DANIEL B. ASIMOW (Bar No. 165661)
daniel.asimow@arnoldporter.com
SEAN M. CALLAGY (Bar No. 255230)
sean.callagy@arnoldporter.com
ANDREW S. HANNEMANN (Bar No. 322400)
andrew.hannemann@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: 415.471.3100
Facsimile: 415.471.3400

SONIA K. PFAFFENROTH (Bar No. 223984)
sonia.pfaffenroth@arnoldporter.com
LAURA S. SHORES (appearance *pro hac vice*)
laura.shores@arnoldporter.com
KATHERINE E. CLEMONS (appearance *pro hac vice*)
katherine.clemons@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, D.C. 20001-3743
Telephone: 202.942.5000
Facsimile: 202.942.5999

Attorneys for Defendant BAYER HEALTHCARE LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

TEVRA BRANDS, LLC,

Plaintiff,

v.

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

Defendants.

Case No. 5:19-cv-04312-BLF

BAYER HEALTHCARE LLC'S OPPOSITION TO TEVRA BRANDS, LLC'S MOTION FOR ALTERNATIVE SERVICE ON DEFENDANTS BAYER AG AND BAYER ANIMAL HEALTH GMBH

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Casess **Page(s)**

Other Authorities

INTRODUCTION

Tevra's Motion for Alternative Service (Dkt. No. 116, "Motion" or "Mot.") asks this Court to excuse Tevra's repeated non-compliance with the core requirements of a binding treaty governing service of process abroad. Rather than fulfilling its obligations, Tevra asks the Court to instead conscript Arnold & Porter, undersigned counsel for Defendant Bayer HealthCare LLC ("BHC"), into acting as Tevra's service agent, and thereby hail into this Court two German defendants without respecting international legal norms.[1]

The Court should exercise its discretion to deny Tevra's Motion for several reasons. Tevra waited two months before first seeking to effect service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (entered February 10, 1969, *see* Fed. R. Civ. P. 4(f)) (the "Hague Convention" or "Convention"), and since then, has repeatedly failed to comply with the Convention's requirements. There is no basis to ignore the requirements of this treaty where Tevra has not even given the German court adequate time to complete service. Further, Tevra has yet to articulate a colorable basis for suing the two German Defendants, and has admitted it did so primarily to obtain discovery from Germany. In such circumstances, bypassing service under the Hague Convention is unwarranted and risks harming international comity.

For these reasons, and as further explained herein, BHC and Arnold & Porter respectfully request that Tevra's Motion be denied.

STATEMENT OF FACTS

Tevra filed its original Complaint on July 26, 2019. Dkt. No. 1. Despite naming the German Defendants as parties, and thus being aware of the need for service overseas, Tevra did not begin to make attempts at service at such time, or even procure a German translation of the Complaint. Rather, on August 7, 2019, Tevra requested that Thomas Szivos, an Arnold & Porter attorney on secondment at Bayer U.S. LLC (a non-party here), accept service on behalf of the German Defendants. Mot. at

[1] This Opposition is submitted jointly by BHC and Arnold & Porter. Tevra's Motion requests that Arnold & Porter be tasked with completing service upon Defendants Bayer AG and Bayer Animal Health GmbH (the "German Defendants"). For the avoidance of doubt, neither BHC nor Arnold & Porter intends to or is authorized to waive service on behalf of the German Defendants.

2:19-21. Mr. Szivos indicated that he did not have authority to accept service, but even then, Tevra did not hire a vendor to prepare a translation of its Complaint until August 29, 2019. Mot. at 3:8-9. It inexplicably took the vendor nearly another month to prepare a translation of the relevant materials and submit them for service in Germany. *Id.* at. 3:10-11. Tevra provides no details regarding where it sent this first service packet, besides its reference to a "German Central Authority." The relevant authority is dependent on the state, or *Bundesland*, where the German entity to be served is located.[2] The German Defendants are headquartered in Leverkusen, in the German state of North Rhine-Westphalia, and the relevant Authority for service under the Convention is the *Oberlandesgericht* (Higher Regional Court) in Düsseldorf.

Tevra also alleges—but submits no records—that the relevant Authority received the packets on October 1, 2019, and mailed them back to Tevra approximately two months later, on December 9, 2019, indicating that Tevra had made an error in filling out the necessary forms. Mot. at 3:12-14. Tevra does not dispute that the forms were not compliant, but indicates that this was due to an error on the part of its vendor.

On December 10, 2019, the Parties held an initial case management conference ("CMC"). At the CMC, Tevra stated that it had "initiated proceedings to have [the German Defendants] served." Dkt. No. 64, CMC Tr. at 3:17-18. Tevra further stated that its purpose for suing the German Defendants was twofold: to obtain discovery from Germany, and to ensure that any hypothetical future judgment could be satisfied in light of BHC's planned sale of certain assets. *Id.* at. 4:2-15.

Tevra alleges that its vendor attempted service a second time on December 10, 2019, and that such materials were received on December 16, 2019. Mot. at 3:15-17. Once more, the German court returned Tevra's materials within two months, informing Tevra on February 10, 2020 that Tevra again had failed to properly comply with service requirements. Mot. at 3:17-19. Tevra then waited another month, until March 10, 2020, before transmitting a third service packet. Dkt. No. 116-2 (Decl. of Russel Ortiz) ¶ 12. Tevra provides no explanation for this additional delay. The third submission of documents was received by the court in Düsseldorf on March 13, 2020. Mot. at 4:20-23.

[2] *See* HCCH, Germany - Central Authority & Practical Information (Dec. 13, 2019), *available at* https://www.hcch.net/en/states/authorities/details3/?aid=257.

With its Motion, Tevra has also submitted a declaration by Stephan Teipel, a German attorney based in Munich—on the other side of the country from Düsseldorf and in a different *Bundesland*—who attested that he had a conversation with a "Ms. Bolten" at the Düsseldorf court on April 23, 2020. According to Mr. Teipel, Ms. Bolten stated that the court was *partly* closed, and that it was working through a backlog of requests for service of process. Dkt. No. 116-1 (Decl. of Stephan Teipel) ¶¶ 3-4.

On April 27, Tevra emailed BHC to request that Arnold & Porter accept service on behalf of the German Defendants via email, citing COVID-19 as preventing service via the Hague Convention. *See* Declaration of Daniel B. Asimow in Support of Bayer HealthCare LLC's Opposition to Tevra's Motion for Alternative Service ("Asimow Decl.") Ex. A (Owen April 27, 2020 Letter). Arnold & Porter responded on May 1, 2020, observing that measures imposed since the emergence of COVID-19 did not arise to "extenuating circumstances," as the lawsuit had been pending for nine months at that point, whereas COVID-related measures had been in place for only six to eight weeks. Asimow Decl. Ex. B (Asimow May 1, 2020 Letter). Arnold & Porter next noted that BHC had offered Tevra reasonable accommodations and assurances concerning discovery and satisfaction of judgment. *Id.* Moreover, Tevra had not articulated any role by the German Defendants in the allegedly exclusionary and tying conduct at the center of Tevra's claims. *Id.* Arnold & Porter requested that Tevra provide additional relevant information regarding Tevra's attempts to effect service via the Hague Convention. *Id.* Contrary to Tevra's claim, Arnold & Porter did not flatly "refuse" to accept service at that time. *Cf.* Mot. at 2:23-24.

Nearly two weeks went by before Tevra responded on May 14, asserting that its second attempt to effect service was returned in March 2020 due to errors in the submission. Asimow Decl. Ex. C. As evidenced by Tevra's motion and declaration, however, this was inaccurate—the second attempt was returned on February 10. Mot. at 3:17-19. While Tevra provided some materials regarding its latest attempt to effect service, Tevra did not include materials showing its prior attempts to effect service or its communications with the court in Düsseldorf.

Without awaiting any further response from BHC or Arnold & Porter, Tevra filed its Motion for Alternative Service the next day, on May 15. Dkt. No. 116.

ARGUMENT

The Court, in its exercise of its discretion, should decline Tevra's Motion. Tevra has not shown that alternative service is warranted here, and it would be improper to serve the German Defendants by emailing counsel at Arnold & Porter.

I. THE COURT SHOULD EXERCISE ITS DISCRETION TO NOT PERMIT TEVRA TO CIRCUMVENT THE HAGUE CONVENTION

Federal Rule of Procedure 4(f) governs service of process on "an individual . . . not within any judicial district of the United States." Rule 4(f) contains three subdivisions, each of which authorizes different manners of serving someone outside the United States. Rule 4(f)(1) permits service "by any internationally agreed means . . . such as those authorized by the Hague Convention on Service." Rule 4(f)(2), not applicable here, lists several alternative means of service that are permissible "if an international agreement allows but does not specify other means," such as letters rogatory or a court-directed mailing. Rule 4(f)(3)—the exclusive basis of Tevra's Motion—allows service "by other means not prohibited by international agreement, as the court orders."

Whether to allow alternative service under Rule 4(f)(3) is left to "the sound discretion of the district court." *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002); *see also Brockmeyer v. May*, 383 F.3d 798, 805 (9th Cir. 2004). This entails a fact-specific determination of whether "the particularities and necessities of a given case require alternative service of process." *Rio Props.*, 284 F.3d at 1016. Here, Tevra has not carried its burden to show that alternative service is needed where (A) all delays in service are due to Tevra's own inaction and errors, (B) there is no risk of prejudice to Tevra, and (C) Tevra's proposal to ignore the Hague Convention would violate principles of international comity.

A. The Delay in Service is Due to Tevra's Inaction and Errors.

Tevra has not acted with diligence or care, and has not given the court in Düsseldorf adequate time to act upon Tevra's most recent submission. This alone is an adequate basis to deny relief.

The delays from which Tevra seeks relief were self-inflicted. Tevra waited for two months after filing suit to attempt service via the Hague Convention. Then, Tevra *twice* failed to properly submit the requisite paperwork and materials. Tevra various blames its vendor, the court in Düsseldorf

for allegedly not following its own rules, and COVID-related measures (Mot. at 3:8-26), but it is Tevra's responsibility to act with sufficient diligence and care to properly and timely effect service. Indeed, the court in Düsseldorf twice alerted Tevra to the flaws in its submissions. *Id.* at 3:12-18. Inexplicably, after receiving its service packet back the second time, Tevra waited *another* month before making a third attempt in mid–March. *Id.* at 3:17-21. Had Tevra acted sooner, COVID would likely have not impacted service at all.

In addition, Tevra wrongly suggests that Arnold & Porter "refused" to agree to alternative service, and is somehow capitalizing on Tevra's delay. Mot. at 2:23-24. Upon receiving Tevra's request, Arnold & Porter responded within four days to ask why Tevra had not completed service prior to the emergence of COVID-19. *See* Asimow Decl. Ex. B. Tevra waited nearly two weeks before providing an incomplete response. *See* Asimow Decl. Ex. C. Instead of giving Arnold & Porter an opportunity to consider this information, Tevra filed its Motion the next day. *See* Dkt. No. 116. Tevra's failure to fully engage in the meet-and-confer process or explain its inactions are further reasons to deny its Motion.

Further, the court in Düsseldorf has not had adequate time to process Tevra's third request for service. Foreign authorities presumptively have six months to complete service. *See* Fed. R. Civ. P. 4, 1993 Advisory Committee Notes, subd. (f), *see also U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, No. C-07-1221-RSL, 2007 WL 3012612 at *2 (W.D. Wash., Oct. 11, 2007) (noting that alternative service may be allowed where a Central Authority fails to effect service within the six-month period contemplated by the Convention). Thus, when considering whether to allow alternative service due to a delay by a country's Central Authority, courts have typically only considered periods longer than six months to be relevant. *See, e.g., Prods. & Ventures Int'l v. Axus Stationary (Shanghai) Ltd.*, No. 16-cv-00669-YGR, 2017 WL 1378532 at *3 (N.D. Cal. Apr. 11, 2017) (permitting alternative service where, eleven months after plaintiff submitted documents to Central Authority, service had not been completed); *Morningstar v. Dejun*, No. CV-11-00655-DDP (VBKx), 2013 WL 502474 at *2 (C.D. Cal. Feb. 8, 2013) (ordering alternative service where plaintiffs had attempted to serve process in China for over a year); *In re South African Apartheid Litig.*, 643 F. Supp. 2d 423, 437 (S.D.N.Y. 2009) (ordering alternative service where attempts at service through the Hague

Convention were delayed by six years). The fact that the court in Düsseldorf *twice* responded to Tevra's requests in two months—far less than the allotted time—shows that it takes its Hague Convention duties seriously.

Unable to show *actual* delay by the court in Düsseldorf, Tevra suggests that service *may* be impacted because of the COVID-19 crisis. Mot. at 3:24-26. This assertion is based on a declaration of Munich-based lawyer Stephan Teipel, who had one telephone conversation in April with an individual in Düsseldorf (a "Ms. Bolten," whose full name and title are not provided). Dkt. No. 116-1 ¶¶ 3-4. If anything, Mr. Teipel's declaration confirms that the court in Düsseldorf remains operational and will continue to process service requests, even if not quite as efficiently as before. *Id.* It is not a surprise that COVID has impacted the court's work, yet Tevra cites no authority that this is grounds for dispensing with the Convention altogether. Courts that deem delay a factor in ordering alternative service require "evidence that the plaintiff's service under the Hague Convention was actually delayed." *Keck v. Alibaba.com, Inc.*, 330 F.R.D. 255, 259 (N.D. Cal. 2018) (Freeman, J.). Such "evidence" is lacking here. *Id.*; *see also Moldex Metric, Inc. v. Swedsafe AB*, Case No. CV 18-3502-JFW (AGRx), 2018 WL 6137578, at *2 (C.D. Cal. June 1, 2018) (holding that plaintiff should continue attempts to effect service under the Hague Convention where there was no evidence that the Central Authority had taken longer than six months to effect service).

Even if it takes additional time for the court in Düsseldorf to effect service, Tevra has not "presented issues that require resolution with greater urgency than the Hague Convention process can accommodate," and that merit resorting to simply emailing Arnold & Porter instead. *See Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 11-CV-02460-LHK, 2011 WL 2607158 at *13 (N.D. Cal. July 1, 2011). Discovery is open until October, and the upcoming hearing on BHC's Motion to Dismiss scheduled for July 30 may moot or reduce the number of pending issues. Dkt. No. 105. And, a modest delay is not dispositive. *See Keck*, 330 F.R.D. at 259 (noting that courts that have considered delays in effecting service under the Hague Convention "did not rely on the delay factor to permit service under Rule 4(f)(3)"). Finally, this is not a case where a defendant cannot be found or sought to evade service, such that the Court's intervention is needed to rectify misbehavior. *Cf. Rio Props.*, 284 F.3d at 1016 (approving of alternative service where defendant' address in Costa Rica—a non-signatory

to the Hague Convention—could not be ascertained, and defendant evaded service attempts); *Keck*, 330 F.R.D. at 258 (noting that plaintiff had "not provided evidence that the locations of Additional Defendants are unknowable and failed to show that the 'particularities and necessities' of this case warrants service by electronic means").

It is solely because of Tevra's delays and errors that the German Defendants have not been served despite this lawsuit having been filed ten months ago. For these reasons, the Court should deny Tevra's Motion.

B. Proceeding with Service Under the Hague Convention Will Not Prejudice Tevra

Contrary to Tevra's assertion, there is no "risk of prejudice to Tevra" in allowing the court in Düsseldorf to complete service under the Hague Convention. Mot. at 4:1-2. That is because Tevra is receiving relevant discovery and has never stated a colorable basis for suing the German Defendants in the first place.

In its Motion, Tevra says the "German defendants are important to the ultimate resolution of this case," but fails to cite any allegations against them that could conceivably give rise to liability. Neither Tevra's original nor its First Amended Complaint ("FAC") state a link between the alleged exclusionary scheme and the German Defendants, or any other non-conclusory basis for suing them here. Even after Tevra was given an opportunity to amend its Complaint, with access to the contracts on which its claims are based, it did not articulate any wrongdoing by the German Defendants—because Tevra knows that the German Defendants are not parties to these contracts. *See* Dkt. Nos. 43-2 through 43-15 (Purchase Agreements, Business Agreements, Master Vendor Agreements, and Distribution Agreements between Bayer HealthCare LLC and certain Retailers and Distributors).

Rather, Tevra has admitted that it sued the German Defendants to obtain additional discovery and secure a hypothetical future judgment. Dkt. No. 64, CMC Tr. 4:2-15. These are not legitimate grounds to sue a party. Instead, Tevra "must include allegations specific to each defendant alleging that defendant's role" in the alleged misconduct. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1120 (N.D. Cal. 2008). Lacking a colorable basis for suing the German Defendants at all, Tevra's contention that it has "not [yet] be[en] able to seek discovery from the German defendants" (Mot. at 4:13-14) puts the cart before the horse. Moreover, while Tevra asserts in the

Motion that global marketing of certain Imidacloprid products "was directed and controlled by employees of the German defendants" (*id.* at 4:7-9), this is both irrelevant—as this case concerns sales contracts, not marketing practices—and unsupported attorney argument. Nor is Tevra being denied essential discovery. BHC is in the process of producing materials relevant to the claims in this case. While Tevra has demanded materials from certain German custodians, it has failed to show that the German Defendants have relevant materials in their possession. Accordingly, Tevra has not established that circumventing the Hague Convention is necessary to obtaining relevant information.

Even if Tevra genuinely needed discovery from Germany, it would not be necessary to *sue* parties based there. Instead, Tevra can seek discovery either via the Federal Rules of Civil Procedure or a separate treaty, the Hague Convention on the Taking of Evidence Abroad ("Hague Evidence Convention"). *See St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 104 F. Supp. 3d 1150, 1160 (D. Or. 2015) ("The taking of discovery from foreign entities in civil litigation pending in the United States federal courts is regulated by two sets of rules: the Federal Rules of Civil Procedure . . . and the Hague Evidence Convention"); *see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539-41 (1987) (finding that both the Hague Evidence Convention and Federal Rules of Civil Procedure could be used to obtain evidence located abroad); *Autodesk, Inc. v. ZWCAD Software Co.*, No. 5:14-cv-01409-EJD, 2015 WL 1928184, at *1 (N.D. Cal. Mar. 27, 2015) (noting that both the Federal Rules of Civil Procedure and the Hague Evidence Convention govern discovery of evidence located abroad). As the Supreme Court has found, the Hague Evidence Convention "draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves." *Societe Nationale*, 482 U.S. at 541. Accordingly, if Tevra were to articulate a non-conclusory basis for taking discovery in Germany—which it still has not—it could avail itself of the Hague Evidence Convention. Deputizing Arnold & Porter to hail the German Defendants into this lawsuit as a means to obtain discovery is not appropriate.

Tevra also asserts that the pending sale of the Bayer animal health business could lead to hurdles in satisfying a hypothetical future judgment, but again provides no basis for this assertion. Mot. at 4:15-18. Even if there were concerns about BHC's solvency, the remedy is not to sue parent entities or affiliates. To allow satisfaction from another entity, the Court would need to disregard the

corporate identity of BHC and allow recovery from its affiliates. Such disregard of the corporate form is only appropriate "where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation." *Walsh v. Kindred Healthcare*, 798 F. Supp. 2d 1073, 1082 (N.D. Cal. 2011) (noting that this doctrine applies equally to LLCs). That, too, has not been alleged here, so there is no basis to assume that the German Defendants would be liable for a hypothetical judgment.

Because of the tenuous basis for suing the German Defendants, there can be no prejudice in requiring Tevra, at a bare minimum, to comply with and respect the German Defendants' rights under an international treaty. Nothing in Tevra's papers demonstrates that the present circumstances are so exigent that the Court's intervention is needed to secure relief. *See Rio Props.*, 284 F.3d at 1016; *see also Madu Edzoie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) ("A district court may require the parties to show that . . . the circumstances are such that the district court's intervention is necessary") (internal quotation marks and citations omitted).

C. Tevra's Attempt to Circumvent the Hague Convention Would Violate Principles of International Comity

Finally, when considering whether to allow alternative service, the Court should take into consideration principles of international comity. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 598-99 (9th Cir. 2014) (noting that comity is "concerned with maintaining amicable working relationships between nations, a shorthand for good neighbourliness, common courtesy, and mutual respect between those who labour in adjoining vineyards") (internal citations and quotations marks omitted). These principles weigh against relief here. Tevra seeks to circumvent agreed-upon procedures between Germany and the United States (among other signatories) for service of process abroad, in part by assigning blame *to a German court* for failing to properly apply *German law*. Mot. at 3:18-26. Such accusations against a foreign court should not be credited and certainly are not in keeping with norms of comity.

Instead, where Tevra has provided no compelling reason for departing from the Convention's procedures, "[f]ollowing the procedures authorized in" a treaty are "preferable for reasons of international comity, which is concerned with maintaining amicable working relationships between

nations and mutual respect for the laws of foreign countries." *C&F Sys., LLC v. Limpimax, S.A.*, No. 1:09-cv-858, 2010 WL 65200, at *1 (W.D. Mich., Jan. 6, 2010). Tevra's assertion that it would be faster to allow alternative service, while perhaps true, is not sufficient reason to bypass service—it is virtually always faster to skip the line. *See In re The Richmond Grp., Inc.*, No. 2-16-20258-PRW, 2017 WL 4221099, at *4 (Bankr. W.D.N.Y. Sept. 21, 2017) ("[T]reading on the sovereignty of [a foreign country], for the sake of simplicity, is not in keeping with the letter or spirit of Rule 4(f)(2)(B)"). Tevra's Motion boils down to a desire to avoid the consequences of its own delays and failure to comply, and the possibility that service may now take slightly longer due to COVID-19. This Court should be loath to set aside the treaty on these grounds, lest citizens of the United States be deprived of their rights under the Hague Convention for as long as COVID-related circumstances persist. For these reasons as well, the Court should deny Tevra's Motion.

II. SERVICE ON BAYER HEALTHCARE LLC'S COUNSEL WOULD BE IMPROPER

While alternative service is not warranted in this case, Teva's requested method of service on Arnold & Porter is independently improper under the circumstances. That Arnold & Porter has represented Bayer AG in other litigation matters is not relevant here. Indeed, such a precedent would put foreign companies to a Hobson's choice between retaining U.S. counsel to be advised of their rights and duties, and later forfeiting their rights under the Hague Convention for having retained counsel at all. This cannot be the purpose or intent of the Federal Rules or the Convention itself.

The types of cases in which service on counsel was allowed are markedly distinguishable from the facts presented here, and in no way presented the risks to comity that Tevra's request poses. In *Rio Properties*, service on counsel was only allowed after plaintiff attempted to serve the foreign entity through an international courier, who maintained an address in Miami and declined to accept service, after which the plaintiff hired an investigator to locate the entity in Costa Rica—a non-signatory to the Hague Convention—and was unsuccessful. 284 F.3d at 1016. This inability to even *locate* much less *serve* the defendant (an online betting service) was critical to the Court's reasoning. The Ninth Circuit reasoned in this regard that "when [plaintiff] presented the district court with its inability to serve an elusive international defendant, striving to evade service of process, the district court properly exercised its discretionary powers to craft alternate means of service." *Id.* Tevra has

made no such showing here—nor could it, as Bayer AG is one of the largest pharmaceutical companies in the world and has been based in Leverkusen, Germany for over a century.

While Tevra also cites *Updateme Inc. v. Axel Springer SE*, there the court allowed alternative service on counsel for a U.S. subsidiary where the plaintiff had specifically alleged that all four defendants were alter egos of one another, filed a tax return together, and acted as a single enterprise. No. 17-cv-05054-SI, 2018 WL 306682 (N.D. Cal. Jan. 5, 2018). That, too, is a far cry from the facts alleged here, where Tevra has made no such similar allegations, and instead seemingly sued the German Defendants because they have "Bayer" in their name. *See id.*; *see also Codigo Music, LLC v. Televisa S.A. de C.V.*, No. 15-CIV-21737-Williams/Simonton, 2017 WL 4346968, at *10 (S.D. Fla. Sept. 29, 2017) ("[T]he Plaintiffs have failed to present any of the circumstances that have been present in other cases where courts have determined that service of a foreign defendant through domestic counsel is warranted. There is no evidence that the Defendant in this case is evading service, that the Defendant's address is unknown, that there is any great urgency present in the case, and there has been no showing that service is particularly difficult").

Tevra's reliance on *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988), is likewise misplaced. In *Volkswagen*, the Supreme Court considered substitute service not on counsel, but on a U.S. subsidiary as Volkswagen's agent under the Illinois long-arm statute. *Id.* at 706. Tevra is not alleging that Arnold & Porter is an agent of the German Defendants, nor has it argued for service under California's long-arm statute. Instead, Tevra is seeking to dispense with service altogether and provide mere notice of this action via email to the undersigned. This exceeds the scope of the holding in *Volkswagen*, and should not be permitted here. *See Liao v. Ashcroft*, No. C-08-2776-PJH, 2009 WL 636191, at *3 (N.D. Cal. Mar. 11, 2009) ("[S]ervice of process . . . is an indispensable prerequisite to the court's jurisdiction to proceed") (quoting *Beecher v. Wallace*, 381 F.2d 372, 373 (9th Cir. 1967)).

CONCLUSION

For the foregoing reasons, BHC and Arnold & Porter respectfully request that Tevra's motion for alternative service on Defendants Bayer AG and Bayer Animal Health GmbH be denied.

Dated: May 29, 2020

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ *Daniel B. Asimow*
DANIEL B. ASIMOW

Attorneys for Defendant
BAYER HEALTHCARE LLC