UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

PNC BANK NATIONAL ASSOCIATION, *Plaintiff,*	§ §	
v.	§	Civil No. 5:23-CV-00113
CORY BLAINE BAGLIEN, *Defendant.*	§ §	

AMENDED ORDER DENYING MOTION FOR SUBSTITUTED SERVICE*

Plaintiff moves for substituted service by ordinary and electronic mail on Defendant, who may live in Alberta, Canada, under Federal Rule of Civil Procedure 4(f)(3). Dkt. No. 7. But, under the present circumstances, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Convention), 20 U.S.T. 361, pre-empts these methods of service, so the Motion shall be denied.

I. Statement of Facts

A skip trace placed Defendant at an address in Calgary and identified his phone number. Ex. B, Dkt. No. 11. The address is a multi-family residence with restricted access, and, on four occasions, a process server could not enter it. Ex. A, Dkt. No. 11. Local counsel attempted service by recorded mail, but this was returned unclaimed. Ex. C, Dkt. No. 11. The server called the phone number twice and left voicemails, but these were not returned. Ex. A, Dkt. No. 11. And a voicemail greeting stated that the caller had reached "Cory Baglien" and gave an electronic-mail address, but the server's message to it went unanswered. *Id.* Now, Plaintiff moves for service by

* This Amended Order corrects a typographical error from the previous order. Dkt. No. 8.

ordinary and electronic mail, arguing that these are not prohibited by international agreement. Dkt. No. 11.

II. Statement of Law

Due process entitles foreign defendants to "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." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Unless an exception applies, as none does here, foreign individuals sued in federal court must be served in one of the ways authorized by Federal Rule of Civil Procedure 4(f). *See Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004). This Rule has three parts.

A. Service Through a Central Authority

Rule 4(f)(1) authorizes service "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." The Convention "was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." *Schlunk*, 486 U.S. at 698. Its terms are to be construed liberally, and they apply "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.* at 699–700 (quoting art. 1, 20 U.S.T. 361). The Convention requires each of its parties to designate a central authority that, with few exceptions, must serve a document "by a method prescribed by its internal law" or "by a particular method requested by the

applicant." Art. 5, 20 U.S.T. 361.[1] Canada, like the United States, is a party and has done so.[2] Plaintiff has not attempted service through the Albertan central authority under Rule 4(f)(1).

B. Service Prescribed by Foreign Law

Rule 4(f)(2) authorizes service, "if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice . . . as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; . . . ." [3] The Hague Convention does not affirmatively authorize, but "shall not interfere with" and requires its parties to declare whether

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[1] The second paragraph of Article 5 of the Convention does not oblige a party to tolerate informal service by foreign plaintiffs but rather specifies one way its central authority may serve some documents. 20 U.S.T. 361; *see Kadmon Corp., LLC v. Ltd. Liab. Co. Oncon*, No. 22-CV-5271 (LJL), 2023 WL 2346340, at *4–6 (S.D.N.Y. Mar. 3, 2023); Permanent Bureau, HCCH, Revised Draft Prac. Handbook on Operation Serv. Convention 106–08, Prel. Doc. No. 7 (May 2024), https://assets.hcch.net/docs/37d9b7a9-f29f-4e43-9c8f-963d899631fa.pdf (last visited Aug. 1, 2024); *Canada—Central Authority & Practical Information: Methods of Service (Art. 5(1))*, HCCH, https://www.hcch.net/en/states/authorities/details3/?aid=248 (last updated Oct. 4, 2023) ("The practice of informal delivery . . . is not known in Canada.").

The Convention "shall not apply" where a defendant's address "is not known." Art. 1, 20 U.S.T. 361; *see Yiqiao v. Zeng*, No. 23-55689, 2024 WL 3372691, at *1 (9th Cir. July 11, 2024); *Ctr. Way Co. Ltd. v. Ningbo Wolfthon Tech. Co.*, No. 22-CV-6012 (LJL), 2022 WL 19003380, at *1–2 (S.D.N.Y. Nov. 9, 2022); *Compass Bank v. Katz*, 287 F.R.D. 392, 394–96 (S.D. Tex. 2012).

[2] For service or notification requests transmitted to a Canadian Central Authority under Article 5(1)(a), service or notification will be effected using the same methods as would be used to serve or notify judicial documents for proceedings in the Central Authority's jurisdiction. The normal procedure for service in Canada is personal service made by a process server in Alberta, . . . on an individual . . . by handing a copy of the document to the individual, ...

Canada—Central Authority & Practical Information: Methods of Service (Art. 5(1)), HCCH, https://www.hcch.net/en/states/authorities/details3/?aid=248 (last updated Oct. 4, 2023); *see Central Authorities (Arts. 2 and 18(3)): Alberta*, HCCH, https://assets.hcch.net/docs/15b5f973-5121-49f0-8a73-9b44d02c7dc5.pdf (last visited Aug. 1, 2024); *Sheriff—Civil Enforcement: Document Service under the Hague Convention*, MyAlberta eServices, https://eservices.alberta.ca/sheriff-civil-enforcement-international-doc-service.html (last visited Aug. 1, 2024).

[3] For simplicity, the above discussion of Rule 4(f)(2) is limited to Rule 4(f)(2)(A). Rule 4(f)(2)(B) authorizes service "as the foreign authority directs in response to a letter rogatory or letter of request," which is inapplicable here, and Rule 4(f)(2)(C) authorizes service, "unless prohibited by the foreign country's law, by: (i) delivering a copy of the summons and of the complaint to the individual personally; or (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; . . . ." In serving an Albertan, the only difference between Rule 4(f)(2)(A) and 4(f)(2)(C) is that, under Rule 4(f)(2)(C)(ii), it must be the Clerk of Court who "addresses and sends" the mail.

they oppose, direct service through postal channels or "competent persons." Arts. 10, 21, 20 U.S.T. 361; *see id.* arts. 11, 19; *Water Splash, Inc. v. Menon*, 581 U.S. 271, 284 (2017) ("[S]ervice by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law."). Canada does not oppose these, and Albertan process servers are "competent persons." *See Canada—Central Authority & Practical Information: Art. 10(a)*, HCCH, https://www.hcch.net/en/states/authorities/details3/?aid=248 (last updated Oct. 4, 2023); *Zurich Ins. Co., S.A. v. Joseph Oat Corp.*, No. CV M-07-61, 2007 WL 9703134, at *6 (S.D. Tex. Sept. 14, 2007). Albertan law provides that commencement documents must be left with a defendant or sent him by recorded mail, receipt of which he must acknowledge by signature. Alta. Rules Ct., Alta. Regul. 124/2010 §§ 11.4, 11.5, App. (*recorded mail*), https://canlii.ca/t/565q0 (last updated Jan. 9, 2024). But, if this is impractical, a court may order substitutional service. *Id.* § 11.28. Plaintiff's service efforts to date have been authorized, if at all, under Rule 4(f)(2).

C. Service Consistent with the Hague Convention, as the Court Orders

Finally, Rule 4(f)(3) authorizes service "by other means not prohibited by international agreement, as the court orders." The Hague Convention "'pre-empts inconsistent methods of service' wherever it applies." *Water Splash*, 581 U.S. at 273 (quoting *Schlunk*, 486 U.S. at 698). Inconsistent methods would bypass the Convention, making its weighty protections an albatross. *See Anova Applied Elecs., Inc. v. Hong King Grp., Ltd.*, 334 F.R.D. 465, 471–72 (D. Mass. 2020). Several district courts in the Fifth Circuit have held electronic mail so inconsistent, at least where unauthorized under otherwise-applicable law. *See UOP LLC v. Industria del Hierro SA de CV*, No. 2:22-CV-01089, 2022 WL 2056363, at *2–3 (W.D. La. June 7, 2022); *Topstone Commc'ns, Inc. v. Xu*, 603 F. Supp. 3d 493, 500 (S.D. Tex. 2022); *Prem Sales, LLC v. Guangdong Chigo*

Heating & Ventilation Equip. Co., 494 F. Supp. 3d 404, 417 (N.D. Tex. 2020).[4] The Court finds their reasoning persuasive and would extend it beyond electronic mail; postal mail, where otherwise unauthorized, might be just as threatening. *See Anova Applied Elecs.*, 334 F.R.D. at 470–71 (comparing electronic with postal mail).[5] The Court would also suppose, without deciding, that, in some circumstances, methods of service technically prescribed by otherwise-applicable law might so subvert the Convention as to be inconsistent with it. *Compare Reintegrative Therapy Ass'n, Inc. v. Kinitz*, No. 3:21-CV-1297-BEN-BLM, 2021 WL 5140195, at *4–5 (S.D. Cal. Nov. 4, 2021) (refusing to order substituted service under Quebecois law before central-authority efforts exhausted), *with* Hague Convention art. 19, 20 U.S.T. 361 (providing Convention "shall not affect" internal laws permitting other methods). Any means of service inconsistent with the Hague Convention, including mail service unauthorized under otherwise-applicable law, is prohibited where the Convention applies. *See Water Splash*, 581 U.S. at 284 (citing *Brockmeyer*, 383 F.3d at 803–04); *UOP*, 2022 WL 2056363, at *2–3. Plaintiff now moves under Rule 4(f)(3). Dkt. No. 7.

[4] District courts in other circuits have split on this point. *See Peanuts Worldwide LLC v. Partnerships & Unincorporated Associations Identified on Schedule "A,"* No. 23 C 2965, 2024 WL 3161661, at *9–10 (N.D. Ill. June 25, 2024) (contrasting lines of cases); *Kelly Toys Holdings, LLC. v. Top Dep't Store*, No. 22 CIV. 558 (PAE), 2022 WL 3701216, at *8 n.6 (S.D.N.Y. Aug. 26, 2022) (noting "issue is in ferment"). But the Court discerns a clear drift toward holding methods of service uncontemplated by the Convention to be pre-empted by it. *See Stebbins v. Garcia Baz*, No. 24-CV-00398-LJC, 2024 WL 3447507, at *3–4 (N.D. Cal. July 16, 2024); *Duong v. DDG BIM Servs. LLC*, No. 823CV01551KKMJSS, 2023 WL 7209982, at *4–5 (M.D. Fla. Nov. 2, 2023). The Court finds the structural reasoning of these cases persuasive.

[5] Discussion of whether the Convention pre-empts inconsistent service methods has arisen almost entirely on facts about electronic mail to countries that object to direct service by postal channels. *See Anova Applied Elecs.*, 334 F.R.D. at 471–72 (holding electronic mail inconsistent in China); *UOP*, 2022 WL 2056363, at *2–3 (holding electronic mail conflicts with Convention in Mexico); *Duong*, 2023 WL 7209982, at *4–5 (holding postal and electronic mail prohibited in India). But, in considering prohibition by the Convention under Rule 4(f)(3), there is no reason to distinguish between methods uncontemplated by or opposed under the Convention and those unprescribed by the foreign country's law; the material question is whether the method is inconsistent with the Convention. If so inconsistent, ordinary mail stands no less prohibited in Alberta than direct and electronic mail do in China, Mexico, and India. Thus, the Court may extend the above pre-emption precedents to facts about ordinary mail in Canada.

III. Analysis

If Albertan defendants could be served notice of U.S. cases by ordinary or electronic mail, no plaintiff "would ever choose" to serve them through the central authority, in person, or by mail requiring a signature, *Anova Applied Elecs.*, 334 F.R.D. at 472, and much of their assurance of receiving "actual and timely notice of suit" would evaporate. *Schlunk*, 486 U.S. at 698. In Alberta, therefore, service by ordinary or electronic mail, at least where not otherwise authorized or excepted, is inconsistent with and prohibited by the Hague Convention. *See Water Splash*, 581 U.S. at 273.

The Court need not decide whether it could, consistent with the Convention, order substitutional service by these methods under Albertan law, as the Court is not persuaded to apply that law's discretionary substitutional-service provision here. *See* Alta. Rules Ct., Alta. Regul. 124/2010 § 11.28, https://canlii.ca/t/565q0 (last updated Jan. 9, 2024) ("[T]he Court may, on application, make an order for substitutional service . . . ."). Plaintiff has neither attempted service through the Albertan central authority, which apparently is quick, inexpensive, and amenable to alternative-service requests,[6] nor shown why the Albertans should not be the first to order any unorthodox efforts there. *See Reintegrative Therapy Ass'n*, 2021 WL 5140195, at *4–5. Because, in its discretion, the Court chooses not to authorize substitutional service under Albertan law, it need not decide whether, under these circumstances, it could do so consistent with the Convention.

[6] *See Canada—Central Authority & Practical Information: Time for Execution of Request*, HCCH, https://www.hcch.net/en/states/authorities/details3/?aid=248 (last updated Oct. 4, 2023) ("The average time for performance of service is: . . . Alberta: 4 weeks . . . ."); *Sheriff—Civil Enforcement: Document Service under the Hague Convention*, MyAlberta eServices, https://eservices.alberta.ca/sheriff-civil-enforcement-international-doc-service.html (last visited Aug. 1, 2024) ("The fee for Service of Foreign Documents under the Hague Convention is $100 Canadian per party to be served."); *Canada—Central Authority & Practical Information: Methods of Service (Art. 5(1))*, HCCH, https://www.hcch.net/en/states/authorities/details3/?aid=248 (last updated Oct. 4, 2023) ("Central Authorities in Canada will consider requests for service by a particular method requested by the applicant under 5(1)(b) to the extent that such a method is not inconsistent with the law of their jurisdiction.").

The parties to the Hague Convention went to a great deal of trouble to set up a flexible interface for their respective service processes. *See Schlunk*, 486 U.S. at 698. If clever end runs are to make this achievement irrelevant, this Court will be the last to join in them. Comity with our northern neighbor impels a higher deference to the Convention's intended function. *See Water Splash*, 581 U.S. at 280 (citing *id.* at 700).

IV. Conclusion

Plaintiff's Motion for Substituted Service, Dkt. No. 7, is **DENIED**, but several avenues remain open to serve Defendant. Plaintiff might continue its efforts to serve him in person or by recorded mail under Rule 4(f)(2)(A), or it might attempt service through the Albertan central authority under Rule 4(f)(1). *See supra* notes 2, 6. Should Defendant prove impossible to serve, this latter path might ease the final stages of Plaintiff's case.[7] Rule 4(m) does not set a time limit, so Plaintiff is only **ORDERED** to advise the Court of its progress by the first day of every other month, starting October 1, 2024, or within five court days of serving Defendant.

IT IS SO ORDERED.

Signed this September 9, 2024, at Laredo,

Texas.

Diana Song Quiroga
United States Magistrate Judge

[7] *See Declarations: Stays of Entry (Art. 15, para. 2)*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=392&disp=resdn (last visited Aug. 1, 2024) ("Canada declares that the judges may give judgment under the conditions stated in Article 15 of the Convention."); Hague Convention art. 15, para. 2, 20 U.S.T. 361 (describing circumstances where default judgment may be given although no certificate of service).