

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE LDK SOLAR SECURITIES
LITIGATION.

No. C 07-05182 WHA

This Document Relates to:

All Actions.

**ORDER GRANTING
PLAINTIFFS' MOTION TO
AUTHORIZE SERVICE TO
UNSERVED DEFENDANTS
LOCATED ABROAD AND
VACATING HEARING**

INTRODUCTION

In this federal securities class action, only four out of the ten defendants have been served. The remaining six defendants are located in China. Plaintiffs therefore move to authorize service on the unserved defendants located abroad pursuant to FRCP 4(f)(3). For the reasons stated below, the motion is **GRANTED**.

STATEMENT

In March 2008, plaintiffs filed a consolidated class action complaint against corporation LDK, its two subsidiaries (one in China and one in the United States), and seven individual defendants. Plaintiffs alleged violations under various federal securities laws. Only LDK, LDK Solar USA, Inc. (LDK's United States subsidiary), chief executive officer Xiaofeng Peng, and chief financial officer Jack Lai have been served. The remaining six defendants who reside, work, and/or are located in China are: Jiangxi LDK Solar (LDK's Chinese subsidiary), president and chief operating officer Xingxue Tong, vice president and chief accounting officer

1 Qiqiang Yao, executive vice president and board member Liangbao Zhu, senior vice president
2 and board member Yonggang Shao, and non-executive director Gang Wang.

3 China is a party to the Hague Convention on the Service Abroad of Judicial and
4 Extra-Judicial Documents in Civil or Commercial Matters. The provisions entered into force
5 between the United States and China in 1991. Pursuant to the Convention, service can be
6 effected in China through the Chinese Central Authority. China, however, objected to Article
7 10 of the Convention, which stated:

8 Provided the State of destination does not object, the present
9 Convention shall not interfere with —

10 a) the freedom to send judicial documents, by postal channels,
directly to persons abroad,

11 b) the freedom of judicial officers, officials or other competent
12 persons of the State of origin to effect service of judicial
documents directly through the judicial officers, officials or other
13 competent persons of the State of destination,

14 c) the freedom of any person interested in a judicial proceeding to
15 effect service of judicial documents directly through the judicial
officers, officials or other competent persons of the State of
destination.

16 Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial
17 Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. Service therefore cannot be effected
18 “by postal channels or through the judicial officers, officials or other individuals of the state of
19 destination. To date, plaintiffs have not tried to serve any of the unserved defendants through
20 the Chinese Central Authority, claiming that the procedure is too time-consuming, costly,
21 and potentially fruitless.

22 ANALYSIS

23 FRCP 4(f) directs how to effect service on an individual in a foreign country.

24 An individual may be served at a place not within any judicial district of the United States
25 “by an internationally agreed means of service that is reasonably calculated to give notice,
26 such as those authorized by the Hague Convention on the Service Abroad of Judicial and
27 Extrajudicial Documents. FRCP 4(f)(1). The rule further provides service “by any other
28 means not prohibited by international agreement, as the court orders. FRCP 4(f)(3).

1 Plaintiffs move for an order pursuant to FRCP 4(f)(3), permitting them to serve the six
 2 yet-unserved defendants through LDK's office, which is located in California. That way,
 3 plaintiffs say, the office can transmit the relevant documents to the unserved defendants, each of
 4 whom is a director, senior officer, or subsidiary of LDK.

5 The four defendants who have been served oppose this motion. They first argue that
 6 FRCP 4(f) requires plaintiffs to serve foreign defendants in accordance with "any
 7 internationally agreed means reasonably calculated to give notice, such as the Hague Service
 8 Convention. This is not true, as FRCP 4(f)(3) allows for an alternate means of service as long
 9 as it is directed by a court and not prohibited by international agreement. Significantly, FRCP
 10 4(f)(3) stands independently of FRCP 4(f)(1); it is not necessary for plaintiffs to first attempt
 11 service through "internationally agreed means" before turning to "any other means not
 12 prohibited by international agreement. In *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d
 13 1007, 1014 (9th Cir. 2002), the Ninth Circuit stated:

14 By all indications, court-directed service under Rule 4(f)(3) is as
 15 favored as service available under Rule 4(f)(1) or Rule 4(f)(2).
 16 Indeed, Rule 4(f)(3) is one of three separately numbered
 17 subsections in Rule 4(f), and each subsection is separated from the
 18 one previous merely by the simple conjunction "or. Rule 4(f)(3)
 19 is not subsumed within or in any way dominated by Rule 4(f)'s
 20 other subsections; it stands independently, on equal footing.
 21 Moreover, no language in Rules 4(f)(1) or 4(f)(2) indicates their
 22 primacy, and certainly Rule 4(f)(3) includes no qualifiers or
 23 limitations which indicate its availability only after attempting
 24 service of process by other means.

* * *

25 The advisory committee notes ("advisory notes ") bolster our
 26 analysis. Beyond stating that service ordered under Rule 4(f)(3)
 27 must comport with constitutional notions of due process and must
 28 not be prohibited by international agreement, the advisory notes
 indicate the availability of alternate service of process under Rule
 4(f)(3) without first attempting service by other means.
 Specifically, the advisory notes suggest that in cases of "urgency,
 Rule 4(f)(3) may allow the district court to order a "special method
 of service, even if other methods of service remain incomplete or
 unattempted.

Consequently, plaintiffs are free to attempt an alternate means of service without having to
 show an attempt of service through the Chinese Central Authority — *assuming plaintiffs do not
 violate any international agreement.*

1 Defendants then contend that plaintiffs' requested form of service *does* violate an
2 international agreement. The Ninth Circuit has held:

3 As obvious from its plain language, service under Rule 4(f)(3)
4 must be (1) directed by the court; and (2) not prohibited by
5 international agreement. No other limitations are evident from the
6 text. In fact, as long as court-directed and not prohibited by an
international agreement, service of process ordered under Rule
4(f)(3) may be accomplished in contravention of the laws of the
foreign country.

7 *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). Neither party
8 disputes that China is a signatory to the Convention. As a signatory to the Convention,
9 however, China explicitly objected to Article 10 of the Convention. Article 10 allowed for
10 service "by postal channels or through judicial officers, officials, or other persons in the state
11 of destination.

12 Defendants then say that the reasoning in *Agha v. Jacobs*, 2008 WL 2051061, *1
13 (N.D. Cal. 2008) (Judge Seeborg), is instructive. There, the court denied plaintiff's request to
14 serve the summons and complaint — via email or facisimile — to the defendants, who were
15 located in the Federal Republic of Germany. Judge Seeborg rejected *Rio* because it "involved
16 service in a country that is not a member of the Hague Convention. *Agha*, 2008 WL 2051061
17 at *1 n.1. Like the situation in *Agha*, defendants say, the instant action involves a country that
18 is a signatory to the Convention and that has objected to service by postal channels. *Rio*
19 therefore does not apply.

20 Defendants' argument is unpersuasive. It is true that *Rio* involved a non-signatory
21 country. Nonetheless, the Ninth Circuit's reasoning in the *Rio* decision is still applicable —
22 as long as the service is "court-directed and not prohibited by an international agreement,
23 service can be effected pursuant to FRCP 4(f)(3). *Rio*, 284 F.3d at 1014. Here, plaintiffs do not
24 request to effect service in China via mail; rather, they request to serve the remaining six
25 unserved defendants through LDK's California office. There is no service by postal channels,
26 as was the case in *Agha* (where the judge concluded that service by email or facsimile was the
27 functional equivalent of service by mail). Plaintiffs are therefore correct that nothing in the
28 Convention bars the requested means of service.

1 Defendants further argue that plaintiffs must show that the signatory destination nation
2 has refused to cooperate. “[A] plaintiff seeking relief under Rule 4(f)(3) must adequately
3 support the request with affirmative evidence of the lack of judicial assistance by the host
4 nation — conclusory assertions of the futility of Hague service are unavailing. *Arista Records
5 LLC v. Media Services LLC*, 2008 WL 563470, *1 (S.D.N.Y. 2008) (Judge Buchwald).
6 Because plaintiffs have not presented any facts indicating that China has refused to cooperate
7 with the service provisions set forth in the Convention, the motion should be denied,
8 defendants say.

9 Again, this argument has little merit. The Ninth Circuit held, “As obvious from its plain
10 language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by
11 international agreement. *No other limitations are evident from the text. Rio*, 284 F.3d at 1014
12 (emphasis added). It is unnecessary for plaintiffs to show the lack of judicial assistance by the
13 host nation. Instead, plaintiffs “needed only to demonstrate that the facts and circumstances of
14 the present case necessitated the district court’s intervention. Thus, when [the plaintiff]
15 presented the district court with its inability to serve an elusive international defendant, striving
16 to evade service of process, the district court properly exercised its discretionary powers to craft
17 alternate means of service. *Id.* at 1016. In the instant action, plaintiffs have shown the
18 difficulty of serving the unserved defendants located abroad. Defense counsel have refused to
19 accept service on behalf of the unserved defendants on the ground that they do not represent the
20 international defendants. (Yet, oddly, defense counsel oppose this motion on behalf of the
21 unserved defendants.) According to the sworn declaration of plaintiffs’ counsel, defense
22 counsel has said that “it might be impossible to serve some of [the unserved defendants]
23 (Kaplan Decl. ¶ 3).

24 Finally, the court-ordered method of service must still be reasonable. “Even if facially
25 permitted by Rule 4(f)(3), a method of service of process must also comport with constitutional
26 notions of due process. To meet this requirement, the method of service crafted by the district
27 court must be ‘reasonably calculated, under all the circumstances, to apprise interested parties
28 of the pendency of the action and afford them an opportunity to present their objections.’ *Rio*,

1 284 F.3d at 1016. This order finds that the proposed form of service is constitutionally
2 acceptable. Serving the remaining six defendants through the California office is reasonably
3 calculated, under these circumstances, to apprise them of the pendency of the action and afford
4 them with the opportunity to respond. After all, LDK trades on the New York Stock Exchange,
5 its subsidiary is located in California, and the remaining defendants are all sophisticated
6 officers, directors, or the Chinese subsidiary of LDK. Accordingly, plaintiffs' motion to
7 authorize service to the unserved defendants abroad is granted.

8 **CONCLUSION**

9 Because plaintiffs' requested form of service is not prohibited by international
10 agreement, the motion authorizing service through LDK's California office to unserved
11 defendants located abroad is **GRANTED**. Because a hearing is unnecessary, the hearing set for
12 June 19, 2008, is **VACATED**.

13
14 **IT IS SO ORDERED.**

15
16 Dated: June 12, 2008.



17 WILLIAM ALSUP
18 UNITED STATES DISTRICT JUDGE
19
20
21
22
23
24
25
26
27
28