UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6252 / October 25, 2018

Administrative Proceeding
File No. 3-18450

In the Matter of

Oriental Dragon Corp.

Order Granting Motion to Pursue Alternative Service

Following the reassignment of this proceeding to me, I directed the Division of Enforcement to file a status report concerning service of the order instituting proceedings (OIP) on Respondent. In response, the Division submitted a motion requesting that I allow it to serve Respondent via Federal Express delivery to its "last known address" in the Cayman Islands and by e-mail to the CEO of the corporation.

Since this proceeding began in April 2018, the Division has unsuccessfully attempted to serve Respondent via the U.S. Postal Service at Respondent's place of incorporation in the Cayman Islands.[1] Although the Division does not appear to have attempted to serve Respondent at its business headquarters in China via the Hague Convention,[2] I take official notice that Hague service can sometimes take years to perfect.[3] Given these

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[1] Motion at 1–2; *see* 17 C.F.R. § 201.141(a)(2)(ii) (concerning service to corporations or entities).

[2] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

[3] *See Replies of the People's Republic of China to the Questionnaire of November 2013 relating to the Hague Convention* 5, https://assets.hcch.net/upload/wop/2014/2014sc_14cn.pdf (reporting that out of the 1,930 requests received in 2012, 40 took more than twelve months to execute and 606 were still pending when the November 2013 survey was

(continued...)

circumstances, it is reasonable for the Division to attempt alternative means of serving Respondent.

The Division notes that the Commission's Rules of Practice allow service of the OIP on a foreign corporation by "any form of mail . . . that requires a signed receipt," "is reasonably calculated to give notice," and is not "prohibited by the foreign country's law."[4] The Division explains why service by Federal Express and e-mail satisfy these provisions.[5] E-mail, however, is not a form of mail requiring a signed receipt. It is also not clear that Federal Express is a form of mail under the Commission's Rules.[6]

But the Rules also allow service on a foreign entity "[b]y any other means not prohibited by international agreement, as the . . . hearing officer orders."[7] Courts interpreting Federal Rule of Civil Procedure 4(f)(3), which is substantively identical to the Commission's rule,[8] have held "that service of process under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief.' It is merely one means among several which enables service of process on an international defendant."[9]

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completed); *id.* at 6 (recognizing that "some cases [are] still pending after 1 or 2 years, but this is not the general situation").

4 17 C.F.R. § 201.141(a)(2)(iv)(C)(3).

5 Motion at 2–4.

6 *See* 17 C.F.R. § 201.150(d) (distinguishing "service by a commercial courier" from "[s]ervice by mail").

7 17 C.F.R. § 201.141(a)(2)(iv)(D).

8 *See* Amendments to the Commission's Rules of Practice, Securities Exchange Act of 1934 Release No. 78319, 81 Fed. Reg. 50212, 50219 (July 29, 2016) (noting the similarity between the two provisions).

9 *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002) (citation omitted); *see AngioDynamics, Inc. v. Biolitec, AG*, 780 F.3d 420, 429 (1st Cir. 2015) ("By its plain terms, Rule 4(f)(3) does not require exhaustion of all possible methods of service before a court may authorize service by 'other means,' such as service through counsel and by email."); *Bazarian Int'l Fin. Assocs., LLC v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 16 (D.D.C. 2016); *KG Marine, LLC v. Vicem Yat Sanayi Ve Ticaret As,* 24 F. Supp. 3d 312, 314 (W.D.N.Y. 2014).

Service by Federal Express

Serving Respondent via Federal Express in the Cayman Islands is not prohibited by international agreement. The Cayman Islands is a territory of the United Kingdom, which is a signatory to the Hague Convention. The United Kingdom does not object under Article 10(a) to service of judicial documents through postal channels.[10] And, "numerous courts have recognized that Federal Express (or other commercial mail couriers) are permissible 'postal channels' through which to complete service consistent with Article 10(a) of the Hague Service Convention."[11]

Any method of service must, however, also satisfy constitutional due process.[12] Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[13] The Division states that delivery to Respondent's "last known address" in the Cayman Islands is reasonably calculated to provide Respondent with notice because it successfully sent a discovery letter to that address earlier this year.[14] But the Division has not explained how it knows that the Cayman Islands address is associated with Respondent. The delivery confirmation for the letter does not establish that a business office, an officer, or an agent of Respondent is located at or receives packages at that address.[15] The Commission's EDGAR database lists the address as Respondent's "business address" in its electronic

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[10] Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) of the Hague Service Convention 15 (June 2017), https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf; *Ghostbed, Inc. v. Casper Sleep, Inc.*, 315 F.R.D. 689, 692 (S.D. Fla. 2016) ("The United Kingdom—and therefore the Cayman Islands—has not objected to Article 10(a) and, hence, permits service by postal channel.").

[11] *TracFone Wireless, Inc. v. Unlimited PCS Inc.*, 279 F.R.D. 626, 631 (S.D. Fla. 2012).

[12] *Rio Props.*, 284 F.3d at 1016.

[13] *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

[14] Motion at 2.

[15] *Id.* at Ex. A.

header,[16] but it is not listed in Respondent's most recent filings with the Commission.[17] As a result, although the Division may send the OIP to Respondent's "last known address" in the Cayman Islands because doing so is not prohibited by international agreement, the Division must establish in its service declaration that the address is a valid address for Respondent to receive notice.

Assuming the Cayman Islands address is proper for notice on Respondent, I will find service by Federal Express effective upon delivery or attempted delivery, similar to service by U.S. Postal Service mail to an entity under the Commission's Rules.[18]

Service by E-mail

With some caveats, the Division may attempt service by e-mail. The Hague Convention, which dates from the 1960s, does not prohibit sending judicial documents by e-mail.[19] Because—so far as can be determined—no other international agreement applies,[20] it follows that e-mail service is not prohibited by international agreement.[21] And although Respondent's CEO may reside in China, and China objects to Article 10(a) of the Hague Convention permitting service by postal channels, an "objection to service through postal channels does not amount to an express rejection of service

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[16] Oriental Dragon Corp., EDGAR Search Results, https://www.sec.gov/cgi-bin/browse-edgar?company=oriental+dragon&owner=exclude&action=getcompany (last visited Oct. 23, 2018).

[17] Oriental Dragon Corp., Current Report (Form 8-K) (Jan. 8, 2015).

[18] *See* 17 C.F.R. § 201.141(a)(2)(ii).

[19] *See Lexmark Int'l, Inc. v. Ink Techs. Printer Supplies, LLC*, 295 F.R.D. 259, 261 (S.D. Ohio 2013); *MacLean–Fogg Co. v. Ningbo Fastlink Equip. Co.*, No. 08-cv-2593, 2008 WL 5100414, at *2 (N.D. Ill. Dec. 1, 2008).

[20] *See D.Light Design, Inc. v. Boxin Solar Co.*, No. 13-cv-5988, 2015 WL 526835, at *2 (N.D. Cal. Feb. 6, 2015) (stating in regard to a defendant in China that "[a]bsent the application of the Hague Convention, it is not apparent that any international agreement applies in this case").

[21] *See Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen*, No. 14-cv-1112, 2018 WL 4757939, at *6 (S.D.N.Y. Sept. 30, 2018) (concerning e-mail service on a defendant in China); *cf. Nagravision SA v. Gotech Int'l Tech. Ltd.*, 882 F.3d 494, 498 (5th Cir. 2018) (holding that a defendant had "not shown that [e-mail] service is prohibited by international agreement").

via electronic mail."[22] And as with Rule 4(f)(3), nothing in Rule 141(a)(2)(iv)(D) "requires that the alternative service ordered … [under] that provision must comply with the law of the foreign state where the service is to be effected."[23] The Division may therefore attempt service by e-mail.[24]

There is a potential due process concern, however. Some courts have indicated that one could demonstrate that e-mail service comports with due process by showing that the parties have previously communicated by e-mail.[25] Here, the Division states that it is "aware of an email address" used by Respondent's CEO, but does not describe any prior successful e-mail communications with the CEO.[26] Therefore, although the Division may attempt to send the OIP to Respondent's CEO by e-mail, I cannot determine at this juncture that the mere act of sending the e-mail, without any reply from the CEO, will constitute service. After the Division files a status report about its attempt, I will determine whether its attempt to serve by e-mail was effective. The Division may also include in its report any prior e-mail communications it has had with the CEO.

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[22] *Gurung v. Malhotra*, 279 F.R.D. 215, 220 (S.D.N.Y. 2011); *see Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 332 (S.D.N.Y. 2015) ("China's objection to service by postal mail does not cover service by email"); *Lexmark*, 295 F.R.D. at 262 ("Email service has been approved even where, as here, the country objects to Article 10 of the Hague Convention.").

[23] *Strabala v. Zhang*, 318 F.R.D. 81, 115 n.38 (N.D. Ill. 2016); *see Rio Props.*, 284 F.3d at 1014 ("service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country").

[24] *Cf. AngioDynamics*, 780 F.3d at 429 ("By its plain terms, Rule 4(f)(3) does not require exhaustion of all possible methods of service before a court may authorize service by 'other means,' such as service … by email.")

[25] *See FTC v. PCCare247 Inc.*, No. 12-cv-7189, 2013 WL 841037, at *4 (S.D.N.Y. Mar. 7, 2013) (allowing service by e-mail when there was "a high likelihood that defendants will receive and respond to emails sent to these addresses."); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. 6-cv-06572, 2007 WL 1140639, at *2 (N.D. Cal. Apr. 17, 2007) (concluding that the e-mail accounts proposed for service "have been effective means of communicating with the defendants").

[26] Motion at 4; *see SEC v. China Intelligent Lighting & Elecs., Inc.*, No. 13-cv-5079, 2014 WL 338817, at *2 (S.D.N.Y. Jan. 30, 2014) (rejecting authorization for e-mail service when the Commission presented no evidence that the e-mails were likely to reach the defendants).

Order

Accordingly, I GRANT the Division's motion. It may attempt service by Federal Express and e-mail. The Division shall file a declaration of service that also addresses the issues raised in this order by November 16, 2018.

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James E. Grimes
Administrative Law Judge