

Judge Albright Weighs Online Presence in Determining Whether Plaintiff Can Serve Process Electronically

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In *Sinox Co. v. YiFeng Manufacturing Co. and Shenzhen Yuandaoyuan Indus. Co.*, Sinox Co. (Sinox) sought the court's permission to effect alternative service via email under Rule 4(f)(3). Judge Albright granted-in-part-as-modified and denied-in-part Sinox's motion for leave to effect alternative service on defendants. He allowed electronic service upon Shenzhen Yuandaoyuan Indus. Co. (SYIC), but not YiFeng Manufacturing Co. (YiFeng), with the difference arising from each defendant's online presence, or lack thereof.

Under Federal Rule of Civil Procedure 4(f)(3), courts enjoy broad discretion to authorize service on foreign corporations by means that are not prohibited by international agreement. Judge Albright found that no international agreement prohibited electronic service on the defendants, which are Chinese companies. As a signatory to the Hague Convention, China has objected to service that is effectuated via postal channels under Article 10(a) of the Hague Convention. Although there is differing case law as to whether Article 10(a) includes electronic service, Judge Albright ruled that an objection to postal service does not also constitute an objection to electronic service.

Judge Albright authorized alternative service under Rule 4(f)(3) because Sinox attempted service through multiple methods, including traditional means. For instance, Sinox attempted postal service, Hague service, and electronic service. Though noting that alternative service may be considered without any attempt at traditional service, Judge Albright acknowledged that courts generally prefer an attempt at service in compliance with the Hague Convention before granting alternative service. He further noted that comity principles counsel in favor of at least attempting service in accordance with foreign law.

In authorizing alternative service, Judge Albright was motivated, at least in part, by the delay Hague service has presented to Sinox. As of the date of the order, Sinox's Hague service has been outstanding for over three months, with further delays likely due to the coronavirus and geopolitical issues. Relying on *Document Operations LLC v. AOS Legal Techs., Inc.*, Judge Albright observed that alternative service can be warranted when time considerations render Hague service inappropriate. No. 4:20-CV-1532, 2020 U.S. Dist. LEXIS 211307, at *8 (S.D. Tex. Nov. 12, 2020). Noting that several months of delay associated with Hague service would permit the accused infringing products to continue to enter the market and delay the resolution of Sinox's patent rights, Judge Albright determined that alternative service is appropriate.

But even though Judge Albright determined that alternative service is justified under Rule 4(f)(3), it must still satisfy due process. Judge Albright ruled that Sinox's proposed electronic service upon SYIC satisfies due process because SYIC conducts online business on both Amazon and its own website. Accordingly, Judge Albright found that service via SYIC's email address is "reasonably calculated to apprise SYIC of this Action." Judge Albright further noted that emails Sinox had previously sent to SYIC actually notified SYIC of the action, and Sinox has even communicated with a SYIC manager about the action via WeChat. On that basis, the court ordered that Sinox may serve SYIC using email and Amazon's messaging center if Sinox also attempts service through the manager's WeChat and translates process into Chinese. Because SYIC has conducted online business through these channels, due process is satisfied by service through the same channels.

However, Judge Albright ruled that email is not reasonably calculated to provide notice to the other defendant, YiFeng. Unlike SYIC, Sinox's allegations rely upon YiFeng's conduct at trade shows, not online conduct. Moreover, Sinox has not shown that YiFeng has responded to any of Sinox's emails or that it is actually aware of the litigation. Accordingly, Judge Albright denied Sinox's request to effectuate alternative service upon YiFeng.

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