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15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION
19

20 TEVRA BRANDS, LLC,

21 Plaintiff,

22 v.

23 BAYER HEALTHCARE LLC, and
24 BAYER ANIMAL HEALTH GmbH, and
BAYER AG,

25 Defendants.
26
27
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Case No. 3:19-cv-04312-BLF

**PLAINTIFF TEVRA BRANDS, LLC'S
NOTICE OF MOTION AND MOTION
FOR ALTERNATIVE SERVICE ON
DEFENDANTS BAYER AG AND BAYER
ANIMAL HEALTH GMBH;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: August 20, 2020
Time: 9:00 a.m.
Ctrm: 3, 5th Floor
Judge: Honorable Beth Labson Freeman

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 20, 2020 at 9:00 a.m., or as soon as the matter may be heard, before the Honorable Beth Labson Freeman, plaintiff Tevra Brands, LLC (“Tevra”) will, and hereby does, move this Court for an order authorizing substituted service of process on defendants Bayer AG and Bayer Animal Health GmbH through counsel for defendant Bayer HealthCare, LLC, Daniel Asimow of Arnold & Porter Kaye Scholer LLP.

Tevra’s motion is based on this notice, the accompanying memorandum of points and authorities, the declarations of Russell Ortiz and Stephan Teipel, the pleadings and papers on file in this action, and such other evidence and argument as may be presented at the hearing on the motion.

Dated: May 15, 2020

Respectfully Submitted,
POLSINELLI LLP

By: /s/ DANIEL D. OWEN
Daniel D. Owen

Attorneys for Plaintiff
TEVRA BRANDS, LLC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Tevra Brands, LLC (“Plaintiff” or “Tevra”) respectfully requests an order
4 pursuant to Fed. R. Civ. P. 4(f)(3) authorizing service on Defendants Bayer AG and Bayer
5 Animal Health GmbH (“German Defendants”) through its U.S.-based lead counsel in this case,
6 Daniel Asimow at Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”), by email. Rule
7 4(f)(3) authorizes such service, and the facts warrant an exercise of that authority. Bayer AG is
8 the parent company and sole owner of the other two defendants in this case, Bayer HealthCare
9 LLC (which was served and has appeared) and Bayer Animal Health GmbH (which has not).
10 All defendants (including the German Defendants) have a “duty to avoid unnecessary expenses
11 of serving the summons.” Fed. R. Civ. P. 4(d)(1). Plaintiff formally requested that the German
12 Defendants waive service under Rule 4(d), but counsel for Bayer HealthCare LLC, speaking for
13 the German Defendants, refused. The defendants are delaying this case, and are imposing
14 unnecessary costs and burdens on Tevra to capitalize on an asymmetry of resources between the
15 parties. No legitimate goal would be served in denying this motion.

16 **II. FACTUAL BACKGROUND**

17 Tevra filed this suit on July 26, 2019 (ECF No. 1) and issued a summons to the German
18 Defendants on the same date (ECF No. 4), but has been unable to serve the German Defendants
19 for several months. Tevra first asked Thomas Szivos, an attorney who is normally based at
20 Arnold & Porter but was on secondment representing Bayer U.S. LLC as in-house counsel, to
21 accept service on behalf of the German Defendants on August 7, 2019. Counsel refused, stating
22 that he was not authorized to accept service on behalf of the German Defendants and that he does
23 not represent the German Defendants. Tevra made the same request on May 1, 2020, and
24 counsel again refused. Although he says he does not represent the German Defendants, Mr.
25 Asimow has told the Court that the German Defendants will contest personal jurisdiction once
26 they are served. *See* Joint CMC Hearing Tr. at 6:4-8; Joint CMC Statement (ECF No. 55) at 2.
27 Additionally, Mr. Asimow is a partner at Arnold & Porter, which regularly represents Bayer AG
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1 and its subsidiaries in federal courts in the United States. *See, e.g. Hillger v. Monsanto Co. et al*,
2 No. 3:19-cv-04657-VC (N.D. Cal.) (Arnold & Porter represented Bayer AG and Monsanto Co.);
3 *Steen v. Bayer Corporation et al*, No. 2:15-cv-05993 (C.D. Cal.) (Arnold & Porter represented
4 Bayer AG, Bayer Corporation and Bayer HealthCare Pharmaceuticals Inc.); *In re:*
5 *Fluoroquinolone Products Liability Litigation*, MDL No. 2642, No. 0:15-md-02642-JRT (D.
6 Minn.) (Arnold & Porter represented Bayer AG, Bayer Corporation, Bayer Pharma AG, Bayer
7 HealthCare Pharmaceuticals Inc. and Merck & Co., Inc.).

8 On August 29, 2019 Tevra hired First Legal Investigations to translate all documents to
9 be served on the German Defendants, and to effectuate service under the Hague Convention. *See*
10 Declaration of Russell Ortiz at ¶ 2. First Legal Investigations first attempted service under the
11 Hague Convention on September 25, 2019. *See id* at ¶ 3. The Central Authority in Germany
12 received the service packets on October 1, 2019. *Id.* On December 9, 2019, Polsinelli PC
13 received those service packets back from the Central Authority because First Legal
14 Investigations had made some errors in the USM-94 form required for service. *Id.* at ¶ 4. First
15 Legal Services attempted service a second time under the Hague Convention again on December
16 10, 2019, and the Central Authority in Germany received the service packets on December 16,
17 2019. *Id.* at ¶ 5. Again, on February 10, 2020, Polsinelli PC received those service packets back
18 from the Central Authority. *Id.* at ¶ 7. Although the Central Authority explained that the service
19 packet did not include the correct number of copies and a listing of the deadlines, it was First
20 Legal Investigation's understanding that the packets were indeed complete. *Id.* at ¶ 8. Service
21 was attempted under the Hague Convention for the third time on March 9, 2020. *Id.* at ¶ 12.
22 Tevra received confirmation that the service packets have been received and that they are
23 complete. *See* Decl. of Stephan Teipel at ¶ 3. However, Tevra has learned from counsel in
24 Germany that due to the coronavirus crisis the court in Düsseldorf is partially closed with a large
25 backlog of service requests. *See id.* at ¶ 4. It is unclear when normal operations will resume, and
26 the court has estimated that it will be another several months before service is effectuated. *Id.*

1 Meanwhile, motions practice and discovery are proceeding without the German
2 Defendants, which creates a risk of prejudice to Tevra. The German defendants are important to
3 the ultimate resolution of this case. Defendant Bayer AG has ultimate control of its U.S.
4 subsidiaries, including defendant Bayer Healthcare LLC. Defendant Bayer Animal Health
5 GmbH is deeply involved in Bayer’s Imidacloprid business, and actually filed a U.S. lawsuit
6 against the maker of a generic Imidacloprid topical. *See Amended Complaint, Bayer Intellectual*
7 *Prop. GmbH v. CAP IM Supply, Inc.*, No. 17-CV-591-RGA (D. Del. May 11, 2017). The global
8 marketing of the Bayer products at issue, Advantix and Seresto, was directed and controlled by
9 employees of the German defendants. Tevra has demanded that several of these employees be
10 added to the list of “custodians” offered by defendant Bayer Healthcare LLC, which does not
11 include any employees of the German defendants. Bayer HealthCare LLC has advised that it is
12 unwilling to produce discovery from the German Defendants because their documents and ESI
13 are not in Bayer HealthCare’s “possession, custody, or control.” As of yet, Plaintiff has not be
14 able to seek discovery from the German defendants, and discovery will close in October 2020.

15 Further, Bayer HealthCare, is selling its Bayer Animal Health division (including the
16 business at issue here) to Elanco Animal Health, which could raise additional hurdles in
17 requesting and receiving discovery from the German Defendants as well as in satisfying
18 judgement. There is no reason to further delay service on the foreign defendants, and good cause
19 to resolve the service and jurisdictional issues promptly.

20 **III. LEGAL STANDARD**

21 Federal Rules of Civil Procedure 4(h)(2) and 4(f) established three mechanisms for
22 serving a corporation in a foreign country: (1) by an internationally agreed means of service that
23 is reasonably calculated to give notice, such as those provided by the Hague Convention; (2) by
24 means reasonably calculated to give notice; or (3) by other means not prohibited by international
25 agreement, as the court orders. *See Fed. R. Civ. P. 4(f)*. “[Plaintiff] need not have attempted
26 every permissible means of service of process before petitioning the court for alternative relief,”
27 but must only “demonstrate that the facts and circumstances of the present case necessitated the
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1 district court’s intervention.” *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1016 (9th
2 Cir. 2002). “Rule 4(f)(3) allows for an alternate means of service as long as it is directed by a
3 court and not prohibited by international agreement.” *Keck v. Alibaba.com, Inc.*, 330 F.R.D.
4 255, 257 (N.D. Cal. 2018). The method of service ordered must also be “reasonably calculated,
5 under all the circumstances, to apprise interested parties of the pendency of the action and afford
6 them an opportunity to present their objections.” *Keck v. Alibaba.com, Inc.*, 330 F.R.D. at 257
7 (internal citations and quotation marks omitted).

8 **IV. ARGUMENT**

9 Service on the German Defendants through counsel for Bayer AG’s U.S.-based
10 subsidiary, Bayer HealthCare LLC, is not prohibited by international agreement and comports
11 with due process requirements.

12 **A. Service on the German Defendants Through Counsel for Bayer Healthcare** 13 **LLC is not Prohibited by International Agreement**

14 “Service upon a foreign defendant’s United States-based counsel is a common form of
15 service ordered under Rule 4(f)(3).” *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, 2011 WL
16 2607158, at *13 (N.D. Cal. July 1, 2011). The United States and Germany are parties to the
17 Hague Convention, and Germany has objected under Article 10 of the Hague Convention,
18 prohibiting service by mail or through judicial officers. Because of Germany’s objection to
19 service through mail or judicial officers, German defendants are typically served through
20 Germany’s Central Authority. However, the Convention does not apply to service effected
21 through U.S.-based counsel. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707
22 (1988) (the “only transmittal to which the Convention applies is a transmittal abroad that is
23 required as a necessary part of service”). Nor has Germany prohibited other methods of service;
24 indeed “[t]he U.S. Supreme Court has upheld service on a German defendant through its U.S.-
25 based subsidiary.” *Updateme Inc. v. Axel Springer SE*, No. 17-CV-05054-SI, 2018 WL 306682,
26 at *3 (N.D. Cal. Jan. 5, 2018) (citing *Schlunk*, 486 U.S. at 696, 707); see also *In re S. African*
27 *Apartheid Litig.*, 643 F. Supp. 2d 423, 437 (S.D.N.Y. 2009) (“Although Germany has expressly
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1 forbidden service by judicial agent, by mail, or by diplomat . . . it has not expressly forbidden
2 numerous other potential avenues to insure that a defendant is aware of the allegations against
3 it.”). Here, service on Bayer AG’s subsidiary’s U.S.-based counsel does not implicate the
4 Convention because service is not being transmitted abroad. *See Schlunk*, 486 U.S. at 707
5 (“Whatever internal, private communications take place between the agent and a foreign
6 principal are beyond the concerns of this case.”).

7 **B. Service on the German Defendants Through Counsel for Bayer Healthcare**
8 **LLC Comports with Due Process Requirements**

9 Due process requires that “the method of service crafted by the district court must be
10 ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency
11 of the action and afford them an opportunity to present their objections.’” *Rio Properties, Inc. v.*
12 *Rio Int’l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002) (quoting *Mullane v. Cent. Hanover Bank*
13 *& Trust Co.*, 339 U.S. 306, 314 (1950) (Jackson, J.)). “Courts in the Ninth Circuit have ordered
14 service through United States-based counsel even when counsel has refused to accept service on
15 the ground that they do not represent the international defendants.” *Prod. & Ventures Int’l v.*
16 *Axis Stationary (Shanghai) Ltd.*, 2017 WL 1378532, at *4 (N.D. Cal. Apr. 11, 2017) (citing
17 *Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560, 566 (C.D. Cal. 2012).

18 Here, service via e-mail and mail upon counsel for Bayer AG’s U.S.-based subsidiary,
19 Bayer HealthCare LLC, is reasonably calculated to apprise them of the pendency of the action.
20 Arnold & Porter represents the German Defendants’ subsidiary Bayer HealthCare LLC in this
21 case, and has spoken on behalf of the German Defendants at the Initial Case Management
22 Conference, and in communications regarding service. Even if Arnold & Porter does not
23 technically represent the German Defendants in this case, it represents Bayer AG and its
24 subsidiaries in many other cases. Its “close connection to the Foreign Defendants would render
25 substituted service on the Foreign Defendants through [Arnold & Porter] as ‘reasonably
26 calculated’ to provide the same with sufficient notice of the action and an opportunity to object.”
27 *Prod. & Ventures Int’l v. Axis Stationary (Shanghai) Ltd.*, 2017 WL 1378532, at *4.

