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12

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15

16 In re LDK Solar Securities Litigation

Master File No. C-07-05182-WHA

17 This Document Relates To:

PLAINTIFF'S REPLY IN FURTHER  
SUPPORT OF HIS MOTION TO  
AUTHORIZE SERVICE TO UNSERVED  
DEFENDANTS LOCATED ABROAD  
PURSUANT TO FEDERAL RULE OF CIVIL  
PROCEDURE 4(F)(3)

18 All Actions  
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Judge: Hon. William H. Alsup  
Date: June 19, 2008  
Time: 8:00 a.m.  
Courtroom: 9, 19th Floor

1 The Opposition by the Defendants who have been served in this case (“the Served  
2 Defendants ) to Plaintiff’s Motion to authorize service of process on the remaining Defendants  
3 (“the Unserved Defendants ) through the U.S. office of Served Defendant LDK Solar Co., Ltd.  
4 (“LDK ), is an improper effort at gamesmanship. The Court has now denied the Served  
5 Defendants’ motion to dismiss, entered a scheduling order and set a trial date. Discovery is about  
6 to begin. Nevertheless, counsel for the Unserved Defendants—advocating on behalf of clients  
7 who are not before the Court and who they supposedly do not represent—insist that this Court  
8 should do nothing to facilitate service on the Unserved Defendants. Effecting service in the  
9 manner proposed by Defendants would probably mean that the Unserved Defendants would not  
10 be brought into this case for a year or more. They would then likely demand a new round of  
11 discovery and perhaps even separate trial dates.

12 In addition to the Served Defendants’ apparent unconcern about issues of judicial  
13 economy, the legal arguments advanced in their Opposition are unsound. There is nothing  
14 inappropriate or unfair in Plaintiff’s request that the Court facilitate, in a manner specifically  
15 authorized by the Federal Rules of Civil Procedure, his efforts to bring before it officers and  
16 directors of a company that chose both to do business in the U.S. and to list itself on the New  
17 York Stock Exchange, when those officers and directors are accused of engaging in conduct at  
18 the company which constituted a fraud against American investors. The views of the Served  
19 Defendants notwithstanding, “service of process is not intended to be a game of cat and mouse.  
20 *First Horizon Home Loan Corp. v. Phillips*, No. CV 07-0250, 2008 WL 906698, at \*4 (D. Ariz.  
21 Mar. 31, 2008). Plaintiff’s Motion should be granted so that this case can be fully and  
22 expeditiously decided on the merits.

23 Although they ignore this obvious threshold issue, counsel for the Served Defendants have  
24 no right or authority to oppose Plaintiff’s Motion. Generally, “a party cannot, absent certain  
25 circumstances, raise the rights of another. *Playboy Enterprises, Inc. v. Public Service Comm’n*  
26 *of Puerto Rico*, 906 F.2d 25, 32 n.9 (1st Cir. 1990). The Served Defendants do not explain why  
27 they or their attorneys are entitled to assert arguments on behalf of third parties who refuse to  
28 submit to the jurisdiction of this Court.

1 In any event, the Served Defendants do not dispute Plaintiff's description of the relevant  
 2 facts. They do not deny that service in China through the Hague Convention is difficult, time  
 3 consuming and expensive. Indeed, service under the Convention could easily take more than a  
 4 year, if it can be done at all. See Decl. of Rick Hamilton ¶ 4, attached as Exhibit A. They also do  
 5 not dispute that they advised counsel for Plaintiff that, notwithstanding the Hague Convention, it  
 6 might be impossible to serve all of the Unserved Defendants in China—perhaps meaning to imply  
 7 that some of the Unserved Defendants would attempt to evade Hague Convention service. And  
 8 the served defendants do not take issue with Plaintiff's view that service through LDK would  
 9 almost certainly provide actual notice of this litigation to any of the Unserved Defendants who do  
 10 not already have such notice. Nevertheless, the Served Defendants insist that, instead of making  
 11 Service through LDK's U.S. office, Plaintiff should be required to pay the costs of requesting  
 12 service through the Hague Convention and then wait, perhaps a year or more, to hear back from  
 13 the Chinese authorities, who may or may not be able to serve the Unserved Defendants.

14  
 15 **I. NOTHING IN THE HAGUE CONVENTION BARS THE PROPOSED MEANS OF SERVICE**

16 The Served Defendants' insistence that, with respect to anyone in China, service through  
 17 the Hague Convention is the "mandated and only "proper "means of service (Opp'n at 1-2)  
 18 ignores the Ninth Circuit's holding in *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d  
 19 1007 (9th Cir. 2002). The *Rio Properties* court, relying on the plain language of Rule 4(f), said  
 20 that "court-directed service under Rule 4(f)(3), which is the basis for this Motion, "is as favored  
 21 as service available under Rule 4(f)(1), which provides for service pursuant to international  
 22 agreements, such as the Hague Convention. *Id.* at 1015. When executing service overseas,  
 23 Plaintiffs can pursue any of the alternative service procedures set forth in Rule 4(f), they are not  
 24 required to use the costly and time consuming procedures set out in Rule 4(f)(1) before seeking  
 25 the Court's permission to utilize the procedures permitted by Rule 4(f)(3).  
 26

27 The Defendants also say that the motion must be denied because "China ... has objected  
 28 to Article 10 of the Convention, which provides for service through postal channels *or other*

1 *informal means*. (Opp'n. at 3 (emphasis added).) While it is true that China has opted out of  
2 Article 10, and that Article 10 provides for service through "postal channels, China's opt out of  
3 Article 10 does not bar "other informal means" of service because Article 10 says nothing about  
4 service through "other informal means." <sup>1</sup> 20 U.S.T. 361 at Article 10.

5 The Defendants insist that *Agha v. Jacobs*, No. C 07-1800, 2008 WL 2051061 (N.D. Cal.  
6 May 13, 2008), stands for the proposition that, because China has opted out of Article 10, "the  
7 only method of service in China that complies with the Convention is personal service through  
8 China's Central Authority. (Opp'n at 6.) But *Agha* stands for nothing of the sort. Magistrate  
9 Judge Seeborg simply held that a plaintiff's proposal to serve by email or fax was improper  
10 because the country where service was to take place had opted out of Article 10 and that  
11 transmission by email or fax in the manner proposed by the plaintiff would be the functional  
12 equivalent of service by mail. *Agha*, 2008 WL 2051061, at \*2 (holding that "Agha's attempt to  
13 distinguish email and facsimile from the 'postal channels' ... is unavailing, but recognizing that  
14 "[t]here might be some circumstances under which such a distinction could be drawn ). The  
15 *Agha* court may have taken into account the fact that Article 10 could not have provided guidance  
16 on service by fax or email since this technology did not exist in 1965, when the Convention was  
17 finalized.

18 While it may be true that China's objection to Article 10 means that Plaintiff cannot use  
19 the mails to serve the Unserved Defendants in China, Plaintiff does not propose to serve anybody  
20 via mail. Instead, Plaintiff asks permission to serve the unserved Defendants through the U.S.  
21 office of LDK. This is entirely reasonable—LDK is traded on the New York Stock Exchange and  
22 each Unserved Defendant (except for the Unserved Defendant which is a subsidiary of LDK) is  
23 one of LDK's senior leaders.

24 The Served Defendants' insistence that China's opt out of Article 10 means that all  
25 service affecting persons in China must be made through Convention procedures is untenable.

26 \_\_\_\_\_  
27 <sup>1/</sup> In addition to service by mail Article 10 also deals with, and allows parties to the  
28 Convention to opt out of, service "through the judicial officers, officials or other competent  
persons of the State of destination. 20 U.S.T. 361, Article 10 (b) & (c). But service through  
such persons is not "informal" and, in any event, this provision has no relevance to this case.

1 Article 10 refers only to “postal channels —nothing in the Convention allows parties to bar *all*  
2 means of service not specifically authorized by the Convention. If the Convention drafters had  
3 wanted to insert such a provision they would have done so. Moreover, although the Served  
4 Defendants raise the issue of international comity, the Ninth Circuit’s view that Rule 4(f)(3)  
5 service can be authorized even if it is to be done “in contravention of the laws of the foreign  
6 country, *Rio Properties*, 284 F.3d at 1014, suggests that comity concerns do not require this  
7 Court to accept an interpretation of China’s opt out that is so expansive that it would preclude all  
8 means of alternative service. This is especially so since there is no indication that China itself has  
9 ever suggested that its opt out should be so interpreted.

10 The court’s reasoning in *RSM Production Corp. v. Fridman*, No. 06 Civ. 11512, 2007  
11 U.S. Dist. LEXIS 58194 (S.D.N.Y. Aug. 10, 2007), is instructive. In that case the court  
12 authorized Rule 4(f)(3) service on the American attorney of a person located in Russia, rejecting  
13 the argument, advanced by Served Defendants here, that such service would be inconsistent with  
14 Russia’s opt out of Article 10—nothing in Article 10 was relevant to service through a U.S.  
15 attorney, *id.* at \*11, just as China’s opt out of Article 10 is irrelevant to Plaintiff’s Motion here.  
16 *See also Arista Records LLC v. Media Services LLC*, No. 06 Civ. 15319, 2008 U.S. Dist. LEXIS  
17 16485 (S.D.N.Y. Feb. 25, 2008) (authorizing service on American attorney of person in Russia  
18 despite Russia’s opt out of Article 10).

## 19 **II. THIS IS A SPECIAL CASE**

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21 Although *Rio Properties* makes it clear that unusual circumstances are not required to  
22 authorize rule 4(f)(3) service, the Served Defendants are wrong when they insist that this case is  
23 not a “special case. In fact, the circumstances here are highly unusual. This is not a run-of-the-  
24 mine dispute between a U.S. Plaintiff and a foreigner. The individual Unserved Defendants here  
25 are leaders of a Company that decided to list itself on a U.S. securities exchange. Each of the  
26 individual Unserved Defendants opted to sign and certify the accuracy of a registration statement  
27 that they knew would be filed with the Securities and Exchange Commission and disseminated to  
28 U.S. investors. Each of the individual Unserved Defendants is alleged to have engaged in a fraud

1 that cost persons who traded on the U.S. markets hundreds of millions of dollars. Yet, having  
2 affirmatively taken steps to participate in the U.S. securities markets, and having apparently been  
3 enriched enormously by that participation, they now seek to discourage efforts to hold them  
4 accountable for violations of the securities laws by making it as difficult, time consuming and  
5 costly as possible to bring them before a U.S. court.

6 The implications of the Served Defendants' Argument that the Hague Convention is the  
7 only means through which service can be made on anyone in China are especially troubling. The  
8 Served Defendants suggest that the Plaintiff should first try his luck at the Hague Convention  
9 process and then, if that fails, seek permission to serve pursuant to Rule 4(f)(3). But if any  
10 method of service outside the four corners of the Hague Convention is prohibited, than Rule  
11 4(f)(3) service will be just as improper in the future as it is today. If the Served Defendants' view  
12 of the law is correct, anyone who stays in China, regardless of his connections to this country, and  
13 who is able to avoid Hague Convention service, whether through artifice or luck, will have  
14 obtained de facto immunity from the consequences of violating U.S. law.

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16 **III. CONCLUSION**

17 If it decides to consider the arguments counsel for the Served Defendants advance on  
18 behalf of persons they do not represent, the Court should reject them. Nothing in the Hague  
19 Convention or U.S. law even suggests that service through LDK's U.S. Office is improper. And  
20 there is no reason that this Court should facilitate the efforts by officers and Directors of a New  
21 York Stock Exchange traded company to evade its jurisdiction.

1 Dated: June 5, 2008

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By:           /s/ Michael P. Lehmann            
Michael Lehmann

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Lead Counsel for the Proposed Class

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses of the parties of record.

I further certify that Service Pursuant to Local Rule 23-2 will be made electronically to:

Securities Class Action Clearinghouse  
Att. Juan-Carlos Sanchez/Cara Mia Perlas  
Stanford University School of Law  
Crown Quadrangle  
Stanford, CA 94305-8612  
scac@law.stanford.edu

/s/ Michael P. Lehmann  
Michael P. Lehmann

June 5, 2008

# EXHIBIT A

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re LDK Solar Securities Litigation

Master File No. C-07-05182-WHA

This Document Relates To:  
All Actions

**DECLARATION OF RICK HAMILTON**

The undersigned hereby declares as follows:

1. I am now and have been at all times herein mentioned a citizen of the United States and resident of the State of Washington, over the age of eighteen, not a party to nor interested in the above entitled action, and competent to be a witness therein.

2. I am Director of Operations for Process Forwarding International which has been contracted by the United States Department of Justice to act as Central Authority in accordance with the Hague Convention on the service abroad of judicial and extra judicial documents in civil and commercial matters (Hague Service Convention) and routinely oversee the service of process to and from other member nations including China.

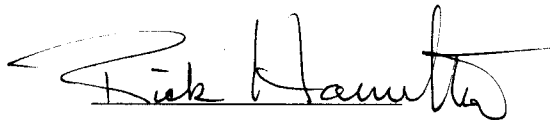
3. That I have records of 352 process service work orders involving process service upon defendants located in China.

4. That it is my belief, based on my prior experiences, it may take a year or longer for the Chinese authorities to complete a process service and there is no protocol prescribed by the Hague Service Convention to compel the foreign authorities to expedite a process service.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2008



Rick Hamilton