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Hon. John D. Bates
U.S. District Court for the
District of Columbia
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Re: *Proposed Amendment to Fed. R. Civ. P. 4(f)(2)*

Gentlemen:

I am writing to propose an amendment to Rule 4(f)(2) to bring the text into better alignment with the practice of the courts and the apparent intent of the drafters in cases involving service of process by the alternate channels permitted by Article 10 of the Convention of 15 Nov. 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Hague Service Convention"). My proposed amendment, redlined against the existing rule, is as follows:

> (f) SERVING AN INDIVIDUAL IN A FOREIGN COUNTRY. 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:
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> * * *
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> (2) if there is no internationally agreed means, or if an international agreement allows but does not ~~specify~~ itself authorize other means, by a method that is reasonably calculated to give notice:

The United States is party to two treaties on the service of process abroad: the Hague Service Convention, and the Inter-American Convention on Letters Rogatory (and its Additional Protocol). The Inter-American Convention is non-exclusive: it provides an optional method of service that plaintiffs may use if they choose, but it does not forbid the use of other methods. *See Kreimerman v. Casa Veerkamp, S.A. de C.V.,* 22 F.3d 634 (5th Cir. 1994). The Hague Service Convention, though, is exclusive: when it applies, the parties must use one of the methods it permits. *See Volkswagenwerk AG v. Schlunk,* 486 U.S. 694, 699 (1988).

The Inter-American Convention provides for a single method of service, namely, a letter rogatory transmitted from the U.S. central authority to the central authority of the state of destination, which then executes the request in the manner prescribed by local law. *See generally* Additional Protocol arts. 2-4. The Convention does not specify any other methods of service. Thus the existing language of Rule 4(f)(2) is a good fit for the Inter-American Convention. Since the Convention is non-exclusive, the methods of service listed in Rule 4(f)(2)(A), (B), and (C) are methods of service that the Inter-American Convention "allows but does not specify," as are methods that a District Court might authorize under Rule 4(f)(3).

The Rule is not a good fit, however, for the Hague Service Convention. The Convention authorizes service via a central authority mechanism, *see* Hague Service Convention art. 5. Service via the central authority mechanism is plainly within the scope of Fed. R. Civ. P. 4(f)(1), which authorizes service "by any internationally agreed means that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." But it also provides for alternate channels of transmission that a plaintiff can use when the state of destination has not objected, including, for example, service by postal channels. *See id.* art. 10. And it provides for other channels of transmission in cases where the state of destination has provided for other methods under its internal law. *See id.* art 19. In *Water Splash, Inc. v. Menon,*137 S. Ct. 1504, 1513 (2017), the Court distinguished between those methods that the Convention affirmatively authorizes and those it merely permits, e.g., service by postal channels.

The current rule is problematic because the Convention does *allow* alternate methods of service, but it also *specifies* the alternate methods of service that it permits. A literal reading of the rule, therefore, suggests that service by mail under Rule 4(f)(2)(C)(ii) is

never available as a method of service when the Hague Service Convention applies, because the Convention allows *and specifies* service by mail as a method of service. Such a reading is at odds with the cases, which routinely approve of service by mail or by other methods permitted by Article 10 of the Convention (e.g., service via a solicitor in England and Wales, which is permitted under Article 10(c)). *See, e.g., Water Splash, supra* (approving service by postal channels in Canada).

The amendment I am proposing would, in my view, clarify the applicability of Rule 4(f)(2) to service under the alternative channels of transmission permitted—but not affirmatively authorized—by the Service Convention and would be helpful to courts and litigants.

Sincerely,

Theodore J. Folkman