UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 19-CV-22842-DPG

SUCESORES DE DON CARLOS
NUÑEZ Y DOÑA PURA GALVEZ,
INC., d/b/a BANCO NUÑEZ,

Plaintiff,

vs.

SOCIÉTÉ GÉNÉRALE, S.A., d/b/a
SG AMERICAS, INC.; THE BANK OF
NOVA SCOTIA, d/b/a SCOTIA
HOLDINGS (US) INC., a/k/a THE BANK
OF NOVA SCOTIA, MIAMI AGENCY;
THE NATIONAL BANK OF CANADA,
d/b/a NATIONAL BANK OF CANADA
FINANCIAL GROUP, INC.; and BANCO
BILBAO VIZCAYA ARGENTARIA, S.A.,
d/b/a BBVA, USA.,

Defendants.
_____/

PLAINTIFF'S MOTION FOR APPROVAL OF A PLAN FOR
ALTERNATIVE SERVICE OF PROCESS

Plaintiff Sucesores de Don Carlos Nuñez y Doña Pura Galvez, Inc., d/b/a Banco Nuñez ("Plaintiff"), requests entry of an Order authorizing alternative service of process on Canadian Defendants The Bank of Nova Scotia, d/b/a Scotia Holdings (US) Inc., a/k/a The Bank of Nova Scotia, Miami Agency ("Scotibank"), and The National Bank of Canada, d/b/a National Bank of Canada Financial Group, Inc. ("NatBC"), as well as Spanish Defendant Banco Bilbao Vizcaya Argentaria, S.A., d/b/a BBVA, USA ("BBVA") (collectively, "Defendants"), pursuant to the "Service Plan" discussed below.

INTRODUCTION

This Cuban Liberty and Democratic Solidarity Act ("Helms-Burton"), 22 U.S.C. 6021, *et seq.*, claim arises from the Defendants' unlawful trafficking[1] in Banco Nuñez's confiscated property.[2] On October 14, 1960, all Cuban-owned banks, including Banco Nuñez, were nationalized and absorbed into Banco Nacional de Cuba ("BNC"). On October 14, 1960, BNC had a "fair value" roughly equivalent to the equity that BNC confiscated from the Cuban banking industry—approximately $74 million. $7.8 million, approximately ten-and-one-half percent of BNC's value as of October 14, 1958, was stolen from Banco Nuñez by BNC. Because Plaintiff has never been paid for its loss, Plaintiff owns a claim to ten-and-one-half percent of the equity of BNC.

The complaint names four defendants: one French company, two Canadian companies, and one Spanish company. As a Helms-Burton action, the purpose of this case is to protect United States nationals, such as Plaintiff, against the wrongful trafficking in property confiscated by the Cuban Government. *See* 22 U.S.C. § 6022(6).

United States District Courts have a mandate to deny traffickers, including international private entities, profits derived from confiscated property. "International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory." 22 U.S.C. § 6081(9). "To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of

[1] An entity "traffics" in confiscated property if it knowingly and intentionally (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property or purchases, leases, receives, possesses, obtains, control of, manages, uses, or otherwise acquires or holds an interest in confiscated property, (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or (iii) causes, directs, participates in, or profits from trafficking, without the authorization of the United States National who holds a claim to the property. *See* 22 U.S.C. §§ 6082 and 6023(13).

[2] Helms-Burton defines "Property" as "any property (including patents, copyrights, trademarks, and any other form of intellectual property), whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein." 22 U.S.C. § 6023(12)(A).

these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11). The Defendants are liable in United States courts of law for unlawful trafficking in Banco Nuñez's property, and the Court should permit service by the most expeditious means available.

Through this motion, Plaintiff seeks and Order authorizing alternative service of process on the Defendants by serving their United States subsidiaries.

DOMESTIC SERVICE ON DEFENDANTS IS WARRANTED AND PERMISSIBLE

Canada and Spain are signatories to The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"); however, service in Canada and Spain through the Hague Convention will unduly delay the speedy determination of this case. Hague Convention service on Defendants NatBC and BBVA would require translation of the summonses, cover sheet, and complaint and then, once translated, the documents directed to each Defendant will have to be transmitted to Canada's and Spain's Central Authority. The Central Authorities would then be charged with serving those documents.

In Canada, the average time from the Central Authority's receipt to return of proof takes three to four months.[3] In Spain, the average time for the Central Authority to return proof of service takes between six and nine months.[4]

The Federal Rules of Civil Procedure give Courts discretion to approve reasonable alternatives to the costly, time consuming, and potentially fruitless procedure of attempting

[3] *See* Aaron Lukken, *How to Serve Process in Canada*, Hague Law Blog, January 1, 2017, available at: https://www.haguelawblog.com/2017/01/serve-process-canada/ (last visited September 24, 2019).

[4] *See* Aaron Lukken, *How to Serve Process in Spain*, Hague Law Blog, December 26, 2017, available at: https://www.haguelawblog.com/2017/12/serve-process-spain/ (last visited September 24, 2019).

service through the Hague Convention. Federal Rule of Civil Procedure 4(f)(3) "authorizes a district court to order an alternative method for service to be effected upon foreign defendants provided it is not prohibited by international agreement and is reasonably calculated to give notice to the defendants." *Wood Mountain Fish, LLC v. Mowi ASA*, Case No.: 19-CV-22128, 2019 WL 3036536, at *1 (S.D. Fla. July 11, 2019) (*citing Brookshire Bros., Ltd. v. Chiquita Brands Int'l, Inc.*, Case No.: 05-CV-61962, 2007 WL 1577771, at *2 (S.D. Fla. May 31, 2007) ("[D]istrict courts have broad discretion under Rule 4(f)(3) to authorize other methods of service that are consistent with due process and are not prohibited by international agreements.")).

The extended wait that would otherwise be attributable to Hague Convention service is unnecessary because each Defendant is a major company with strong United States connections, including wholly-owned subsidiaries. If approved, Plaintiff will serve each Defendant through those United States subsidiaries—a means of service that satisfies Constitutional notice requirements. Plaintiff's Service Plan will not violate any strictures of international law, the Federal Rules, or any other applicable law.

THE SERVICE PLAN IS PERMISSIBLE UNDER THE FEDERAL RULES

Service of process outside of the United States is governed by Rule 4(f),[5] which provides that such service may be completed through international agreements, such as the Hague Convention, or through Rule 4(f)(3) by "other means not prohibited by international agreement, as the court orders." *See Brookshire Bros., Ltd.*, 2007 WL 1577771, at *1-2. "Rule 4(f)(3) Fed. R. Civ. P., allows a district court to order an alternative method for service to be effected upon foreign defendants, provided that it is not prohibited by international agreement, and is

[5] "Federal Rule of Civil Procedure 4(h)(2) authorizes service of process on a foreign business entity in the manner prescribed by Rule 4(f) for individuals." *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F3.3d 1007, 1014 (9th Cir. 2002).

reasonably calculated to give notice to the defendants." *Abercrombie & Fitch Trading Co. v. 2cheapbuy.com*, Case No.: 14-CV-60250, 2014 WL 11706443, at *2 (S.D. Fla. Mar. 5, 2014).

The United States, Canada, and Spain are signatories to the Hague Convention, which does not specifically preclude service on a foreign corporation's United States-based subsidiary. Where a signatory nation has objected to the alternative means of service provided by Section 10 of the Hague Convention, that objection is expressly limited to those means listed in the objection and does not represent a blanket objection to other forms of service, such as by service through a United States subsidiary. *See Stat Med. Devices, Inc. v. HLT-Strefa, Inc.*, Case No.: 15-CV-20590, 2015 WL 5320947, at *3 (S.D. Fla. Sept. 14, 2015) (authorizing service by e-mail).

Courts have rejected the argument that Plaintiff must use other methods of overseas service authorized by Rule 4(f), such as the Hague Convention, before asking a court to authorize service by "other means." These subsections are not mutually exclusive and "there is no indication" they "are meant to be read as a hierarchy." *TracFone Wireless, Inc. v. Bitton*, 278 F.R.D. 687, 692 (S.D. Fla.); *see also Atlas One Fin. Group, LLC v. Alacorn*, Case No.: 12-CV-23400, 2014 WL 12571403, at *4 (S.D. Fla. Feb. 28, 2014) (Rule 4(f)(3) "is not considered as a last resort or as extraordinary relief."); *Brookshire Bros., Ltd.*, 2007 WL 1577771, at *1-2 (finding that Rule 4(f)(3) includes no qualifiers or limitations indicating its availability only after attempting service of process by other means.).

Rather, service under Rule 4(f)(3) need only "comport with constitutional notions of due process." *U.S. Commodity Futures Trading Commc'n v. Aliaga*, 272 F.R.D. 617, 620 (S.D. Fla. 2011). To conform with due process requirements, the Service Plan must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust CO.*, 339 U.S. 306, 314 (1950). Plaintiff's Service Plan will put

Defendants on notice of the action by serving the Defendants through their Untied States subsidiaries.

SERVICE PLAN

"Service through a subsidiary is … sufficient to satisfy Rule 4(f)(3) because it does not violate The Hague Convention." *Wood Mountain Fish*, 2019 WL 3036536, at *1 (*citing In re LDK Solar Sec. Litig.*, Case No.: 07-CV-05182, 2008 WL 2415186 (N.D. Cal. June 12, 2008) (authorizing service on local subsidiary)). Plaintiff requests an Order allowing it to serve all the Defendants through their wholly-owned Untied States subsidiaries as follows:

1. The Bank of Nova Scotia

Scotiabank is a Canadian multinational bank and financial services company with operations in over 45 countries. Scotiabank maintains three "Material Entities"[6] in the United States: The Bank of Nova Scotia New York Agency; The Bank of Nova Scotia Houston Branch; and Scotia Capital (USA) Inc. The core business lines conducted by these three United States subsidiaries are: corporate lending. Debt capital markets, global business payments, U.S. rates, and prime services.

Plaintiff proposes to serve Scotiabank through its wholly-owned United States subsidiary:

Scotia Holdings (US) Inc.
c/o Corporation Service Company
80 State Street
Albany, NY 12207

2. The National Bank of Canada

NatBC is a Canadian multinational bank and financial services company with operations in Canada, the United States, Hong Kong, Ireland, and London. NatBC identifies its United

[6] Defined as "a subsidiary or foreign office of a covered company that is significant to the activities of a critical operation or core business line of the company." *See U.S. Resolution Plan Public Summary*, The Bank of Nova Scotia, December 20, 2018, available at: https://www.fdic.gov/regulations/reform/resplans/plans/bns-165-1812.pdf (last visited September 24, 2019).

States-based New York Branch as a Material Entity through which its core business is conducted.[7] The core business lines conducted through its United States entities are: personal and commercial banking, wealth management, and financial markets. These business lines are supported by various corporate functions (corporate treasury, finance, risk management, information technology, operations, human resources and corporate affairs), none of which are domiciled in the United States.

Plaintiff proposes to serve NatBC through its wholly-owned United States subsidiary:

National Bank of Canada Financial Group, Inc.
c/o Corporation Service Company
1201 Hays St.
Tallahassee, Florida 32301

3. Banco Bilbao Vizcaya Argentaria, S.A.

BBVA is a Spanish multinational bank and financial services company with operations in 17 countries. BBVA identifies three United States subsidiaries: BBVA Compass Bancshares, Inc.; Compass Bank; and Compass Capital Markets, Inc., as Material Entities through which its core business is conducted.[8] In the United States, BBVA's core lines of business are: consumer and commercial banking, and corporate and investment banking.

Plaintiff proposes to serve BBVA through its wholly-owned United States subsidiary:

BBVA, USA
c/o C T Corporation System
1200 South Pine Island Rd.
Plantation, Florida 33324

[7] *See 165(d) Resolution Plan Part A Public Section*, The National Bank of Canada, December 31, 2016, available at: https://www.fdic.gov/regulations/reform/resplans/plans/nbc-165-1612.pdf (last visited September 24, 2019).

[8] *See U.S. Resolution Plan*, Banco Bilbao Vizcaya Argentaria, S.A., December 31, 2015, available at: https://www.fdic.gov/regulations/reform/resplans/plans/bbva-idi-1512.pdf (last visited September 24, 2019).

CONCLUSION

Accordingly, Plaintiff respectfully requests that the Court enter the proposed order attached hereto as Exhibit 1 authorizing alternative service of process on Defendants Scotibank, NatBC, and BBVA.

Dated: September 24, 2019.

Respectfully submitted,

KOZYAK TROPIN & THROCKMORTON, LLP
Counsel for Plaintiff
2525 Ponce de Leon Blvd., 9th Floor
Miami, Florida 33134
Tel: (305) 372-1800
Fax: (305) 372-3508

By: */s/Javier A. Lopez, Esq.*
Javier A. Lopez, Esq.
Florida Bar No. 16727
jal@kttlaw.com
Stephanie M. Gomez, Esq.
Florida Bar No. 112095
sgomez@kttlaw.com
Evan J. Stroman, Esq., CPA
Florida Bar No. 118929
estroman@kttlaw.com

LAW OFFICES OF PAUL A. SACK, P.A.
Counsel for Plaintiff
1210 Washington Ave., Ste. 245
Miami Beach, Florida 33139
Tel: (305) 397-8077
Fax: (305) 763-8057

By: */s/ Paul A. Sack*
Paul A. Sack, Esq.
Florida Bar No. 363103
paul@paulsacklaw.com
ps1619@bellsouth.net

Brandon R. Deegan, Esq.
Florida Bar No. 117368
deegan@paulsacklaw.com