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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

ASARCO LLC, a Delaware corporation,

Plaintiff,

v.

XSTRATA PLC, a UK corporation,

Defendant.

Case No.: 2:12-cv-00527-TC

**ASARCO LLC'S MEMORANDUM
IN OPPOSITION TO DEFENDANT
XSTRATA PLC'S MOTION TO
QUASH SERVICE OF PROCESS**

(Oral Hearing Requested)

Judge Tena Campbell

Plaintiff ASARCO LLC (“Asarco”) respectfully submits this Memorandum in Opposition to Defendant Xstrata PLC’s (“Xstrata”) Motion to Quash Service of Process (the “Motion”) (Docket No. 33).

I. INTRODUCTION

Xstrata’s Motion confuses service of process by a foreign state’s *Central Authority* under Article 5 of The Convention on the Service Abroad of Judicial and Extrajudicial Documents (“The Convention”), which is how service was accomplished in this case, with attempted service by a *party* through postal channels under Article 10(a) of the Convention, which is not what happened here. As a result, Xstrata incorrectly asks this Court to conclude that service of process that has been certified as proper by the Central Authority of a foreign state is not valid and should not be recognized under Rule 4 of the Federal Rules of Civil Procedure. In doing so, Xstrata would have this Court disregard the controlling provisions of the Convention and the Federal Rules, and overlook that Xstrata does not claim it lacks sufficient notice or has suffered any prejudice. For the reasons discussed below, Xstrata’s Motion lacks merit and should be denied in its entirety.

II. XSTRATA WAS PROPERLY SERVED WITH PROCESS, AND ITS MOTION TO QUASH SHOULD BE DENIED

A. Service by International Certified Mail Is Not Required Here, Where Service Was Properly Effected and Certified through the Central Authority of the United Kingdom

Xstrata’s Motion takes a circuitous detour from the relevant facts and issues of law to focus instead on alternative methods of service of a foreign corporation under the Convention that are simply inapplicable to the circumstances of this case. Even though service of process through a foreign state’s Central Authority is the primary method contemplated under the

Convention, the Motion fails to note that service here was properly effected through the United Kingdom's Central Authority. In fact, nowhere in its Motion does Xstrata even mention the term "Central Authority". Instead, the Motion incorrectly assumes that service was effected directly by Asarco: "Plaintiff Asarco LLC ... asserts in its Certificate - Attestation filed with this Court ... **that it effected service of process on Defendant** by 'posting them through the defendant company's letterbox.'" [Docket No. 33 at 2 (*emphasis added*).] This is simply incorrect, and Xstrata provides no facts to support it. In fact, the Central Authority itself refutes Xstrata's allegation, as the Central Authority certified on August 8, 2012 that *it* effected service in compliance with its own internal laws, as it is authorized to do under Article 5 of the Convention, not Article 10(a). [Docket No. 24, Attestation/USM-94 Form ("Attestation") at 3.] Here, the Central Authority's Foreign Process Section specifically states and certifies through its authenticating stamp and accompanying signature that "[t]he undersigned authority has the honour to certify, in conformity with article 6 of the Convention... 1) that the document has been served the (date) 06 August 2012... in one of the following methods authorised by article 5...." [Docket No. 24 at 3.]

As noted, no mention is made in the Motion that the Central Authority, not Asarco, effected service in compliance with its internal laws. The Motion then proceeds to focus exclusively on Rule 4(h)(3) of the Federal Rules of Civil Procedure and Article 10(a) of the Convention, which have no application to the circumstances of this case. These provisions apply only when a party itself directly sends documents to a foreign country. Asarco never did so.

Xstrata's Motion nevertheless proceeds to contend that mail service is not permissible under Article 10(a). [Docket No. 33 at 2.] This contention is a blind alley, as the Attestation

establishes that proper service was effected instead by the United Kingdom's Central Authority under Article 5 of the Convention. [Docket No. 24.] Thus, the Motion's arguments that service was improper due to Asarco's alleged direct service through postal channels under Article 10 of the Convention are incorrect.

B. Service Was Properly Effected Under FRCP 4 and The Convention

As established by the Attestation and described below, Asarco's service upon Xstrata was proper under Rule 4(f)(1) of the Federal Rules of Civil Procedure and under the Convention. Under Federal Rule of Civil Procedure 4(h), service of a foreign corporation may be carried out "in any manner prescribed by Rule 4(f) for serving an individual." Fed. R. Civ. P. 4(h). Federal Rule of Civil Procedure 4(f)(1) provides that service of process may be effected "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." Fed. R. Civ. P. 4(f)(1). In its Motion, Xstrata acknowledges that it is a United Kingdom corporation, that the United Kingdom and the United States are signatories to the Convention, and that provisions of the Convention are applicable in this case. [Docket No. 33 at 2.]

The Supreme Court has noted that the primary method of service under the Convention is through a foreign state's Central Authority. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-699 (1988). Each foreign state must establish a Central Authority that receives requests for service of documents from other signatory countries. *Id.*; *see also* Convention, Art. 2. The Central Authority must serve a request in the proper form "**by a method prescribed by the internal law of the receiving state.**" *Id.* at 699 (emphasis added); *see also* Convention, Art.

5(a). The Central Authority must then provide a certificate of service under Article 6 of the Convention. *Id.* at 699; *see also* Convention, Art. 6. This is precisely the course of events that Asarco followed to effect service of process in this case. The request for service of process was sent by Asarco to the United Kingdom's Central Authority. [Docket No. 24 at 4.] The Central Authority then properly effected service at Xstrata's registered address. [*Id.* at 3.] The Central Authority certified this was good service pursuant to the internal laws of the United Kingdom "under Section 1139 of the Companies Act 2006." [*Id.*] Finally, the Central Authority certified that service was effected through Article 5 of the Convention. [*Id.*] Asarco filed the certificate of service with this Court on August 28, 2012. [*Id.*] The Motion puts forth no facts to establish that the Central Authority did not agree to accept the request for service of process on the grounds that the request failed to comply with proper form. The Central Authority never certified that the summons and complaint were not served upon Xstrata. Indeed, nowhere in the Motion does Xstrata state that it did not receive the Summons and Complaint or that it did not receive actual notice of this lawsuit.

Furthermore, it is undisputed that service complied with the United Kingdom's internal laws, as Xstrata does not contend otherwise. Xstrata instead mistakenly contends that whether service complied with the internal laws of the United Kingdom is "immaterial." [Docket No. 33 at 5.] Xstrata provides no relevant authority to support this contention. In fact, the Convention expressly provides that service may be effected through the Central Authority of another signatory state "by a method prescribed by its internal law." Convention, Art. 5(a). As noted above, the Central Authority of the United Kingdom certified in its Attestation that its service upon Xstrata was proper under the United Kingdom's internal laws. [Docket No. 24 at 3.]

Because Xstrata fails to claim that service was not proper under the foreign state's laws, this Court is not required to look behind the certificate of service to determine whether service complied with the procedural law of the United Kingdom. Even if Xstrata had argued that service was improper under the internal laws of the United Kingdom, however, most United States courts have held that certification by the central authority establishes *prima facie* evidence of proper service pursuant to the foreign state's internal laws. *See, e.g., United Nat'l Ret. Fund v. Ariela, Inc.*, 643 F. Supp. 2d 328, 335 (S.D.N.Y. 2008) (stating that when the Central Authority in a foreign state did not object to documents and certified service, the Central Authority indicated that it had made service as foreign state's law required). In this case, the Central Authority's Attestation that service was proper establishes a *prima facie* case that service was proper under the United Kingdom's internal laws, which Xstrata may rebut only by establishing lack of actual notice and prejudice. *Id.* (stating that defendant was required to "rebut a prima facie case of proper service through lack of actual notice or a showing of prejudice"); *see also Northrup King Co. v. Compañia Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1390 (8th Cir. 1995).

As noted above, Xstrata does not contend anywhere in the Motion that it does not have actual notice of the Complaint. Nor does Xstrata claim it has suffered prejudice. Therefore, it is undisputed that service of the Summons and Complaint was proper under the internal laws of the United Kingdom. Consequently, because the Convention specifically authorizes service of process by a Central Authority under the internal laws of the foreign state, which is exactly what happened here, service is proper under the Convention.

Finally, even assuming that service did not comply with the Federal Rules and the Convention, this Court may still determine that service was properly perfected where there was a good faith attempt to effect service, Xstrata has actual notice, and Xstrata does not claim prejudice. *Ariela*, 643 F. Supp. 2d at 335 (noting that a court has discretion to deem service properly perfected when plaintiff made good faith attempt to comply with the Convention and where defendant had sufficient notice of the action such that no injustice would result). All three elements are satisfied here.

III. CONCLUSION

For all of the foregoing reasons, Asarco respectfully requests that this Court deny Xstrata's Motion in its entirety. Asarco also requests oral hearing regarding the Motion.

Respectfully submitted this 17th day of October 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October 2012, I filed the foregoing
**ASARCO LLC'S MEMORANDUM IN OPPOSITION TO DEFENDANT XSTRATA
PLC'S MOTION TO QUASH SERVICE OF PROCESS** via the CM/ECF system, which
electronically served the following:

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