

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND

CIVIL MINUTES -- GENERAL

Case No. **CV 08-5742-JFW (JCx)**

Date: April 15, 2009

Title: OGM, Inc., et al -v- Televisa, S.A. DE C.V., et al.

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

**Shannon Reilly
Courtroom Deputy**

**None Present
Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS (IN CHAMBERS):

**ORDER QUASHING SERVICE OF PROCESS ON
DEFENDANT TELEVISA, S.A. DE C.V.**

**ORDER DENYING DEFENDANT TELEVISA, S.A.
DE C.V.'S MOTION TO DISMISS UNDER FRCP
12(b)(5) FOR DEFICIENT SERVICE OF
PROCESS [filed 3/16/2009; Docket No. 32];**

On March 16, 2009, Defendant Televisa, S.A. de C.V. ("Televisa") filed a Motion to Dismiss under FRCP 12(b)(5) for Deficient Service of Process. On April 6, 2009, Plaintiffs OGM, Inc., Group Pro Inc., and Ole Georg ("Plaintiffs") filed their Opposition. On April 10, 2009, Televisa filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for April 20, 2009 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

I. Procedural and Factual Background

On September 3, 2008, Plaintiffs filed this action against Televisa, a Mexican corporation, and other defendants, alleging claims for relief for copyright infringement and breach of contract.

Plaintiffs have made three separate attempts to serve the summons and complaint on Televisa. First, on November 20, 2008, Plaintiffs' counsel sent copies of the summons and complaint to Televisa's office in Mexico City via international registered mail, return receipt requested. The return receipt was received by the Plaintiffs' counsel in January 2009, indicating that the documents were delivered to Armando Verduco on December 15, 2008. Second, on

January 30, 2009, copies of the summons and complaint were personally delivered to Televisa's office in Mexico City by a Mexican notary public. Finally, on March 17, 2009, the day after Televisa filed this Motion to Dismiss claiming insufficient service of process, Plaintiffs submitted translated copies of the summons and complaint, together with an official Request for Service Abroad of Judicial or Extrajudicial Documents, to Mexico's Central Authority for service pursuant to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (the "Hague Convention"). As yet, the Central Authority has not certified that the summons and complaint have been served.

Televisa moves to dismiss under Federal Rule of Civil Procedure 12(b)(5), contending that it was not properly served in accordance with the Hague Convention.

II. Standard

Federal Rule of Civil Procedure 12(b)(5) authorizes a defendant to move for dismissal based on insufficient service of process. When a defendant challenges service, the plaintiff bears the burden of establishing the validity of service. See *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir.2004).

III. Discussion

Rule 4 of the Federal Rules of Civil Procedure expressly authorizes service of process on foreign business entities, such as Televisa, "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention" See Fed.R.Civ.P. 4(f)(1), 4(h)(2). Because the United States and Mexico are both signatories to the Hague Convention, the Hague Convention provides the exclusive means by which Plaintiff can serve Televisa. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) ("[C]ompliance with the Convention is mandatory in all cases to which it applies."); *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) ("Because service of process was attempted abroad, the validity of that service is controlled by the Hague Convention, to the extent that the Convention applies").

The primary method by which service is accomplished under the Hague Convention is by forwarding the summons and complaint to the "Central Authority" for the country in which service is to be made, along with a request for service. See Hague Convention, Arts. 2, 3, and 5. Once the Central Authority receives a request that complies with the Hague Convention, the Central Authority must itself serve the documents or arrange to have them served by an appropriate agency. See *id.* at Art. 5. After service has been completed, the Central Authority must then "complete a Certificate in the form of the model annexed to the . . . Convention," detailing "the method, the place, and the date of service" or explaining why service did not occur, and thereafter forward the completed Certificate "directly to the applicant." See *id.* at Art. 6

In addition to service through a country's Central Authority, Article 10 of the Hague Convention permits service of process by alternative methods, including personal service or service by mail "[p]rovided the State of destination does not object." See *id.* at Art. 10. The parties dispute whether Mexico has objected to these alternative methods of service under Article 10.

When Mexico acceded to the Hague Convention, it filed with the Ministry of Foreign Affairs of the Netherlands (the “Ministry”) declarations in Spanish, objecting to all alternative methods of service under Article 10 of the Hague Convention. Specifically, Mexico’s Article 10 declaration provides in relevant part:

En relación con el artículo 10, los Estados Unidos Mexicanos no reconocen la facultad de remitir directamente los documentos judiciales a las personas que se encuentren en su territorio conforme a los procedimientos previstos en los incisos a), b) y c)

See Declaration of Dylan Ruga, Exhibit B at p. 26; Accession (with Declarations) of Mexico to the Hague Service Convention, 2117 U.N.T.S. 318 (2000) (Spanish text of Declarations). According to a certified translation by American Language Services, a company specializing in the translation of documents, this declaration provides:

In relation to Article 10, the United Mexican States are opposed to the direct service of documents to persons in Mexican territory according to the procedures described in subparagraphs a), b) and c)

See Declaration of Dylan Ruga, Exhibit H at p. 126.

This translation comports with the translation and analysis of the original Mexican declaration in a forthcoming law review article, and the translation by Fernando Guerrero Ponce, one familiar with the English and Spanish languages for 32 years. See Declaration of Dylan Ruga, Exhibit F at pp. 86-92 (Charles B. Campbell, No Sirve: *The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention*, 19 Minn. J. Int’l L. (forthcoming Winter 2010) [hereinafter “Campbell”]; Exhibit C at p. 41 (translation by Fernando Guerrero Ponce).

Unfortunately, however, when Mexico filed its declarations with the Ministry, the Ministry prepared an erroneous “courtesy translation” of Mexico’s declarations from the original Spanish text into English, which makes it appear that Mexico did not object to certain of the alternative methods of service under Article 10. Declaration of Dylan Ruga, Exhibit D; Exhibit F at p.77/Campbell at p.2 (“Unfortunately, a mistake occurred in the English courtesy translation of Mexico’s Article 10 declaration, making it appear that Mexico’s opposition applies only to the alternative methods of service of process under Article 10 when attempted ‘through diplomatic or consular agents.’”). Apparently relying on the English courtesy translation, a section on the U.S. State Department’s website, entitled “International Judicial Assistance in Mexico,” states that service may be accomplished in Mexico by international registered mail or by personal service because “[t]here is no provision in Mexico law specifically prohibiting service” by these methods.¹ See http://travel.state.gov/law/info/judicial/judicial_677.html (last visited April 14, 2009). Several courts, relying on the State Department’s website and/or the erroneous English courtesy

¹Yet, the State Department’s Foreign Affairs Manual, also available on its website, states that service of process in Mexico by registered mail is prohibited because Mexico lodged objections to Article 10(a) of the Hague Convention. See 7 Foreign Affairs Manual § 953.5 (2007).

translation, have concluded that Mexico did not object to certain of the alternative methods of service under Article 10. See, e.g., *Casa de Cambio Delgado, Inc. v. Casa de Cambio Puebla, A.A. de C.V.*, 196 Misc. 2d 1, 7 (N.Y. Supr. Ct. 2003) (citing English courtesy translation, and U.S. State Department's website in support of its conclusion that "[a]s Mexico did not expressly prohibit the private service of process through a privately retained agent/attorney in its declaration regarding article 10 of the Hague Convention, this court finds that such service was proper under article 10(b) or (c) of the Hague Convention."); *In re Alyssa F.*, 112 Cal. App. 4th 846, 854 (2003) (citing State Department website and concluding that "Mexico apparently does not prohibit service on a person by registered mail."); *NSM Music, Inc. v. Alvarez*, 2003 WL 685338, at * 2 (N.D. Ill. Feb. 25, 2003) ("Mexico does not appear to have a prohibition on service by registered mail, at least according to a U.S. State Department Web site.").

The Court is bound by the original Mexican declaration, not the "courtesy translation," the U.S. State Department's website, or the state or district court decisions relying on the courtesy translation and/or the U.S. State Department's website. See, e.g., *Todak v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 453 (1930) (rejecting an English translation and explaining that "[t]he text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling."); *In re Alyssa F.*, 112 Cal. App. 4th at 855 n.10 ("[T]he State Department web site is not authority and lacks the force of law . . ."). Accordingly, based on the original Mexican declaration, the Court concludes that Mexico has in fact objected to service through the alternative methods specified in Article 10 of the Hague Convention, and that service through Mexico's Central Authority is the exclusive method by which Plaintiff can serve Televisa in Mexico. See Restatement (Third) of Foreign Relations Law § 471 cmt. e (1987) ("[F]or states that have objected to all of the alternative methods, service through the Central Authority is in effect the exclusive means."). Although Plaintiffs have submitted a Request for Service to Mexico's Central Authority, such service is not complete as the Central Authority has yet to provide Plaintiffs with a certificate of service under Article 6 of the Hague Convention, and the requirements of Article 15 have not been satisfied.² See *Universal Trading & Investment Co. v. Kiritchenko*, 2007 WL 66083 (N.D. Cal Feb. 28, 2007).

Where service of process is insufficient, federal courts have broad discretion to dismiss the action or to retain the case but quash the service of process. *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir.1976) ("The choice between dismissal and quashing service of process is in the district court's discretion."). "[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiffs free to effect proper service." *Umbenhauer v. Woog*, 969 F.2d 25, 30-31 (3rd Cir.1992) (citing, *inter alia*, 5AB Charles A. Wright

²According to Article 15 of the Hague Convention, the Court may hold that service is complete even if the Central Authority has not returned a certificate under Article 6, if the following three conditions are satisfied: (1) "the document was transmitted by one of the methods provided for in this Convention," (2) "a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document," and (3) "no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed." Hague Convention, Art. 15.

& Arthur R. Miller, Federal Practice and Procedure § 1354 (2004)). Because there exists a reasonable prospect that Plaintiffs will be able to serve Televisa, the Court quashes the service on Televisa, but declines to dismiss the action.

IV. Conclusion

For the foregoing reasons, the Court **QUASHES** the service of process on Defendant Televisa, S.A. de C.V, but **DENIES** Defendant Televisa, S.A. de C.V.'s Motion to Dismiss under FRCP 12(b)(5) for Deficient Service of Process.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.