

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97200 / March 24, 2023

Admin. Proc. File No. 3-21035

In the Matter of

ENERGEM RESOURCES, INC.
f/k/a DIAMONDWORKS LTD.

SECOND ORDER REGARDING SERVICE

The Securities and Exchange Commission issued an Order Instituting Proceedings (“OIP”), on September 7, 2022, pursuant to Section 12(j) of the Securities Exchange Act of 1934, against Energem Resources, Inc. f/k/a DiamondWorks Ltd. (“Respondent”).¹ On December 9, 2022, the Division of Enforcement filed a status report stating that Respondent provided a South African address for itself in its most recent filing with the Commission, a Form SC 13D/A dated November 2, 2004. The Division stated that it sent a copy of the OIP to that address for Respondent by U.S. mail and that it obtained a confirmation that delivery was attempted on November 9, 2022. The Division stated that service by that method on an issuer with a class of securities registered with the Commission, such as Respondent, is complete upon obtaining the confirmation of attempted delivery. The Division also noted that “service by mail to South Africa is not prohibited by international agreement,” citing as authority *Lexmark Int’l, Inc. v. Ink Techs. Printer Supplies, LLC*.²

Commission Rule of Practice 141(a)(2)(iv) sets forth the permissible methods of service of an OIP upon a person in a foreign country.³ It has four subsections providing methods of

¹ *Energem Res., Inc.*, Exchange Act Release No. 95680, 2022 WL 4103356 (Sept. 7, 2022).

² No. 1:10-cv-564, 2013 WL 12178588, at *9 (S.D. Ohio Aug. 21, 2013) (stating that “South Africa is not a signatory to the Hague Convention [on the Service Abroad of Judicial and Extrajudicial Documents] or the [Inter-American Convention on Letters Rogatory],” and that “[t]he Court is unaware of any other international agreement governing service of process between South Africa and the United States”).

³ 17 C.F.R. § 201.141(a)(2)(iv); *see also Amendments to the Commission’s Rules of Practice*, Exchange Act Release No. 78319, 2016 WL 3853756, at *13 (July 13, 2016) (stating that “Rule 141(a)(2)(iv) contains the requirements for serving an OIP on a person in a foreign country”).

service: subsections (A) to (D). The Division does not cite any of these subsections, but it appears the only ones that might apply are subsections (A) and (D).

Under subsection (A), service of an OIP may be made by “[a]ny method specified in [Rule 141(a)(2)] that is not prohibited by the law of the foreign country.”⁴ One method specified in Rule 141(a)(2) provides that an OIP may be served upon an “issuer of a class of securities registered with the Commission, by sending a copy of [it] addressed to the most recent address shown on the entity’s most recent filing with the Commission by U.S. Postal Service certified, registered, or express mail and obtaining a confirmation of attempted delivery.”⁵ As indicated above, the Division provided the Commission with a proof of service showing that it used this method to serve Respondent and that delivery was attempted on November 9, 2022. But the Division has not addressed whether service by this method—*i.e.*, service by U.S. mail with confirmation of attempted delivery—is prohibited by South African law. The Division must do so if it contends that service was effective under Rule 141(a)(2)(iv)(A).

Under subsection (D), service of an OIP may be made by “any other means not prohibited by international agreement, as the Commission . . . orders.”⁶ The Commission has not issued an order in this case permitting the means by which the Division attempted to serve Respondent; nor has the Division filed a motion requesting such an order. Accordingly, service was not effective under Rule 141(a)(2)(iv)(D).⁷

If the Division decides to file a motion requesting that the Commission issue an order permitting an alternative means of service under Rule 141(a)(2)(iv)(D), that motion should address the following issues: (i) whether the means of service is prohibited by international agreement;⁸ (ii) whether the method of service comports with due process;⁹ (iii) whether the

⁴ 17 C.F.R. § 201.141(a)(2)(iv)(A).

⁵ 17 C.F.R. § 201.141(a)(2)(ii).

⁶ 17 C.F.R. § 201.141(a)(2)(iv)(D).

⁷ See *Flatworld Acquisition Corp.*, Exchange Act Release No. 92399, 2021 WL 2953609, at *1 (July 13, 2021) (finding that service was not effective because, among other things, the Division had not “sought an order authorizing service by ‘other means not prohibited by international agreement’ pursuant to Rule 141(a)(2)(iv)(D)”).

⁸ In its status report, the Division satisfied this element with respect to service to an address in South Africa by U.S. mail with confirmation of attempted delivery by citing *Lexmark Int’l, Inc.*, 2013 WL 12178588, at *9. See *supra* note 2 and accompanying text. Accordingly, the Division need not reestablish this element if it files a motion requesting that the Commission approve that means of service under Rule 141(a)(2)(iv)(D).

⁹ See *Lexmark Int’l, Inc.*, 2013 WL 12178588, at *2 (stating that whenever a determination is made whether to allow service by “other means not prohibited by international agreement” under Rule 4(f)(3) of the Federal Rules of Civil Procedure, the court “must determine whether the chosen method comports with constitutional notions of due process, namely that the service of process be ‘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.’” (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950))); Wright & Miller, 4B

means of service is prohibited by the law of the foreign country;¹⁰ and (iv) why the Division needs the Commission's intervention to serve the OIP.¹¹

Accordingly, IT IS ORDERED that the Division of Enforcement file a status report providing additional information regarding its efforts to effect service of the OIP on Respondent by April 21, 2023, and every 28 days thereafter until service is accomplished.

Fed. Prac. & Proc. Civ. § 1134 (4th ed.) (“[A]lthough not expressed in Rule 4(f)(3) as it is in Rules 4(f)(1) and (4)(f)(2), the due process requirements of reasonable notice and opportunity to be heard also must be satisfied.”); *ERHC Energy, Inc.*, Exchange Act release No. 90517, 2020 WL 6891409, at *2 (Nov. 24, 2020) (“We have also considered precedent construing the Federal Rules of Civil Procedure when construing our Rules of Practice (although that precedent does not bind us when doing so.”).

¹⁰ See *Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 84 (D.C. Cir. 2014) (stating that, although under Rule 4(f)(3) a federal district court may authorize an alternative means of service upon a person in a foreign country even if it contravenes the foreign country's laws, “an earnest effort should be made to devise a method of communication that . . . minimizes offense to foreign law” (quoting FRCP 4(f)(3) Notes of Advisory Comm. on Rules—1993 Amendments)).

¹¹ See *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002) (stating that, although the plaintiff “need not have attempted every permissible means of service of process before petitioning the court for alternative relief” under Rule 4(f)(3), the plaintiff must “demonstrate that the facts and circumstances of the present case necessitated the district court's intervention”); cf. *Flatworld Acquisition Corp.*, 2021 WL 2953609, at *1 (noting with respect to Rule 141(a)(2)(iv)(D) that the Division had not “asserted that valid service could not otherwise be made on Respondent”).

The parties' attention is directed to the e-filing requirements in the Rules of Practice.¹²

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

¹² *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020), 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-30/pdf/2020-25747.pdf>; *see also Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, <https://www.sec.gov/efapdocs/instructions.pdf>. The amendments also impose other obligations on parties to administrative proceedings such as a redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465–81.