

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

SAGE BROWN, and
PATRICIA M. BROWN

Plaintiffs,

v.

Case No. CV412-233

True & Associates, Ltd.; True
Designs; True Designs, Inc.;
True Innovations, Inc.; True North
Innovations, Inc.; True North
America; True North America, Inc.
True Seating Concepts, Inc.
True Seating Concepts, LLC;
Sam's East, Inc.; Wal-Mart Stores
East, LP.; Wal-Mart Stores, Inc.,

Defendants.

ORDER

Plaintiff Sage Brown bought an “executive chair” from Sam’s East, Inc., d/b/a Sam’s Club (Sam’s), in Savannah, Georgia. Doc. 1-3 at 1-7. It collapsed on him while he sat in it, injuring him. *Id.* at 7-8. Proceeding *pro se*, he and his wife filed this product liability action against Sam’s and related corporate entities, plus the chair’s manufacturer, which could be (plaintiffs are not sure) True & Associates, Ltd, True Designs, or a host of other “True” entities captioned as defendants above. *Id.* at 7

¶ 20. Plaintiffs E-filed their Complaint and stuck their “Petition For Issuance of a ‘Letter Rogatory,’” at the end of it, *id.* at 30-34, rather than as a separate motion. Hence, the Petition was not placed on the Court’s motions calendar for review. *See* doc. 3 (having manually detected it, the Clerk re-entered it, thus placing it on the Court’s motions calendar).¹

Noting that defendant True & Associates, Ltd. does not maintain a registered agent or business location in Georgia, doc. 3 at 2, plaintiffs ask the Court to issue the Letter to “the Appropriate Judicial Authority in Taiwan to cause the attached summons and complaint to be served upon Defendant True & Associates, Ltd, a foreign corporation created under the laws of Taiwan and physically located outside the boundaries of the United States of America.” Doc. 3 at 1-2.

The request is problematic. Some background:

¹ Timing matters here. Fed. R. Civ. P 4(m) basically prompts plaintiffs to get their defendants timely served or face dismissal of their case. The rule’s 120-day clock does *not* tick in actions against foreigners, *see, e.g., Lozano v. Bosdet*, ___ F.3d ___, 2012 WL 3764046 at * 2 (5th Cir. Aug. 31, 2012), but courts are still obligated to move cases along. To that end, the Fifth Circuit has joined several other circuits in imposing a “flexible due diligence standard” to determine whether to excuse a delay in service of process on a foreign defendant. *Id.* at * 3. Hence, a plaintiff must deploy reasonable diligence in attempting service of process on a foreign defendant. *Id.*; *see also Angellino v. Royal Family Al-Saud*, 688 F.3d 771, 775-76 (D.C. Cir. 2012).

A letter rogatory is the medium by which one country, speaking through its courts, requests another country, acting through its own courts and by the methods of court procedure peculiar thereto, to assist the administration of justice in the former country. In international practice, the term "letters rogatory" denotes a formal request from a court in which an action is pending to a foreign court to perform some judicial act, such as the taking of evidence, the serving of a summons, subpoena, or other legal notice, or the execution of a civil judgment; in United States usage, letters rogatory have been commonly utilized only for the purpose of obtaining testimony.

23 AM. JUR. 2D DEPOSITIONS AND DISCOVERY § 17 (Aug. 2012) (footnote omitted). However, another encyclopedist warns that “[a] letter rogatory or a letter of request is a method of service that is generally *not* recommended.” 3 L OF INTL TRADE § 76:22 (Sept. 2012) (emphasis added). It can be complicated. The basic mechanics of achieving such international service are specified in Fed. R. Civ. P. 4(h)(2), which states that a foreign corporation served outside the United States can be served “in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).” Rule 4(f), in turn, states that an individual in a foreign country may be served:

(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.

Fed. R. Civ. P. 4(f).

Depending on the method one chooses, additional requirements may apply, including: translation, an “apostille certification,” submission of the letter (in duplicate) to the U.S. State department for transmission “to the American embassy in the foreign country,” and ultimately “through the Ministry of Justice to the appropriate foreign court.” 3 L OF INTL TRADE § 76:22.²

² There is another option:

Plaintiffs' petition includes a "Proposed Letter Rogatory" that is bare-bones at best. For example, it appears to contemplate a court-to-court (hence, bypass the embassy channel) transmission, *see supra* n. 2, but specifies no receiving court (name, address, etc.). Nor does it specify whether Taiwan *requires* that such a letter be transmitted through a diplomatic channel. *See supra* n. 2. Plaintiffs also want this Court to "[i]ssue a 'Letter Rogatory' to the Appropriate Taiwanese Official" without stating who that is. Doc. 3 at 3.

Letters rogatory are often transmitted directly from the issuing court to the receiving court. Some foreign governments, however, require that letters rogatory be submitted through a diplomatic channel, such as the receiving country's Ministry of Foreign Affairs. Other foreign governments permit letters rogatory to be transmitted by local counsel in the receiving country directly to the foreign court. Thus, litigants should confer with foreign counsel and determine which method of transmission is appropriate in each country.

2 BUS. & COM. LITIG. FED. CTS. § 21:94 (3d ed. Dec. 2011) (footnotes omitted).

One "Practice Hint" warns that one should "count on service by letters rogatory taking at least a year." 3 L OF INTL TRADE § 76:22 (Sept. 2012). A plaintiff may also "[u]se local counsel in the country involved to speed up process[, but a]lways use a translation[, and, i]f the complaint is long, include a summary." *Id.* "The State Department charges a nominal consular fee for services related to execution of a letter rogatory; foreign authorities may charge fees as well." 2 BUS. & COM. LITIG. FED. CTS. § 21:94.

Apparently, they want this Court to do their legal spade work. It will not. They are entitled to some leeway, *see Angellino*, 688 F.3d at 778 (“*pro se* litigants are allowed more latitude than litigants represented by counsel to correct defects in service of process and pleadings.”) (quotes, cite and alteration omitted), but not *de facto* legal assistance. *Sec’y, Fla. Dep’t of Corr. v. Baker*, 406 F. App’x 416, 421 (11th Cir. 2010) (“*Pro se* pleadings must be liberally construed, though the courts may not serve as *de facto* counsel for the litigant or rewrite an otherwise deficient pleading in order to sustain an action.”); *Smith v. Ocwen Financial*, 2012 WL 3758378 at * 1 (Aug. 30, 2012).

The U.S. State Department notes other options:

SERVICE BY INTERNATIONAL REGISTERED MAIL: (Rule 4(f)(2)(C)(ii) F.R.Cv.P.) registered or certified mail, return receipt requested may be sent to most countries in the world. Rule 4(f)(2)(C) provides that this method of service may be used unless prohibited by the law of the foreign country. (*But see* discussion below regarding treaty obligation to refrain from this method of service in certain countries.)³ To ascertain whether such mail service exists in a foreign state, contact your local Post Office to review the International Mail Manual and consult the business section on international mail of the U.S. Postal Service web page

³ Taiwan is not on that list. Note that plaintiffs have also named as a defendant True Seating Concepts, LLC, “a corporation having its primary business location in Hong Kong, China.” Doc. 1-3 at 4 ¶ 10. They seek no assistance in serving it.

for general information, or contact the Government Printing Office.

http://travel.state.gov/law/judicial/judicial_680.html (site as of Oct. 22, 2012) (footnote added); *see also id.* (“If personal service⁴ is desired in countries which are not party to the Hague Service Convention, the most expeditious method may be to retain the services of a local foreign attorney or process server. [Fed. R. Civ. P. 4(f)(2)(C)] provides for

⁴ Personal service has been expressly approved by federal courts:

The Ninth Circuit has observed that “courts have applied Rule 4(f)(2)(A) to approve personal service carried out in accordance with foreign law.” *Brockmeyer v. May*, 383 F.3d 798, 806 (9th Cir. 2004). Indeed, numerous courts have upheld personal service on a foreign corporation under Rule 4(f)(2)(A). For example, in *Joescan, Inc. v. LMI Technologies, Inc.*, No. 07–5323, 2007 WL 2253319, at *1 (W.D. Wash. Aug. 2, 2007), the district court found that although not effected through the Canadian Central Authority under the Hague Convention, personal service on a Canadian company in Canada was proper because defendants were served in accordance with Canadian law. Similarly, in *Cosmetech International, LLC v. Der Kwei Enterprise and Co., Ltd.*, 943 F. Supp. 311, 316 (S.D.N.Y. 1996), the court upheld service on a Taiwanese corporation by personal service on its manager in accordance with Taiwanese law. Thus, a corporation can be served by personal delivery under Rules 4(h)(2) and 4(f)(2)(A), provided that personal delivery is prescribed by the foreign country's laws for service in that country in an action in its courts of general jurisdiction.

Nuance Communications, Inc. v. Abby Software House, 626 F.3d 1222, 1238 (9th Cir. 2010); *see also id.* (it is not necessary to exhaust Hague-Convention based methods before resorting to alternative service methods. Rule 4 “was not intended to burden plaintiffs with the Sisyphean task of attempting service through the Hague Convention procedures when a member state has categorically refused to effect service.”) (quotes and alteration omitted).

personal service unless prohibited by the laws of the foreign country. The attorney (or agent) can execute an affidavit of service at the nearest U.S. embassy or consulate, or before a local foreign notary which can be authenticated, either with an apostille for countries party to the Hague Legalization Convention, or by a U.S. consular officer at a U.S. Embassy abroad.”) (footnote added); Fed. R. Civ. P. 4(h)(2) (authorizing Rule 4(f) service on corporations “not within any judicial district of the United States”).⁵

The Court will thus **DENY** the motion (doc. 3) without prejudice to renew it, fortified with the missing information noted above. Plaintiffs are reminded of the timeliness requirement set forth *supra*, n. 1.

SO ORDERED this 22nd day of October, 2012.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

⁵ Hence, Rule 4(d) “permits the use of the mail to reach individuals and corporations outside the United States who fall under Rule 4(f). *See* Fed.R.Civ.P. 4(d), (h). . . .” *Lozano*, 2012 WL 3764046 at * 3.