UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20602

In the Matter of **NOE CORRALES REYES,** **Respondent.**	**DIVISION OF ENFORCEMENT'S RESPONSE TO THE COMMISSION'S ORDER REGARDING SERVICE**

In its Order Regarding Service in this matter, dated March 1, 2023 (the "Service Order"), the Securities and Exchange Commission ("Commission") ordered that the Division of Enforcement ("Division") file a brief by March 29, 2023, addressing issues raised in the Service Order and any other matters the Division may deem pertinent. The Division hereby respectfully submits its response to the Service Order and in support of its Motion for Leave to Use Alternative Means of Service as to Respondent, dated January 18, 2023 (the "Motion").

I. Procedural Background

The Commission issued its order instituting these proceedings ("OIP") on September 27, 2021. The Division was unable to successfully serve Respondent with the OIP at his last known address via means authorized by the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").[1] As a result, the Division then filed the Motion, requesting approval to

[1] *See also* Section II.b, below.

serve Respondent with the Order by, among other means,[2] registered e-mail at an e-mail address known to be used by Respondent. (*See* Motion at 3.) In its Motion, the Division explained that this method comports with Commission Rule of Practice 141(a)(2)(iv)(D), which provides for service by "any other means not prohibited by international agreement, as the Commission or hearing officer orders." (*Id.*) The Division further noted that although Mexico, where the Division understands Respondent resides, has objected to alternative service under Article 10 of the Hague Convention, Federal courts applying Fed. R. Civ. P. 4(f)(3) – which like Rule 141(a)(2)(iv)(D) allows for alternative service by other "means not prohibited by international agreement" – have authorized alternative service in jurisdictions that have objected to such service under Article 10. (*Id*.)

In the Service Order, the Commission noted that there is "a split in authority in the federal courts as to whether a foreign country's objection to service by mail under Article 10 also precludes service by e-mail" (*id.* at 2) (citing cases) and that the "Commission would benefit from additional briefing to determine whether service of the [Order] on Respondent using e-mail would constitute a 'means not prohibited by international agreement' under the circumstances of this case…" (*id.* at 3).

For the reasons below, service by e-mail in this matter would not constitute a "means not prohibited by international agreement" and is otherwise appropriate here.

[2] The Division also seeks leave to serve Respondent by publication, though this method of service is not addressed herein, as the Commission found "it appropriate to defer consideration of that request given the uncertainty, at this juncture, as to whether other methods of service are more likely to provide Respondent with actual notice of this proceeding." (*Id.* at n. 6.)

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II. Argument

a. Service on Respondent by E-mail is Not a "Means Prohibited by International Agreement"

As an initial matter, service by e-mail is not explicitly addressed by the Hague Convention, including in Article 10. Under Article 10(a) of the Hague Convention, "[p]rovided the State of destination does not object," the Convention "shall not interfere with… the freedom to send judicial documents, by postal channels, directly to persons abroad." In other words, a country's objection to Article 10 may constitute a rejection of service by "the postal channels," but does not constitute a prohibition on service by e-mail.

Courts in a number of circuits, including the Second, Fourth, Sixth, Ninth, Eleventh and D.C. Circuit have held that the Hague Convention does not prohibit parties from using e-mail service of process even where, as is the case with Mexico, the defendant's country has objected to the means of service specified in Article 10(a) of the Hague Convention. As noted in one of the cases cited by the Commission in its Service Order, "according to a *majority of courts*, 'alternative means of service [such as e-mail that are] unmentioned by the Hague Convention are not prohibited if 'the receiving state has not objected to [that alternative form of service].'" *Chanel, Inc. v. HandbagStore*, No. 20-CV-62121, 2021 WL 3060329, at *9 (S.D. Fla. June 30, 2021) (quoting *Hangzhou Chic Intelligent Tech. Co. v. Partnerships & Unincorporated Associations Identified on Schedule A*, No. 20 C 4806, 2021 WL 1222783, at *3 (N.D. Ill. Apr. 1, 2021)); *see also SEC v. Craven*, No. 1:15-MC-0004-GNS, 2015 WL 9275741, at *1 (W.D. Ky. Dec. 18, 2015) (authorizing alternative service by e-mail in Switzerland, a country that objected to Article 10 of the Hague Convention, and finding that the "the trend is clearly toward an interpretation of Article 10 that email is not construed as a 'postal channel[ ]'").

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Looking to courts in the D.C. Circuit, specifically, the question of service by e-mail was addressed by the district court in *Bazarian International Financial Associates v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1 (D.D.C. 2016).[3] In *Bazarian*, the court denied a motion to dismiss based on improper service where plaintiff served defendants by registered mail and e-mail on defendants' U.S. counsel, addressing arguments by defendants including that a country of residence "specifically objects to 'the transmission of documents through postal channels' as laid out in Article 10 of the Hague Convention." (*Id.* at 17.) The court found this argument unavailing, reasoning that "a country's objection to Article 10 does not constitute an express rejection of service by email" (*id.*) (collecting cases that permitted service by e-mail on defendants in countries that objected to Article 10 of the Hague Service Convention and finding their reasoning "persuasive").

Some courts have suggested that service by e-mail is inappropriate where the defendant is located in a country that has objected to Article 10(a) of the Hague Convention. These cases generally fall into two categories: (1) cases that center on the view that a method of service, such as email, *not* mentioned in the Hague Convention is "preempted and therefore prohibited by international agreement, disqualifying it under Rule 4(f)(3)" *UOP LLC v. Industria del Hierro SA de CV*, No. 2:22-CV-01089, 2022 WL 2056363, at *2 (W.D. La. June 7, 2022) (collecting cases); and (2) cases that draw an equivalency between the term "postal channels" and other forms of transmittal, including e-mail, placing the "burden [on plaintiff] of showing that the 'other means' of service [a plaintiff proposes] to utilize are permissible" under the Hague

[3] The Division is unaware of any opinion by the U.S. Court of Appeals for the D.C. Circuit addressing the specific question raised by the Service Order – *i.e.*, whether service by email to a resident of a country that has objected to Article 10 of the Hague Convention constitutes a means of service "not prohibited by international agreement" – but offers *Bazarian* as persuasive authority in light of Exchange Act Section 25(a)(1), 15 U.S.C. § 78y(a)(1) (contemplating that a respondent, as is the case here, who neither resides in nor has a place of business in the United States can seek judicial review of a Commission final order in the U.S. Court of Appeals for the D.C. Circuit).

Convention where the country of residence objects to Article 10. *Agha v. Jacobs*, No. 07–cv–1800, 2008 WL 2051061 at *1–2 (N.D. Cal. May 13, 2008).[4]

However, as noted above, the weight of authority in most circuits, including in the D.C. Circuit, has expressly rejected these preemption and the postal service analogy approaches to service by e-mail. Further, many cases that suggested that service by e-mail was inappropriate were limited to specific facts that are not present here. For instance, the court in *Agha* recognized that service via e-mail might be appropriate in other circumstances where policy or other grounds justified its use, regardless of the relevant country's objection to Article 10 of the Hague Convention. Referencing *Rio Properties v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002), the court suggested that plaintiff's failure to even attempt service at a known address via the Hague Convention "[led] to a very different 'balance'" than was the case in *Rio*, where the plaintiff was unaware of other addresses. (*Agha*, 2008 WL 2051061, at *1.) In other words, if plaintiff in *Agha* had attempted to serve defendants at known addresses via means permitted by the Hague Convention before requesting leave to serve them via e-mail, as the Division has done here with Respondent, that case might have been differently decided. Similarly, the court in *UOP LLC*, in denying alternative service via e-mail in Mexico, found it significant that plaintiff "admitted that it did not even attempt to serve [defendant] pursuant to the [Hague] Convention

[4] One court has gone so far as to find that the Hague Convention does not permit service of process in Mexico via e-mail because Mexico's Central Authority is the "exclusive method of service of process on parties in Mexico under the Hague Convention." *Compass Bank v. Katz*, 287 F.R.D. 392, 397 (S.D. Tex. 2012). However, in so finding, the court in *Compass Bank* did not identify an express rejection by Mexico of service by e-mail as contemplated by the D.C. district court in *Bazarian* (and the Division is aware of none). Rather, it simply highlighted that a prior discrepancy caused by "erroneous courtesy translations of Mexico's declarations from the original Spanish text into English," had been resolved and that it was now "undisputed that Mexico has objected to all alternative methods of service" specifically listed in Article 10, including "postal channels" under Article 10(a). (*Compass Bank*, 287 F.R.D. at 397.). *See also Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.,* 970 F.3d 1269, 1294 (10th Cir. 2020) (finding that the "relevant inquiry… is whether the alternative service *method* in question is 'prohibited' by the agreement" and not simply, as plaintiff argued, whether a country objects to Article 10 of the Hague Convention) (collecting cases, including the district court's opinion in, *SEC v. de Nicolas Gutierrez* (the "Homex Action"), No. 17cv2086-JAH (JLB), 2020 WL 1307143, at *3 (S.D. Cal. Mar. 19, 2020)).

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before filing its motion for alternative service," *UOP LLC*, 2022 WL 2056363, at *3, suggesting that another outcome may have resulted had plaintiff first taken efforts to comply with permitted means of service under the Hague Convention.

b. The Hague Convention Does Not Apply Because Respondent's Address is Unknown

Alternatively, the Commission may conclude that even though both the United States and Mexico are signatories to the Hague Convention, it is not applicable here because it "shall not apply where the address of the person to be served with the documents is not known." Hague Service Convention, Art. 1. *See BP Prods. N. Am., Inc. v. Dagra*, 236 F.R.D. 270, 271 (E.D. Va. 2006) ("The Hague Convention does not apply in cases where the address of the foreign party to be served is unknown." (citing 20 U.S.T. 361 (U.S.T. 1969))). In deciding whether defendants' addresses are "unknown," courts have repeatedly looked to the efforts plaintiffs have put forth in attempting to discover said addresses. *See, e.g., Opella v. Rullan*, No. 10-21134, 2011 WL 2600707, at *5 (S.D. Fla. June 29, 2011) ("an address is not 'known' within Article I of the Hague Convention only when it is unknown to the plaintiff after the plaintiff exercised reasonable diligence in attempting to discover that address"); *O'Donnell v. Diaz*, No. 3:17-CV-1922-S-BK, 2019 WL 13095195, at *2 (N.D. Tex. June 18, 2019) (authorizing service by e-mail where plaintiff was unable to locate an address for defendant after hiring investigators, finding that defendant's "location is clearly unknown, thus, the provisions of the Hague Convention are inapplicable").

The Division has exercised reasonable diligence in attempting to locate Respondent's current address. This diligence included searching through the Division's extensive investigative records, performing public records searches, and spending significant time attempting Hague Convention service on Respondent through Mexico's Central Authority using his last known

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address. Despite more than a year passing since its initial attempt at service, the Division has yet to receive confirmation from the Mexico Central Authority regarding the status of its service on Respondent via the Hague Convention. As ordered by the Commission in its Service Order, the Division will submit "a status report regarding its attempts to serve Respondent with the OIP via the Mexico Central Authority by May 30, 2023, and every 90 days thereafter until service is accomplished." (Service Order at 3.) The Division is not currently and does not expect to become aware of any other potential address for Respondent.

Accordingly, the Hague Convention does not apply here, and alternative service, including via registered e-mail, is appropriate. *See Chanel, Inc. v. Zhixian*, No. 10-CV-60585, 2010 WL 1740695, at *3 (S.D. Fla. Apr. 29, 2010) (finding that the Hague Convention did not apply where plaintiff had "attempted to verify Defendant's addresses and [] determined that each address [was] false, incomplete, or invalid for service of process" and authorizing alternative service via e-mail despite the resident country's objection to Article 10 as "the e-mails that did not bounce back presumptively reached Defendant" and therefore satisfied due process)

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III. Conclusion

For the reasons set forth above and in its Motion, the Division of Enforcement respectfully requests that the Commission authorize alternative service of process upon Respondent.

Dated: March 29, 2023

Respectfully submitted,

/s/ Benjamin Brutlag
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BENJAMIN D. BRUTLAG
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Securities and Exchange Commission

Certificate of Service

In accordance with Rule 150(d)(2) of the Commission's Rules of Practice, I hereby certify that a true and correct copy of the foregoing Motion was served on the following persons on March 29, 2023, and otherwise sent, by the method indicated:

By e-filing:
Office of Secretary
Securities and Exchange Commission
100 F Street, N .E.
Washington, DC 20549-2557

VIA USPS REGISTERED MAIL BY DIVISION OF ENFORCEMENT
Noe Corrales Reyes
[redacted]

/s/ Benjamin Brutlag
Benjamin Brutlag
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