins or tokens into the crypto wallet at issue. (NYSCEF 48, June 2, 2022 Tr at 6:24-7:14.)[4]

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[3] Pages refer to NYSCEF pagination.

[4] The court rejects defendants' attack on the attorney affirmations regarding service of process which is a quintessential area of expertise of attorneys. While courts habitually reject attorney affirmations because attorneys typically lack first-hand knowledge, in this particular case, the attorney at issue has written and lectured extensively on the topic of cryptocurrency and could explain the proposed service of process. (*See* NYSCEF 9, Balthazor Aff ¶¶ 4-10; *See also Zuckerman v City of N.Y.*, 49 NY2d 557, 563 [1980].) The court is aware that attorney witnesses may raise ethical issues (Rules of Professional Conduct §3.7 ["A lawyer shall not act as advocate before a tribunal in a

Despite the urgency, plaintiff requested extra time explaining that it would take a few days to mint the coin to which it would attach a hyperlink to a Holland & Knight LLP (H&K) web page where the pleadings and motion papers could be reviewed by anyone with access to the wallet at issue. (*Id.* at 32:16-33:5.) On June 3, 2022, the court issued a TRO enjoining the account at Centre Consortium LLC, which was present at the argument, and the court directed:

> "Holland & Knight LLP, Plaintiff's attorneys, shall serve a copy of this Order to Show Cause, together with a copy of the papers upon which it is based, on or before June 8, 2022, upon the person or persons controlling the Address via a special-purpose Ethereum-based token (the Service Token) delivered—airdropped—into the Address. The Service Token will contain a hyperlink (the Service Hyperlink) to a website created by Holland & Knight LLP, wherein Plaintiff's attorneys shall publish this Order to Show Cause and all papers upon which it is based. The Service Hyperlink will include a mechanism to track when a person clicks on the Service Hyperlink. Such service shall constitute good and sufficient service for the purposes of jurisdiction under NY law on the person or persons controlling the Address."

(NYSCEF 15, June 2, 2022 OSC.)

In New York, CPLR 308 guides service of process on a person by either "1. by delivering the summons within the state to the person to be served;" or "2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served…" or 3. delivery to an agent; or "4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual

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matter in which the lawyer is likely to be a witness on a significant issue of fact"]). However, §3.7 provides for certain exceptions, including when "the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony." (Rules of Professional Conduct §3.7[4].) How cryptocurrency tokens work is not challenged by defendants, and thus, "there is no reason to believe that substantial evidence will be offered in opposition." (*Id.*) Indeed, as to the basics of cryptocurrency, defendants' expert report is consistent with Balthazor's explanation. Defendants' conclusory objection is insufficient.

place of business, dwelling place or usual place of abode within the state of the person to be served ... ."

LCX has the right to use CPLR 308. LCX reported the January 8, 2022 theft of the following cryptocurrency to the Liechtenstein police:

"Cryptocurrency:	Value (Jan 9, 2022 - Coingecko):
162.68 ETH	$502.671 USD
3,437,783.23 USO Coin (USDC)	$3,437,783 USD
761,236.94 EURe	$864,840 USD
101,249.71 SAND Token	$485,995 USD
$1,847,65,592 USD	[$1,847,65,592 USD]
485,995.30. LINK51 LCX Token	$2,466,558 USD
669.00 Quant (QNT)	$115,609 USD
4,819.74 Enjin (ENJ)	$10,890 USD
76 Maker (MKR)	$9,885 USD
Total value approx.	$7,942,788 USD"

(NYSCEF 7, January 9, 2022 Letter to National Police; *See also* NYSCEF 6, Metzger Aff ¶¶ 4-7.) Accordingly, plaintiff has some evidence that the stolen assets belong to plaintiff, contrary to defendants' objection.

Next, LCX has provided support for its contention that it knows the location of the account where its purloined funds have been deposited, but it has no information, and can have no such information, as to where the Doe Defendants, who belong to that account, are located. (NYSCEF 4, January 17, 2022 Tracing Report by BLIN, Block Chain Investigative Agency; NYSCEF 29, June 22, 2022 Expert Report of Jonelle Still.)[5] Plaintiff argues that "[d]efendants are hackers who anonymously exploited a

[5] The court rejects defendants' argument that alternate service on the Doe Defendants is improper because plaintiff has traced other stolen funds to an account in Ireland and a Hotmail account in Spain. That other funds may have been stolen by others does not undermine plaintiff's expert report as to the funds traced to the 0x1654, 0x475cb and 0x2987 accounts. (NYSCEF 29, June 22, 2022 Expert Report of Jonelle Still, §V.) Indeed, plaintiff alleges that the stolen funds were split into 50 transactions. (NYSCEF 2, Complaint 19.) The alleged thefts are not mutually exclusive.

vulnerability in Plaintiff's computer code to steal approximately $8 million in cryptocurrency from Plaintiff on or around January 9, 2022. Almost immediately after the theft, Defendants used a variety of techniques to disguise their tracks and to conceal the trail of transactions that followed in the aftermath of the theft from Plaintiff." (NYSCEF 11, Magruder Aff ¶ 5.) Plaintiff's contention is supported by defendants' expert Paul Sibenik who explains:

"17. Tornado cash is a mixing protocol that operates on the Ethereum blockchain (in addition to other blockchains) with the alleged aim of enhancing privacy for those who use it.

18. It's express purpose is to allow a user to obfuscate the source of their funds, from the destination, essentially making the funds 'untraceabic' since one would normally not be inherently abic to determine the (post-Tornado) destination of funds that are sent into Tornado cash from an originating wallet, and conversely, one would normally not be inherently able to determine the (pre-Tornado) origin of funds from that are received into a wallet where its funds have been received from Tornado Cash (apart from the user that sent and received the funds themselves that is).

19. Some blockchain forensics investigative experts can sometimes trace 'through' mixing services with varying degrees of certainty (or uncertainty) or success. This can vary depending on a myriad of variables, including the mixer used, any 'mistakes' made by the uscr of the mixer, and of course the knowledge, experience, and capabilities of the investigator.

20. While Tornado Cash certainly has legitimate use cases, it would be fair to suggest that a disproportionately large amount of Tornado cash usage is illicit. It is common for hackers that have stolen a considerable amount of cryptocurrency to send their illgotten gains to mixing services, of which Tornado cash is by far the largest and most well-known mixmg service on the Ethercum blockchain.

21. Tornado cash operates by allowing a user to deposit select amount of cryptocurrency into a pool of assets via a smart control. Tornado cash often operates multiple pools on cach blockchain it is operating on. In the case of Ethereum (by far the most common for Tornado cash usage), there is a 0.1 ETH pool, I ETll pool, 10 ETH pool and 100 ETH pool. A user can only contribute the exact corresponding amount of the pool, although it should be noted that they can deposit into that pool multiple times. For example, if a user wants to deposit 500 ETI1, they could send 5 transactions of 100 ETH each to the 100 ETH pool.

22. The user can then redeem their deposit(s) at a later point of their choosing, albeit with a service fee deducted to cover transactional costs."

(NYSCEF 89, Expert Report of Paul Sibenik.) Accordingly, plaintiff has established that it is impossible for LCX to serve the Doe Defendant(s) via the methods set forth in CPLR 308(1), (2), (3) or (4).

Fortunately, CPLR 308(5) permits alternative service of process "in such manner as the court, upon motion without notice, directs, if service is impracticable." The impracticability standard is "not capable of easy definition." (*Liebeskind v Liebeskind*, 86 AD2d 207 [1st Dept 1982], *affd* 58 NY2d 858 [1983].) However, it "does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to subdivisions (1), (2), or (4) of CPLR 308." (*Franklin v Winard*, 189 AD2d 717, 717 [1st Dept 1993].) Likewise, and contrary to defendant's objection, plaintiff need not know defendant's physical location. Indeed, recent alternate service methods using social platforms and technology are designed for such service where defendants' identify is known, but their location is a mystery, as is the case here.

Rather, due process requires that the method of service "be reasonably calculated, under all the of the circumstances, to apprise the defendant of the action." (*Contimortgage Corp. v Isler*, 48 AD3d 732, 734 [2d Dept 2008] [citation omitted].) The court has broad discretion to fashion the means of the alternate service "adapted to the particular facts of the case before it." (*Dobkin v Chapman*, 21 NY2d 490, 498–99 [1968].) It is not a guarantee of notice to the intended recipient. (*See id.* at 500 [discussing CPLR 317].)

Recent cases of alternate service using electronic means where defendants' physical locations were unknown support this court's finding that physical service is impracticable. For example, in *Hollow v Hollow*, the court approved email service due to

the defendant's exclusive use of that method to communicate to his children and the plaintiff. (193 Misc 2d 691, 696 [Sup Ct Oswego County 2002]; *See also Snyder v Alternative Energy, Inc.*, 19 Misc 3d 954, 962 [Civ Ct, NY County 2008] [email service sufficient because plaintiff showed the defendant was regularly "using an e-mail address that by all indications is his."].) In *Baidoo v Blood-Dzraku*, the court approved service by Facebook messenger to serve defendant in a matrimonial action because plaintiff showed that she lacked defendant's physical or email address and defendant regularly used his Facebook account. (48 Misc 3d 309, 314-315 [Sup Ct, NY County 2015].) Most recently, in *Rule of Law Socy. v Dinggang*, the court authorized alternative service via WhatsApp and Twitter accounts. (2022 WL 1104004, at *1 [Sup Ct, NY County 2022].) Here, alternate service is especially necessary because of the anonymity of the Doe Defendants.

Next, the court finds that the method of alternate service was "reasonably calculated, under all the of the circumstances, to apprise the defendant of the action." Plaintiff's step-by-step procedure follows:

1. On June 3, 2022, Samantha Marlott, a digital communications specialist at H&K, created a webpage on H&K's website (the Service Webpage). (NYSCEF 36, Marlott Aff. ¶ 3.) Marlott uploaded the Service Documents to the Service Webpage. (*Id.*; NYSCEF 37, Court Docket.)

2. Subsequently, on June 3, 2022, Balthazor, visited the Service Webpage and verified that the Service Documents had been published to the Service Webpage. (NYSCEF 34, Balthazor Aff. ¶ 3.) Balthazor created the Service Hyperlink to the Service Webpage. (*Id.* ¶¶ 4–6.) Balthazor visited the Service Hyperlink and verified that it directed the viewer to the Service Webpage. (*Id.* ¶ 7.) Balthazor emailed the Service Hyperlink to Josias Dewey, Esq. at H&K. (*Id.* ¶ 8.)

3. Dewey created, minted and then served the Service Token. (NYSCEF 32, Dewey Aff. ¶¶ 3–6.) The Service Token includes the Service Hyperlink. (*Id.* ¶ 5.) Dewey then airdropped the Service Token to the Address. (*Id.* ¶ 6.)

4. On June 6, 2022, the Service Token was delivered to the Address. (*Id.* ¶ 7.)

5. Balthazor later reviewed the tracking statistics for the Service Hyperlink. (NYSCEF 34, Balthazor Aff. ¶ 9.) He confirmed that, as of June 15, 2022, the Service Hyperlink had been clicked by 256 unique non-bot users. (*Id.*; NYSCEF 35, Service Times.)

6. On June 15, 2022, two attorneys for Sharova filed Notices of Appearance on behalf of the Doe Defendant(s). (*See* NYSCEF 18, Yelena Sharova, Esq. Notice of Appearance; NYSCEF 19, Steven Garfinkle, Esq. Notice of Appearance.)

Plaintiff has demonstrated that the Doe Defendants regularly use the blockchain[6] address and have used it as recently as May 31, 0222. (NYSCEF 9, Balthazor Aff ¶¶ 27-28.) Since the account contains nearly $1.3 million US Dollar Coin, plaintiff has shown that the Doe Defendants are likely to return to the account where they would find the Service Token. (NYSCEF 2, Complaint ¶ 27.) Communication through the account using the Service Token is effectively the digital terrain favored by the Doe Defendants. (*See Hollow*, 193 Misc 2d at 696 [email favored communication method of defendant].) Indeed, using a blockchain transaction to communicate with the Doe Defendants is the only available manner of communication.[7] Here, the court finds that plaintiff has

[6] For a primer on blockchain and cryptocurrency, see *Virtual Currencies and Blockchain Technologies*, 10 BUS. & COM. LITIG. FED. CTS. § 111:2 (5th ed.).

[7] The court notes that air drops are used as a marketing device to communicate with and market to cryptocurrency consumers which, as evidenced by the allegations in this case, are subject to scammers. (*See* Jake Frankenfield, June 14, 2022, Investopia, Investing > Cryptocurrency Airdrop. https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.investopedia.com%2Fterms%2Fa%2Fairdrop-cryptocurrency.asp&data=05%7C01%7Camasley%40nycourts.gov%7Ca0ae85cd22174267276e08da82551134%7C3456fe92cbd1406db5a35364bec0a833%7C0%7C0%7C637965599133365716%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=oZNrkMUy079ZXBGfERj6SAd4aNx5hXlFd7VcepxFwNg%3D&reserved=0.) However, none of these vulnerabilities were raised by defendants as undermining the service method.

sufficiently authenticated the method of communication. (*Cf Qaza v Alshalabi*, 54 Misc 3d 691, 696 [Sup Ct, Kings County, 2016] [counsel's affirmation was insufficient to establish that plaintiff regularly communicated with defendant through Facebook].) Therefore, plaintiff's motion is granted to the extent that the court finds that the service by the Service Token satisfied CPLR 308(5).

Identity of Doe Defendants

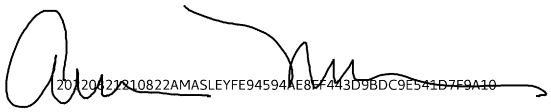
Next, plaintiff's request that defendants' attorney reveal the identity or identities of the Doe Defendants is granted. (*See Banco Frances v John Doe No. 1*, 36 NY2d 592, 595–96, 599 [1975], *cert denied* 423 US 867 [1975] [where a Brazillian bank initiated action against John Does who exchanged "cruzeiros into travelers checks in United States dollars" which were then deposited into a New York bank, defendants' attorney was directed to disclose the identity of its client or resign].) The attorney-client privilege does not extend to the identity of the client. (*People ex rel. Vogelstein v Warden of County Jail,* 150 Misc 714, 717 [Sup Ct, NY County], *affd* 242 AD 611 [1st Dept 1934].) This case is not an exception to *Vogelstein* as in *In re Kaplan* where the client's identity was permitted to be kept confidential as the client had reported wrongdoing to the authorities. (*See In re Kaplan*, 8 NY2d 214, 218-219 [1960].) Rather, the Doe Defendants rely on *Signature Management Team, LLC v Doe*, 876 F3d 831 (6th Cir 2017), a political speech case involving an anonymous blogger and the sole case cited by defendants, for the proposition that because there is a right to anonymity on the internet, there is no presumption in favor of unmasking until there is a judgment against a Doe Defendant. If the *Signature* Court made such a statement, which it did not, it would be inconsistent with the law of the State of New York. Rather, regarding pre-judgment unmasking, the *Signature* Court stated "in addition to the public

interest in the litigation, the presumption in favor of disclosure is stronger or weaker depending on the plaintiff's need to unmask the defendant in order to enforce its rights." (*Id*. at 837.) The *Signature* Court gave as an example of such circumstances where the identity would be unmasked before judgment when plaintiff obtains an injunction. (*Id*.) Here, not only does plaintiff seek a preliminary injunction, but defendants' identity is critical to this court's evaluation of defendants' motion to dismiss for lack of jurisdiction (seq. 04). (*See Deer Consumer Prod v Little*, 35 Misc 3d 374, 382 [Sup Ct, NY County 2012].) The Doe Defendants' concern about disclosure of its financial records can be addressed with the court's confidentiality agreement.[8]

Accordingly, it is

ORDERED that plaintiff's motion 02 to confirm that service by alternate service is good service is granted; and it is further

ORDERED that plaintiff's motion 02 to reveal the identity of the Sharapova law firm's identity is granted and Sharapova shall disclose the identity of its client to plaintiff in writing within 48 hours of the date of this decision.



8/21/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[8] (*See* https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/JMasley-CStip.pdf; *see also* 22 NYSCRR 202.5[e][1][iv]).