UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

LAWRENCE F. CLUFF, JR., ROGER E. SHAOUL, and JAMES SHAOUL,

Defendants.

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MEMORANDUM AND ORDER

17-CV-2460 (RMB) (KNF)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

PLAINTIFF'S MOTION, DOCKET ENTRY NO. 64

Before the Court is the plaintiff's motion "for authorization to serve the Second Amended Complaint on Defendant James Shaoul ('Defendant') by email." In its memorandum of law in support of the motion, the plaintiff contends that service by email is appropriate where, as here, the plaintiff "obtains an order to show cause and an asset freeze." The plaintiff maintains that it "is not required to attempt service through the other provisions of Rule 4(f) before the Court may order service pursuant to Rule 4(f)(3)." According to the plaintiff, "[t]he delays in service under the Hague Convention here would unduly burden the parties' ability to adhere to the Case Management Plan," which "calls for fact and expert discovery to be completed by March 26, 2018." Thus, "[a]lternative service is appropriate where traditional service under the Hague Convention would take numerous months. See In [re] GLG Life Tech Corp. Securities Litigation, 287 F.R.D. 262, 266-67 (S.D.N.Y. 2012)." The plaintiff asserts that "James Shaoul is an Israeli citizen that resides in Israel" and "Israel does not object to service by alternative means under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters if approved by the Court." Furthermore, "Israel does not oppose Article 10(a) of the Hague

Convention, which states that absent an objection from the State of destination (*i.e.* Israel), the Convention 'shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad.'" The plaintiff maintains that "[s]ervice by email is reasonably calculated to reach Defendant James Shaoul because e-mail addresses for him and for his lawyer are known to the SEC. Further, James Shaoul is already aware of this lawsuit and the fact that he has been named as a party through press coverage, his close friend Amir Waldman, his brother Roger, and/or his lawyer."

In support of the motion, the plaintiff submitted a declaration by its attorney, Stephen C. McKenna ("McKenna"), with exhibits A, B, C and D. According to McKenna, Exhibit A contains testimony from James Shaoul's brother, defendant Roger Shaoul, who "testified that James lives in Israel." McKenna contends that, "[u]pon information and belief James Shaoul is an Israeli citizen." Moreover, "James Shaoul is close friends with Amir Waldman, the defendant in the related matter *SEC v. Waldman*, 17-cv-02088-RMB-KNF (S.D.N.Y.). Ex. B, Waldman Tr. at 35:4-24." According to McKenna, "[t]he lawsuits against the Shaouls, Mr. Cluff, and Mr. Waldman have received extensive press coverage in Israel. See 'Another Defendant Added in Mobileye Insider Trade Case,' CTECH, September 19, 2017, available at: https://www.calcalistech.com/ctech/articles/0,7340,L-3721578,00.html." McKenna contends: "My colleague, Terry Miller, and I have recently been in contact with an Israeli lawyer acting on behalf of James Shaoul and have inquired whether he would accept service on James Shaoul's behalf," but "[t]hat lawyer, whose e-mail address is a_biger@apm-law.com, has not agreed to accept service." McKenna explains that "Roger Shaoul listed James Shaoul's e-mail address as james.shaoul@gmail.com in his First Supplementary Answers and Objections to Plaintiff's Interrogatories served on July 14, 2017. Ex. C. This is the same e-mail address used by James

Shaoul in numerous documents produced in discovery in this matter." The plaintiff's motion is unopposed.

LEGAL STANDARD

> Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States: (1) 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; (2) 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: (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; (B) as the foreign authority directs in response to a letter rogatory or letter of request; or (C) 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; or (3) by other means not prohibited by international agreement, as the court orders.
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> Fed. R. Civ. P. 4(f).
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> "The decision whether to allow alternative methods of serving process under Rule 4(f)(3) is committed to the sound discretion of the district court." In exercising this discretion, district courts may "impose a threshold requirement for parties to meet before seeking the court's assistance." A district court may require the parties "to show that they have reasonably attempted to effectuate service on the defendant(s) and that the circumstances are such that the district court's intervention is necessary." This requirement, although not expressly provided by Rule 4(f)(3), "is necessary in order to prevent parties from whimsically seeking alternative means of service and thereby increasing the workload of the courts."
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> Madu, Edozie & Madu, P.C. v. Socketworks Ltd. Nigeria, 265 F.R.D. 106, 115-16 (S.D.N.Y. 2010) (internal citations omitted).

The United States and Israel are parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, T.I.A.S. No. 6638, (the "Hague Convention"). "Thus, in cases involving service on a person residing in a country that is a signatory to the Hague Convention, courts have often imposed a requirement that litigants first

attempt service by means of the Hague Convention before seeking court-ordered alternative service under section 4(f)(3)." In re GLG Life Tech Corp. Sec. Litig., 287 F.R.D. 262, 266 (S.D.N.Y. 2012). "But nothing in Rule 4(f) itself or controlling case law suggests that a court must always require a litigant to first exhaust the potential for service under the Hague Convention before granting an order permitting alternative service under Rule 4(f)(3)." Id.

"Service by e-mail is appropriate under Rule 4(f)(3) in some circumstances," and "[a]lthough courts have upheld service vie e-mail, those cases involved e-mail addresses undisputedly connected to the defendants and that the defendants used for business purposes." NYKCool A.B. v. Pacific Int'l Services, Inc., 66 F. Supp. 3d 385, 391 (S.D.N.Y. 2014). "District courts have not authorized service on a lawyer unless there has been adequate communication between the foreign defendant and the lawyer." Madu, Edozie & Madu, P.C., 265 F.R.D. at 116. "Inasmuch as Rule 4(f)(3) calls upon a court to exercise its discretion, however, each case must be judged on its facts." In re GLG Life Tech Corp. Sec. Litig., 287 F.R.D. at 266. "It is axiomatic that where notice is legally required, the Due Process Clause of the Fourteenth Amendment requires notice that is '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.'" Oneida Indian Nation of New York v. Madison County, 665 F.3d 408, 428 (2d Cir. 2011) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950)).

APPLICATION OF LEGAL STANDARD

The Court noted, in its December 11, 2017 order, that the plaintiff's document submitted as part of the plaintiff's initial motion and styled "Motion to Serve Second Amended Complaint on James Shaoul by Email," Docket Entry No. 59, contained factual allegations and legal

conclusions and the initial motion lacked a notice of motion, pursuant to Local Civil Rule 7.1.(a)(1) of this court. The plaintiff submitted a document in connection with the instant motion identical to Docket Entry No. 59, except it added the words "Notice of" to the title of the document filed as Docket Entry No. 59, rejected previously as deficient, styling it "Notice of Motion to Serve Second Amended Complaint on Defendant James Shaoul by Email." Docket Entry No. 64. The plaintiff's notice of motion does not comply with Local Civil Rule 7.1(a)(1) of this court because it: (a) contains factual assertions and legal conclusions not permitted by Local Civil Rule 7.1.(a)(1) of this court; (b) does not "specify the applicable rules or statute pursuant to which the motion is brought," although it makes citation to "Fed. R. Civ. P. 4(f)" appended to the legal conclusion that "service of the Second Amended Complaint on defendant James Shaoul is 'reasonably calculated to give notice' to Defendant"; and (c) does not "specify the relief sought by the motion" because it seeks "authorization to serve the Second Amended Complaint on Defendant James Shaoul . . . by email" without identifying the "email" address to be used to effect service. The plaintiff makes improper factual assertion in its notice of motion, namely, that "[t]he Commission has valid e-mail addresses for James Shaoul and for a lawyer that has represented him," appearing to suggest that it seeks leave to serve James Shaoul by way of "e-mail addresses for James Shaoul and for a lawyer that has represented him." However, in the "Preliminary Statement" of its memorandum of law in support of the motion, the plaintiff contends:

> In this motion, the Commission seeks alternative service by email which is a method of service reasonably calculated to provide James Shaoul formal notice of this action. Roger Shaoul listed James Shaoul's e-mail address as james.shaoul@gmail.com in his First Supplementary Answers and Objections to Plaintiff's Interrogatories served on July 14, 2017. . . . This is the same e-mail address used by James Shaoul in numerous documents produced in discovery in this matter.

The above paragraph suggests that the plaintiff seeks leave to serve James Shaoul via an e-mail address alleged to be "James Shaoul's e-mail address." However, in the section of its memorandum of law entitled "Alternative Means of Service Will Avoid Delay, Will Not Offend Israeli Law, and Is Reasonably Calculated to Provide Notice," the plaintiff contends: "Service by email is reasonably calculated to reach Defendant James Shaoul because e-mail addresses for him and for his lawyer are known to the SEC," appearing to suggest that the plaintiff seeks leave to serve James Shaoul by way of using "e-mail addresses for him and for his lawyer." The plaintiff's "Conclusion" section of its memorandum of law requests "that this motion be granted," without specifying the relief sought. Notwithstanding the plaintiff's deficient notice of motion and the ambiguities concerning the relief sought in its submissions, the Court will assume, for the purpose of this motion, that the plaintiff seeks leave to serve the "Second Amended Complaint on Defendant James Shaoul" by sending it electronically to the "e-mail addresses for James Shaoul and for a lawyer that has represented him."

On May 8, 2017, defendant Roger Shaoul, James Shaoul's brother, testified that James Shaoul lives in Israel, not that James Shaoul is an Israeli citizen. McKenna contends in his declaration: "Upon information and belief James Shaoul is an Israeli citizen," without identifying the source of his information or the basis for his belief. McKenna failed to indicate that his declaration is based on personal knowledge. Thus, no evidence was presented in support of the motion that James Shaoul is an Israeli citizen.

McKenna also contends in his declaration that "[t]he lawsuits against the Shaouls, Mr. Cluff, and Mr. Waldman have received extensive press coverage in Israel," referring to an internet link that he accessed on September 19, 2017: http://www.calcalistech.com/ctech/articles/0,7340,L-3721578,00.html. However, McKenna does

not state that he has personal knowledge about the link he referenced or the "press coverage in Israel," in general, or the "press coverage in Israel" of the lawsuits he referenced, in particular. The content accessed by the internet link McKenna cited appears to be hosted on a website of "CTECH," an entity that describes itself on that website as follows: "CTech is a technology news site providing an international readership with real-time, high-impact stories from the Israeli tech scene." Thus, it appears that "CTech" is an online news site, not "press coverage in Israel." Also no evidence corroborates McKenna's contention that the lawsuits he referenced received "extensive press coverage in Israel," since he cited a single online technology news site—not the "press coverage"—that by itself does not indicate anything about the extent of the "press coverage in Israel" of the referenced lawsuits.

McKenna contends in his declaration that he and his colleague have "recently been in contact with an Israeli lawyer acting on behalf of James Shaoul" and "[t]hat lawyer, whose e-mail address is a_biger@apm-law.com, has not agreed to accept service." McKenna did not identify: (a) "the lawyer acting on behalf of James Shaoul"; (b) how "recently" he has been in contact with that person; and (c) the basis for asserting that the "lawyer" is "acting on behalf of James Shaoul." No evidence corroborates McKenna's contention that an unidentified "Israeli lawyer [is] acting on behalf of James Shaoul," and no evidence exists of any communications between James Shaoul and any attorney representing him in any matter. Moreover, in light of McKenna's contention that the "Israeli lawyer acting on behalf of James Shaoul . . . has not agreed to accept service," it is unclear how serving process on that person could reasonably be calculated to give notice of the second amended complaint to James Shaoul. Accordingly, service of the second amended complaint on James Shaoul via an e-mail address for an

unidentified person alleged to be "an Israeli lawyer acting on behalf of James Shaoul," is not warranted.

It is not clear why the plaintiff contends in its memorandum of law that "Israel does not object to service by alternative means under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters if approved by the Court," since the plaintiff's motion does not involve taking of evidence abroad. The plaintiff's contention that "Israel does not oppose Article 10(a)" of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters is irrelevant, since Article 10(a) deals with "the freedom to send judicial documents, by postal channels, directly to persons abroad," and the plaintiff is not seeking leave to serve James Shaoul "by postal channels, directly to persons abroad."

The plaintiff asserts in its memorandum of law, without citation to any evidence, that "James Shaoul is already aware of this lawsuit and the fact that he has been named as a party through press coverage, his close friend Amir Waldman, his brother Roger, and/or his lawyer." No evidence is submitted in connection with this motion showing James Shaoul's awareness of the instant action "through press coverage, his close friend Amir Waldman, his brother Roger, and/or his lawyer." The plaintiff's contention is baseless as neither Roger Shaoul's nor Amir Waldman's testimony submitted in support of the motion speaks about whether "James Shaoul is already aware of this lawsuit and the fact that he has been named as a party" and no evidence exists that James Shaoul has a "lawyer," let alone that "James Shaoul is already aware of this lawsuit . . . through . . . his lawyer."

The plaintiff asserts that "service under the Hague Convention would take numerous months," without identifying the number of months or providing any evidence in support of the

assertion. Although the plaintiff filed its second amended complaint on September 13, 2017, Docket Entry No. 48, and requested, on November 15, 2017, international assistance pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Docket Entry No. 55, which was granted, Docket Entry No. 59, the plaintiff does not explain why it: (a) did not initiate the Hague Convention service process at the time it filed the second amended complaint; and (b) waited until November 29, 2017, to make its motion for alternative service, without attempting to serve James Shaoul with process by using the Hague Convention. The plaintiff relies on In re GLG Life Tech Corp. Sec. Litig., 287 F.R.D. at 266-67, for the proposition that "service under the Hague Convention would take numerous months." However, in that case counsel to the plaintiff submitted his declaration in which he explained the steps he undertook in his attempt to use the Hague Convention, stating, on September 6, 2012, that service of process on the defendant in China "would take at least six to eight months to complete." In re GLG Life Tech Corp. Sec. Litig., 287 F. R.D. at 266-67, Docket Entry No. 49. The plaintiff did not take any steps to attempt to use the Hague Convention to serve James Shaoul with process, and it failed to explain how the evidence that serving a defendant in China, in 2012, by using the Hague Convention would take six to eight months supports the plaintiff's assertion that serving James Shaoul in Israel, in 2017, by using the Hague Convention "would take numerous months." The mere assertion of delay in service, without any evidence supporting it, is not sufficient to show that "service under the Hague Convention would take numerous months." The plaintiff failed to act diligently when it did not attempt to use the Hague Convention or take steps that would evidence the amount of time it would take to serve James Shaoul in Israel by using the Hague Convention. Moreover, the plaintiff did not take any steps to attempt service in any other manner authorized by Rule 4(f) before seeking "authorization to

serve the Second Amended Complaint on Defendant James Shaoul. . . by email." The plaintiff failed to establish that it attempted reasonably to effectuate service on James Shaoul before making this motion and that the circumstances are such that they warrant an "authorization to serve the Second Amended Complaint on Defendant James Shaoul . . . by email." See Madu, Edozie & Madu, 265 F.R.D. at 115.

The plaintiff relies on: (a) Roger Shaoul's "First Suppementary Answers and Objections to Plaintiff's Interrogatories served on July 14, 2017"; and (b) the "e-mail address used by James Shaoul in numerous documents produced in discovery in this matter" as evidence that "James Shaoul's e-mail address" is "james.shaoul@gmail.com." However, no evidence corroborates Roger's Shaoul's assertion in his discovery responses that the e-mail address james.shaoul@gmail.com belongs to James Shaoul or that it is undisputedly connected to James Shaoul or that James Shaoul uses and checks that e-mail address, presently, for business purposes or otherwise. See NYKCool A.B., 66 F. Supp. 3d at 391. Absent evidence that the e-mail address alleged to be "James Shaoul's e-mail address" is what it is claimed to be and that James Shaoul uses and checks that e-mail address currently and frequently, the Court finds that using the proposed e-mail address to serve James Shaoul with the second amended complaint is not an adequate form of notice because it is not reasonably calculated, in the circumstance of this case, to give notice of the second amended complaint to James Shaoul and afford him an opportunity to be heard. See Oneida Indian Nation of New York, 665 F.3d at 428.

CONCLUSION

For the foregoing reasons, the plaintiff's motion, Docket Entry No. 64, is denied.

Dated: New York, New York
January 10, 2018

SO ORDERED:

Kevin Nathaniel Fox

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE