

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WASHINGTON STATE INVESTMENT
BOARD,

Plaintiff,

- against -

ODEBRECHT S.A, CONSTRUTORA
NORBERTO ODEBRECHT S.A.,
ODEBRECHT ENGENHARIA E
CONSTRUÇÃO S.A., and ODEBRECHT
FINANCE LTD.,

Defendants.

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ORDER

17 Civ. 8118 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

This is a securities fraud action arising out of a massive bribery scandal. Plaintiff Washington State Investment Board has sued Odebrecht, S.A. (“Odebrecht”), a Brazilian corporation, and three of its subsidiaries for violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5, Section 20(a) of the Securities Exchange Act, Washington state law, and New York state law. Plaintiff has served Odebrecht’s subsidiaries, but Odebrecht itself has not been served. Plaintiff seeks an order permitting it to serve Odebrecht through either (1) Quinn Emanuel Urquhart & Sullivan, LLP – Odebrecht’s counsel in a related criminal case and counsel for Odebrecht’s subsidiaries in this case; or (2) its subsidiaries’ U.S.-based agent.

For the reasons set forth below, this Court will authorize service through Quinn Emanuel.

BACKGROUND

I. FACTS

Plaintiff Washington State Investment Board “is a state agency responsible for the prudent investment and management of public trust and public employee retirement funds.”

(Am. Cmplt. (Dkt. No. 35) ¶ 22)

Defendant Odebrecht “is a holding company headquartered in Brazil that, through various subsidiaries and operating entities, conducts business in construction, engineering, infrastructure, chemicals, utilities and real estate . . . in Brazil and throughout 27 other countries, including the United States.” (*Id.* ¶ 23)

Defendant Construtora Norberto Odebrecht S.A. (“Construtora Odebrecht”) is “a wholly-owned subsidiary of defendant Odebrecht, primarily engaging in the construction of large-scale infrastructure and other public works projects” around the world. (*Id.* ¶ 24)

Defendant Odebrecht Finance is a Cayman Islands corporation that “is a wholly-owned subsidiary of defendant Odebrecht and was created for the sole purpose of raising money for Odebrecht and [Construtora Odebrecht] through the issuance of bonds.” (*Id.* ¶ 26)

Odebrecht Finance, in conjunction with Construtora Odebrecht, solicited investors through public statements and by issuing offering memoranda. (*See id.* ¶¶ 51-53, 55-56, 58-59)

On March 31, 2015, Odebrecht reorganized, and Defendant Odebrecht Engenharia E Construção S.A. (“Odebrecht Engenharia”) “took over [Construtora Odebrecht’s] role as the consolidator of Odebrecht’s construction subsidiaries.” (*Id.* ¶ 25) Construtora Odebrecht is currently a subsidiary of Odebrecht Engenharia that “focuses solely on projects within Brazil.” (*Id.* ¶ 24) Before March 2015, Construtora Odebrecht was the guarantor for Odebrecht Finance’s debt – including certain notes purchased by Plaintiff – and Odebrecht

Finance “relie[d] primarily upon defendant [Construtora Odebrecht’s] reported financial results and business prospects to sell bonds to investors.” (*Id.*) Odebrecht Engenharia has since become “a guarantor of the Notes bought by plaintiff.” (*Id.* ¶ 25)

Between June 21, 2012 and February 4, 2015, Plaintiff purchased notes from four different offerings of Odebrecht Finance “with a face value of over \$100 million” (the “Notes”). (*Id.* ¶ 2) The Notes purchased include (1) 7.125% notes due 2042, (2) 4.375% notes due 2025, (3) 8.25% notes due 2018, and (4) 5.25% notes due 2029. (*Id.* ¶ 2 n.1) An offering memoranda for the 7.125% notes states that Odebrecht Finance has “no substantial assets,” and that its ability “to make payments on the notes depends on its receipt of payments” from Constutora Odebrecht. (*Id.* ¶ 13)

Plaintiff asserts that it decided to invest in Odebrecht Finance “based in large part on Odebrecht’s and [Construtora Odebrecht’s] financial statements,” and complains now that “the offering memoranda . . . emphasized that Odebrecht and [Constutora Odebrecht] secured contracts through a ‘competitive bidding process,’ when, in truth, Odebrecht’s and [Constutora Odebrecht’s] success, and their reported financial results, depended on a massive bribery and kickback scheme involving hundreds of millions of dollars in illicit payments that defendants used to secure government contracts.” (*Id.* ¶ 2) Plaintiff further claims that had it known that Defendants obtained contracts through bribery, it “would not have purchased the Notes, or at least not at the prices at which it paid.” (*Id.* ¶ 145)

On December 21, 2016, Odebrecht pleaded guilty in the U.S. District Court for the Eastern District of New York to conspiring to violate the anti-bribery provisions of the Foreign Corrupt Practices Act and agreed to pay a fine of \$2.6 billion. (*Id.* ¶¶ 6, 15; Britton Decl., Ex. C (Plea Agreement) (Dkt. No. 29-3) ¶¶ 3, 21) In the plea agreement between

Odebrecht and the U.S. Department of Justice, Odebrecht admitted to using a business unit within Construtora Odebrecht – the “Division of Structured Operations” – to pay “nearly \$800 million in bribes in connection with 100 projects with 100 people in 12 countries in exchange for ill-gotten benefits of more than \$3.3 billion.” (*Id.* ¶¶ 3, 16; *see* Plea Agreement, Attachment B (Statement of Facts) (Dkt. No. 29-3) ¶¶ 19-23) As part of Odebrecht’s guilty plea, it “accepted responsibility ‘for the acts of its affiliates, subsidiaries, officers, directors, employees, and agents,’ including [Construtora Odebrecht], and pled guilty so the U.S. government would ‘not file additional criminal charges against [Odebrecht] or any of its direct or indirect subsidiaries or joint ventures,’ including [Construtora Odebrecht.]” (*Id.* ¶ 6; Plea Agreement (Dkt. No. 29-3) ¶ 14; *id.* Attachment B (Statement of Facts) at 34)

Plaintiff alleges that “[a]s defendants’ misdeeds have come to light over time, the Notes [purchased by Plaintiff] have plummeted in value.” (*Id.*)

II. SERVICE

The Complaint was filed on October 20, 2017, and alleges violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5, Section 20(a) of the Securities Exchange Act, Washington state law, and New York state law. (*See* Cmplt. (Dkt. No. 1) ¶¶ 132-78)

On October 24, 2017, Defendants Construtora Odebrecht and Odebrecht Finance accepted service of the Complaint.¹ Odebrecht Engenharia was served on February 5, 2018. (Affidavit of Service (Dkt. No. 38)) Plaintiff has attempted to serve Odebrecht through Construtora Odebrecht and Odebrecht Finance’s registered agent – Cogency Global Inc. – but Cogency has refused to accept service on Odebrecht’s behalf. (*See* Nov. 10, 2017 Def. Ltr. Mtn.

¹ The offering memoranda for the Notes provides that these entities “have irrevocably submitted to the non-exclusive jurisdiction of any state or federal court sitting in the Borough of Manhattan.” (Am. Cmplt. (Dkt. No. 35) ¶ 8; *see also* Affidavits of Service (Dkt. Nos. 11 & 12))

(Dkt. No. 18) at 1 n.1; Def. Opp. (Dkt. No. 32) at 15) Plaintiff also asked Quinn Emanuel to accept service for Odebrecht, but the firm refused to do so. (Def. Opp. (Dkt. No. 32) at 15)

Plaintiff has not attempted to serve Odebrecht in Brazil pursuant to the Inter-American Convention on Letters Rogatory, Jan. 30, 1975, and the Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, S. Treaty Doc. No. 98-27, 53 Fed. Reg. 31,132 (1988) (the “Inter-American Convention”). (Pltf. Br. (Dkt. No. 28) at 7) Instead, Plaintiff seeks an order permitting it to serve Odebrecht either through Quinn Emanuel, or through Construtora Odebrecht and Odebrecht Finance’s registered agent, Cogency Global Inc. (*Id.*) Construtora Odebrecht and Odebrecht Finance have filed a brief and declaration opposing Plaintiff’s motion (Dkt. Nos. 32, 33).²

DISCUSSION

I. LEGAL STANDARD

Service on a corporation is governed by Rule 4(h) of the Federal Rules of Civil Procedure. That rule provides that a domestic or foreign corporation must be served

(1) In a judicial district of the United States

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

² Construtora Odebrecht and Odebrecht Finance do not have standing to contest Plaintiff’s motion for alternative service. See *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 114 (S.D.N.Y. 2010) (“[c]o-defendants do not have standing to assert improper service claims on behalf of other defendants”) (citing *Farrell v. Burke*, 449 F.3d 470, 494 (2d Cir. 2006) (“Federal courts as a general rule allow litigants to assert only their own legal rights and interests, and not the legal rights and interests of third parties.”)). The Court will, however, treat the opposition papers as an *amicus* filing. See *id.* (adopting this approach under similar circumstances, because without the opposition papers the court “would be hampered in issuing a ruling grounded on all the facts presented”); see also *In re GLG Life Tech Corp. Sec. Litig.*, 287 F.R.D. 262, 265 (S.D.N.Y. 2012) (agreeing to consider company’s submission contesting alternative service on chief executive officer as *amicus* filing (citing *Madu*, 265 F.R.D. at 114)).

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and – if the agent is one authorized by statute and the statute so requires – by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

Fed. R. Civ. Proc. 4(h).

Rule 4(f) permits a court to direct service on an individual in a foreign country in one of three ways:

(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. Proc. 4(f).

“Courts have repeatedly recognized that ‘there is no hierarchy among the subsections in Rule 4(f).’” In re GLG Life Tech Corp. Sec. Litig., 287 F.R.D. 262, 265

(S.D.N.Y. 2012) (quoting Advanced Aerofoil Techs., AG v. Todaro, 11 Civ. 9505 (ALC), 2012 WL 299959, at *1 (S.D.N.Y. Jan. 31, 2012)). Ultimately, the decision of “whether to allow alternative methods of serving process under Rule 4(f)(3) is committed to the sound discretion of the district court.” Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) (quoting RSM Prod. Corp. v. Fridman, 6 Civ. 11512 (DLC), 2007 WL 1515068, at *1 (S.D.N.Y. May 24, 2007) (citation and internal quotation marks omitted)).

In exercising that discretion, a district court “may ‘impose a threshold requirement for parties to meet before seeking the court’s assistance,’” id. (quoting Ryan v. Brunswick Corp., 2 Civ. 133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002)), including a showing that plaintiff has “‘reasonably attempted to effectuate service on the defendant(s) and that the circumstances are such that the district court’s intervention is necessary.’” Id. (quoting Export-Import Bank v. Asia Pulp & Paper Co., Ltd., 3 Civ. 8554, 2005 WL 1123755, at *4 (S.D.N.Y. May 11, 2005) (citation and internal quotation marks omitted)). “A plaintiff 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),” however. S.E.C. v. Anticevic, 5 Civ. 6991 (KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (emphasis in original).

“‘[S]ervice of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief[, however]. It is merely one means among several which enables service of process on an international defendant.’” KPN B.V. v. Corcyra D.O.O., 8 Civ. 1549 (JGK), 2009 WL 690119, at *1 (S.D.N.Y. Mar. 16, 2009) (quoting Ehrenfeld v. Salim a Bin Mahfouz, 4 Civ. 9641 (RCC), 2005 WL 696769, at *2 (S.D.N.Y. Mar. 23, 2005)). “To obtain the Court’s permission to utilize Rule 4(f)(3), [plaintiff] must show that ‘the facts and circumstances of the present case necessitate . . . district court intervention.’” United States v. Lebanese Canadian Bank SAL, 285

F.R.D. 262, 266 (S.D.N.Y. 2012) (quoting Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1016 (9th Cir. 2002) (citation omitted)).

Service under Rule 4(f)(3) is proper as long as it “(1) is not prohibited by international agreement; and (2) comports with constitutional notions of due process.” Stream SICAV v. Wang, 989 F. Supp. 2d 264, 278 (S.D.N.Y. 2013) (quoting SEC v. Anticevic, 5 Civ. 6991 (KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (citation omitted)). As to due process, “the basic inquiry” as to “the range of alternative means of service the Court may order . . . ‘is whether the method is reasonably calculated, under all the circumstances, to give actual notice to the party whose interests are to be affected by the suit or proceeding, and to afford him an adequate opportunity to be heard.’” KPN, 2009 WL 690119, at *1 (quoting Levin v. Ruby Trading Corp., 248 F. Supp. 537, 540-41 (S.D.N.Y. 1965)). In deciding whether constitutional due process will be satisfied by a particular method of service, a court may consider “the practicalities in a given case.” Id. (quoting Levin, 248 F. Supp. at 541).

II. ANALYSIS

A. Service on Quinn Emanuel is Not Barred by Rule 4(h)(2)

Defendants argue that service on Quinn Emanuel is not permissible under Rule 4(h)(2), because that provision addresses service “not within any judicial district of the United States.” (Def. Opp. (Dkt. No. 32) at 31-32 (citing Codigo Music, LLC v. Televisa S.A. de C.V., 15 Civ. 21737, 2017 WL 4346968, at *13 (S.D. Fla. Sept. 29, 2017) (“[T]he plain language of Rule 4(f)(3) requires that the alternative service sought contain, at least, some component that will occur outside of the United States.”); Freedom Watch, Inc. v. Org. of Petroleum Exporting Countries, 107 F. Supp. 3d 134, 137 (D.D.C. 2015) (“[B]ased on a textual reading of both subsections (h) and (f)(3) of Rule 4 . . . service [under Rule 4(f)(3)] cannot occur in the United

States” (emphasis in original)); Drew Techs., Inc. v. Robert Bosch, L.L.C., No. 12-15622, 2013 WL 6797175, at *3 (E.D. Mich. Oct. 2, 2013) (“Court ordered service under Rule 4(f)(3) is clearly limited to methods of service made outside of the United States.”))

Other courts have held, however, that Rule 4(h)(2) and (f)(3) do not bar the type of alternative service proposed here, because such service “require[s] transmission of service papers to a foreign defendant via a domestic conduit like a law firm or agent – ultimately, the foreign individual is served and thereby provided notice outside a United States judicial district, in accordance with Rule 4’s plain language.” In re Cathode Ray Tube (CRT) Antitrust Litig., 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014); see Bazarian Int’l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A., 168 F. Supp. 3d 1, 14 (D.D.C. 2016) (same); cf. Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries, 766 F.3d 74, 83 (D.C. Cir. 2014) (“A number of courts thus have sanctioned service on United States counsel as an alternative means of service under Rule 4(f)(3) without requiring any specific authorization by the defendant for the recipient to accept service on its behalf.”). This Court finds these cases persuasive, and concludes that the relevant circumstance is where the defendant is, and not the location of the intermediary.

B. Service on Quinn Emanuel Is Not Barred By International Agreement and Does Not Violate Due Process

Rule 4(f)(3) permits a Court to order alternative methods of service that are “not prohibited by international agreement.” Fed. R. Civ. P 4(f)(3). The governing international agreement between the U.S. and Brazil is the Inter-American Convention. “The Convention merely provides one possible method of service, however. It is neither mandatory nor exclusive.” Mayatextil, S.A. v. Liztex U.S.A., Inc., 92 Civ. 4528 (SS), 1994 WL 198696, at *5 (S.D.N.Y. May 19, 1994) (citing Pizzabiocche v. Vinelli, 772 F.Supp. 1245, 1249 (M.D. Fla. 1990)); see Kreimerman v. Casa Veerkam, S.A. de C.V., 22 F.3d 634, 640, 642 (5th Cir. 1994)

(stating that the Inter-American Convention “appears solely to govern the delivery of letters rogatory among the signatory States,” and “merely provides a mechanism for transmitting and delivering letters rogatory when and if parties elect to use that mechanism”); In re Petrobas Sec. Litig., 14 Civ. 9662 (JSR), 2016 WL 908644, at *2 (“The [Inter-American Convention] does not forbid other methods of service.”); DHL Global Forwarding Mgmt. Latin Am., Inc. v. Pfizer, Inc., 13 Civ. 8218 (KBF), 2014 WL 5169033, at *4 (S.D.N.Y. Oct. 14, 2014) (“It is true that the Inter-American Convention may not foreclose service by means other than letters rogatory . . .”). Accordingly, the Inter-American Convention does not prohibit service on Defendant Odebrecht through Quinn Emanuel instead of through the Brazilian system for letters rogatory.

As to due process, “[c]onstitutional notions of due process require that any means of service be ‘reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” Stream SICAV v. Wang, 989 F. Supp. 2d 264, 279 (S.D.N.Y. 2013) (quoting Anticevic, 2009 WL 361739, at *4).

Here, service on Quinn Emanuel comports with due process, and Defendants make no contrary argument. “In many instances, courts have authorized service under Rule 4(f)(3) on an unserved party’s counsel.” In re GLG, 287 F.R.D. at 267 (citing cases). Although “[d]istrict courts have not authorized service on a lawyer unless there has been adequate communication between the foreign defendant and the lawyer,” Madu, 265 F.R.D. at 116, this circumstance is present here. Quinn Emanuel represented Odebrecht in the related criminal proceeding that resulted in Odebrecht’s guilty plea (Plea Agreement (Dkt. No. 29-3) at 27), and also represented Odebrecht in a recent securities fraud class action in this District. See Notice of

Appearance (Dkt. No. 92), In re Braskem, S.A. Sec. Litig., 15 Civ. 5132 (PAE) (S.D.N.Y. Oct. 18, 2016), available at Britton Decl., Ex. B (Dkt. No. 29-2) at 2. While the Braskem action was settled earlier this year,³ the Court concludes that service on Quinn Emanuel is reasonably likely to apprise Odebrecht of this action.

In re Petrobras Sec. Litig., 14 Civ. 9662 (JSR), 2015 WL 10846515 (S.D.N.Y. Nov. 2, 2015) is instructive. In that case, Plaintiffs requested that the court authorize alternative service on individual defendants in Brazil through attorneys representing them in related criminal proceedings in Brazil. “Plaintiffs represent[ed] that they obtained the names of counsel for [two individual defendants] in related criminal matters by searching the dockets of Brazilian courts. They believe that these attorneys still represent the Individual Defendants and can communicate with them regarding the present lawsuit. On the basis of these representations, [Judge Rakoff concluded] that attorney service will provide these two defendants with adequate notice.” Id. at *2.

Similarly here, Quinn Emanuel represented Odebrecht in a related criminal case in the Eastern District of New York⁴ and in a recently concluded civil case in this District, and currently represents three Odebrecht subsidiaries in the instant case. Given these circumstances, the Court concludes that service through Quinn Emanuel is reasonably likely to apprise Odebrecht of this case.

³ Braskem was closed on February 21, 2018, after Judge Engelmayer entered a class action settlement. Order and Final Judgment (Dkt. No. 132), Braskem, 15 Civ. 5132 (S.D.N.Y. Feb. 21, 2018).

⁴ Odebrecht’s obligations under the plea agreement continue until at least December 2019. (See Plea Agreement (Dkt. No. 29-3) at 2 (obligations under plea agreement run three years from the later of the appointment of independent compliance monitor and the filing of an information); Minute Entry (Dkt. No. 11), United States v. S.A. Odebrecht, 16 Cr. 643 (E.D.N.Y. Dec. 21, 2016) (waiver of indictment executed and Odebrecht enters guilty plea to Information))

C. Whether Service on Quinn Emanuel is Necessary and Appropriate

Because service through Quinn Emanuel does not violate an international agreement and comports with due process, it is permitted under Rule 4(f)(3). “The final question, then, is whether the Court should exercise its discretion to order it.” Stream SICAV, 989 F. Supp. 2d at 280. To determine whether alternative service is appropriate, “district courts in this Circuit have generally required: ‘(1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court’s intervention is necessary.’” Lebanese Canadian Bank SAL, 285 F.R.D. at 267 (quoting Devi v. Rajapaska, 11 Civ. 6634 NRB, 2012 WL 309605, at *1 (S.D.N.Y. Jan. 31, 2012)). However, “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 an international agreement “before granting an order permitting alternative service under Rule 4(f)(3).” In re GLG, 287 F.R.D. at 266 (citing WRIGHT & MILLER, 4B FEDERAL PRACTICE & PROCEDURE: CIVIL § 1134, at 33 (3d ed. 2002) (“The only proscription on the district court’s discretion is that the method not be prohibited by international agreement.”)).

Here, Plaintiff contends that lengthy delays associated with the letters rogatory system in Brazil justify alternative service. (Pltf. Reply (Dkt. No. 30) at 8-12) Plaintiff has submitted an affidavit from Diane Myers, who is employed at APS International Ltd., which “offers assistance in obtaining service of process upon foreign countries.” (Britton Decl., Ex. E (Myers Aff.) (Dkt. No. 29-5) ¶ 1) Myers states that “service in Brazil is currently taking twelve to eighteen months or longer. Brazilian defendants are notified and given the opportunity to object, prior to service, which delays the process.” (Id. ¶ 7)

Several courts in this district have cited concerns about such delays in excusing plaintiffs from utilizing the Hague Convention or other international agreements regarding service of process. For example, in In re GLG Life Tech Corp. Sec. Litig., 287 F.R.D. 262 (S.D.N.Y. Nov. 9, 2012), Magistrate Judge Gorenstein expressed concern that “the length of time required for service under the Hague Convention, approximately six to eight months, may unnecessarily delay this case,” id. at 266, and noted that “[c]ourts have frequently cited delays in service under the Hague Convention as supporting an order of alternative service under Rule 4(f)(3).” Id. (citing cases); see also Stream SICAV v. Wang, 989 F. Supp. 2d 264, 280 (S.D.N.Y. 2013) (“[T]he Court sees no reason to slow the progress of this case by ordering service through the [Hague] Convention when service through [the company where defendant CEO worked] and its counsel will be just as reliable, if not more so.”).

Defendants argue, however, that principles of comity suggest that Plaintiff should be required to make a reasonable effort to effect service before seeking the Court’s intervention. (Def. Opp. (Dkt. No. 32) at 16-19) Defendants cite the Advisory Committee Notes to Rule 4 in support of this argument. (Id. at 9, 16) The Advisory Committee Notes provide that

Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit service within the time required by the circumstances. Other circumstances that might justify the use of additional methods include the failure of the foreign country’s Central Authority to effect service within the six-month period provided by the Convention, or the refusal of the Central Authority to serve a complaint seeking punitive damages or to enforce the antitrust laws of the United States. In such cases, the court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law.

Fed. R. Civ. P. 4, Adv. Comm. Notes, 1993 Amendment. Courts in this District have also stated that plaintiffs should be required to make such “earnest effort[s]” “[i]n the interests of comity.” Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co., 3 Civ. 8554 (LTS) (JCF), 2005 WL 1123755, at *4 (S.D.N.Y. May 11, 2005).

Defendants argue that “[b]y refusing even to attempt service by Letters Rogatory, Plaintiff disregards the obligation to minimize the offense to Brazilian law.” (Def. Opp. (Dkt. No. 32) at 16) Defendants also cite Brazilian court decisions holding that “Brazil recognizes only Letters Rogatory as legitimate service by a foreign plaintiff within Brazil.” (Id. (citing Superior Court of Justice, Reg. No. 2012/0224986-7, SEC 5.420/IL, Israeli Credit Ins. Co. v. Crown Processamento de Dados Ltda, at 7 (“Individuals domiciled in Brazil must be summoned to respond to legal proceedings abroad through a letter rogatory, as it is inadmissible to do so in any other manner.”), available at Def. Opp., App. (Dkt. No. 32-1) at 19))

At least one court has explicitly rejected the argument that delays in the letter rogatory system in Brazil justify approving alternative service. In J.B. Custom, Inc. v. Amadeo Rossi, S.A., 10 Civ. 326, 2011 WL 2199704 (N.D. Ind. June 6, 2011), the court stated that even if it is “difficult to obtain service in Brazil via letters rogatory,” it is not appropriate to

override the laws [of] a sovereign state like Brazil just because they are perceived to be slow or difficult. Any questions about the ways in which Brazil processes letters rogatory or complies with the Inter-American Convention are ultimately diplomatic issues for the executive branch. For me to impose by fiat a rule allowing service on Brazilians in a manner that Brazil has apparently resisted for decades would be to side-step the State department and its role in negotiating with the sovereign state of Brazil.

J.B. Custom, 2011 WL 2199704, at *6.

Here, Plaintiff filed the Complaint on October 20, 2017, and has unsuccessfully attempted to serve Odebrecht through its subsidiaries’ agent in New York (See Pltf. Br. (Dkt. No. 28) at 6; Def. Ltr. Mtn. (Dkt. No. 18) at 1 n.1) and through Quinn Emanuel. Both the

subsidiaries' New York agent and Quinn Emanuel declined to accept service. (Def. Opp. (Dkt. No. 32) at 15) The evidence before this Court suggests that – absent an order approving alternative service – there is likely no other way to effect service on Odebrecht other than through letters rogatory.

Plaintiff relies on the Myers affidavit to argue that service through letters rogatory will likely take 12 to 18 months.⁵ (Pltf. Br. (Dkt. No. 28) at 20) Defendants challenge the Myers affidavit on several grounds, however, complaining that it does not address the service of a summons and complaint specifically; does not offer examples of “effecting the service actually at issue here”; and is not consistent with puffery on the APS International website claiming that APS ““has the expertise in all methods of service of process abroad to ensure successful results in virtually any area of the world”” and that APS has ““developed personal relationships with many foreign authorities and can expedite what can be a complicated and time consuming endeavor for you.”” (Def. Opp. (Dkt. No. 32) at 19-20 (quoting Services: International Service of Process, APS INTERNATIONAL, <https://www.civilactiongroup.com/international-service-of-process> (last visited Sept. 20, 2018)) (emphasis in Def. Opp.)))

Defendants offer no evidence that service of a summons and complaint takes less time than service of other types of documents, however. Moreover, Myers' description of the letters rogatory process in Brazil – which involves a multitude of steps – suggests that the

⁵ Plaintiff's argument that service could take up to three years (see Pltf. Br. (Dkt. No. 28) at 20) is not persuasive. The basis for the three year estimate is apparently an outdated warning from the U.S. Department of State that has since been removed from its website. (Def. Opp. (Dkt. No. 32) at 20-21; see also Russell Brands, LLC v. GVD Int'l Trading, SA, 282 F.R.D. 21, 25 (D. Mass. 2012))

process is complex and is likely to be time consuming.⁶ Finally, the statements on APS's website cited by Defendants do not pertain specifically to Brazil.

A number of courts have cited much shorter periods of delay as justification for alternative service under Rule 4(f)(3). See In re GLG, 287 F.R.D. at 266-67 (six to eight months) (citing Brown v. China Integrated Energy, Inc., 285 F.R.D. 560, 562-66 (C.D. Cal. 2012) (four to six months)); The Knit With v. Knitting Fever, Inc., Nos. CIV.A. 08-4221 & 08-4773, 2010 WL 4977944, at *4-5 (E.D. Pa. Dec. 7, 2010) (service through Italian Central Authority could take up to three months).

Under the circumstances of this case, the Court concludes that alternative service on Odebrecht through Quinn Emanuel is justified. Plaintiff has offered persuasive evidence that use of the letters rogatory system will delay this case for a year to a year-and-a-half. Plaintiff has also made some effort to effect service on Odebrecht, and has not delayed in seeking relief from the Court. Finally, while generalized complaints about the cost and delay associated with international conventions and letters rogatory may be unpersuasive, here Plaintiff has offered un rebutted evidence from someone who is in the business of assisting clients in effecting service in Brazil. This Court sees no purpose in requiring Plaintiff to make an effort to serve Odebrecht through the letters rogatory system just to confirm the delays and difficulties that Plaintiff has already demonstrated are likely to occur. See In re GLG, 287 F.R.D. at 267 ("Given the

⁶ Myers describes the process as follows: APS prepares an Inter-American Convention form (USM 272); sends it to the requesting attorney for review and to obtain the necessary signatures and court seals; documents are then returned to APS, translated, and sent to the designated Central Authority for the United States; the documents are then sent to the designated Brazilian Central Authority, which then forwards the documents to the Brazilian Superior Court of Justice; the Brazilian defendant is then notified of the request and given an opportunity to object prior to service; the Brazilian authorities will then complete a Proof of Service or Proof of Non-Service in Portuguese and return it to APS in the reverse order. (Myers Aff. (Dkt. No. 29-5) ¶¶ 5-8)

certainty that service on [the corporation’s attorneys] and/or [the corporation] will result in notice to [its CEO], and given that service via the Hague Convention would be a pointless and lengthy exercise, an order of alternative service is justified.”); see also In re Petrobras Sec. Litig., 14 Civ. 9662 (JSR), 2015 WL 10846515 (S.D.N.Y. Nov. 2, 2015) (Plaintiffs represented that they had attempted service through the Inter-American Convention but that “these efforts have so far been futile,” id. at *1; district court allowed service against Brazilian defendants under Rule 4(f)(3)).

The circumstances here distinguish this case from those in which courts have found delay alone insufficient. For example, in KG Marine, LLC v. Vicem Yat Sanayi Ve Ticaret As, 24 F. Supp. 3d 312 (W.D.N.Y. 2014), plaintiff sued a Turkish yacht manufacturer, two American corporate entities, and a Turkish individual, and moved under Rule 4(f)(3) to serve the Turkish company and Turkish citizen through alternate means.⁷ The court noted that “[p]laintiff does not offer any reason explaining why it is in need of alternate means to effectuate service on [defendants], other than that . . . service under Fed. R. Civ. P. 4(f)(1) pursuant to the Hague Convention ‘is very costly and time consuming.’” Id. at 315. The court further noted that “[p]laintiff does not state that it has attempted to serve [defendants] by any of the methods described in Fed. R. Civ. P. 4(f)(1) or (f)(2), nor does [p]laintiff raise any reason why it would be unsuccessful at effectuating service pursuant to either of those provisions.” Id. The court concluded that “[p]laintiff has not demonstrated that it made a reasonable attempt to serve [defendants] without a court order, or that this Court’s intervention is necessary to effectuate service under the circumstances of this case.” Id. Here, however, Plaintiff has made some attempts at service, and has offered evidence demonstrating the difficulties associated with the

⁷ The proposed alternate means of service are not disclosed in the opinion.

letters rogatory process in Brazil. In other words, Plaintiff has done more than make an unsupported generalized complaint that service through the letters rogatory process would be “very costly and time consuming.”

Similarly in U.S. Aviation Underwriters, Inc. v. Nabtesco Corp., No. C07-1221RSL, 2007 WL 3012612 (W.D. Wash. Oct. 11, 2007), the court denied plaintiffs’ request for permission to serve a Japanese corporation by international certified mail, fax, email or Federal Express overnight courier. Id. at *1. Plaintiff argued that service under Rule 4(f)(3) “will be much faster, thus moving this case forward in an expeditious and cost-effective manner,” but “cite[d] no reason why the methods specified by Fed. R. Civ. P. 4(f)(1) and (2) would be ineffective.” Id. at *2. Here, as discussed above, Plaintiff has offered more than generalized complaints about delay and inefficiency, and has made some attempts at service.⁸

While this Court recognizes that the method of service proposed by Plaintiff presents some offense to Brazilian law, this factor is outweighed by Plaintiff’s showing of the delay and difficulties associated with obtaining service through letters rogatory, and by the unique circumstances of this case, including the fact that Quinn Emanuel (1) has already

⁸ The Court notes that both KG Marine and U.S. Aviation involve service in countries (Turkey and Japan) that are signatories to the Hague Convention. Under Article 15 of the Hague Convention, a party requesting service through the Convention may seek a default judgment if the Central Authority of a country has had the service documents for six months and has not returned proof of service, provided that the documents were transmitted in a way prescribed under the Convention and that every reasonable effort has been made to obtain proof of service. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Convention”) art. 15, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163; see also Burda Media, Inc. v. Viertel, 417 F.3d 292, 302 (2d Cir. 2005) (“Article 15 provides that a member state may permit its courts to enter a default judgment in the absence of a returned Certificate where at least six months have passed since the documents were sent to the defendant and the plaintiff has made ‘every reasonable effort’ to obtain a Certificate.”) Brazil is not a signatory to the Hague Convention, and no comparable remedy for delay appears in the Inter-American Convention.

appeared in this action as counsel for Odebrecht's subsidiaries; (2) recently represented Odebrecht in another matter in this district; and (3) currently represents Odebrecht in connection with a closely related criminal prosecution brought by the U.S. Department of Justice.

Moreover, the evidence before this Court demonstrates that any method of service other than letters rogatory would offend Brazilian law. If this factor were dispositive – absent a contractually appointed U.S. agent – letters rogatory would constitute the exclusive method of service for Brazilian defendants. As numerous courts have found, however, the Inter-American Convention is not the exclusive method of service. See, e.g., Kreimerman v. Casa Veerkam, S.A. de C.V., 22 F.3d 634, 640, 642 (5th Cir. 1994) (Inter-American Convention “appears solely to govern the delivery of letters rogatory among the signatory States” and “merely provides a mechanism for transmitting and delivering letters rogatory when and if parties elect to use that mechanism”); Mayatextil, S.A. v. Liztex U.S.A., Inc., 92 Civ. 4528 (SS), 1994 WL 198696, at *5 (S.D.N.Y. May 19, 1994) (“The Convention merely provides one possible method of service. . . . It is neither mandatory nor exclusive.” (citing Pizzabiocche v. Vinelli, 772 F.Supp. 1245, 1249 (M.D. Fla. 1990))).

Finally, other courts in this district have authorized alternative means of service against Brazilian defendants. As discussed above, in In re Petrobras Sec. Litig., 14 Civ. 9662 (JSR), 2015 WL 10846515 (S.D.N.Y. Nov. 2, 2015), Judge Rakoff noted that the Inter-American Convention “does not forbid other methods of service,” and allowed service to be made on two individual defendants in Brazil through the Brazilian attorneys represented them in ongoing criminal matters in Brazil. Id. at *1-2. And Judge Engelmayer has authorized alternative service on Odebrecht through certified mail. See Order Directing Service of the Summons and

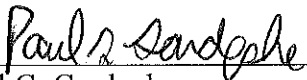
Complaint by Alternative Means (Dkt. No. 45), In re Braskem, S.A., Sec. Litig., 15 Civ. 5132 (PAE) (S.D.N.Y. Dec. 15, 2015).

CONCLUSION

For the reasons stated above, Plaintiff's motion to effect service on Odebrecht through Quinn Emanuel is granted. Plaintiff will serve the summons and complaint by UPS courier or U.S. mail on Jacob J. Waldman, Quinn Emanuel Urquhart & Sullivan, LLP, 51 Madison Avenue, 22nd Floor, New York, New York 10016 no later than September 28, 2018. The Clerk of Court is directed to terminate the motion. (Dkt. No. 27)

Dated: New York, New York
September 21, 2018

SO ORDERED.



Paul G. Gardephe
United States District Judge