

[Antitrust Law Daily Wrap Up, ANTITRUST—N.D. Cal.: Request for alternative service on German firm due to pandemic premature, \(Jun. 24, 2020\)](#)

Antitrust Law Daily Wrap Up

[Click to open document in a browser](#)

By Nicole D. Prysby, J.D.

The plaintiff failed to show that alternative service on foreign defendants was warranted because any delays in effectuating service on German entities were due to the plaintiff's own errors and lack of diligence.

In an antitrust action against Germany-based Bayer AG and Bayer Animal Health GmbH, as well as U.S.-based subsidiary Bayer Healthcare LLC, related to the distribution of "squeeze on" Imidacloprid topical flea and tick treatments for pets, a complaining generic flea and tick medication maker was not permitted to employ alternative methods of service on the German entities. The federal district court in San Jose, California denied the plaintiff's motion for alternative service without prejudice, concluding that alternative service was premature. The plaintiff had attempted to serve the German defendants, but its first two attempts at service through the German Central Authority were rejected for failure to comply with administrative requirements. A third attempt was filed with a German court, but the plaintiff was informed that it could be several months before service was effectuated because of the court's backlog due to the COVID-19 pandemic. Most of the delay was due to the plaintiff's own errors and lack of diligence. The plaintiff did not begin making service attempts until a month after the summons was issued, attempted service through alternative means before attempting to go through the German Central Authority and made multiple errors that caused delay. The plaintiff would, however, be permitted to renew its motion for alternative service ([*Tevra Brands LLC v. Bayer HealthCare LLC*](#), June 23, 2020, Freeman, B.).

Tevra Brands LLC sued Bayer Healthcare LLC, Bayer Animal Health GmbH, and Bayer AG related to the distribution of topical flea and tick treatments for pets. Tevra [alleged](#) antitrust violations of the Clayton Act section 3 (exclusive dealing and tying) and the Sherman Act section 2 (maintenance of a monopoly) through a Secret Bundled Loyalty Rebate program. Bayer AG and Bayer Animal Health GmbH are German companies, while Bayer Healthcare LLC (BHC) is based in the United States. Beginning in July 2019, Tevra attempted to serve the German Defendants through the German Central Authority. The first two attempts at service were rejected for failure to complete the forms correctly. In March 2020, Tevra's third submission was filed with a German court, but Tevra was told that it could be several months before service is effectuated because of the court's backlog due to the COVID-19 pandemic.

Tevra sought an order authorizing it to serve the German Defendants through their U.S.-based lead counsel, by email. Tevra argued that alternative service is appropriate in light of anticipated delay due to the COVID-19 global pandemic, and that Tevra would otherwise be prejudiced because discovery closes in October 2020 and it has not yet been able to seek discovery from the German Defendants.

The court rejected Tevra's request. Most of the delay was due to Tevra's own errors and failure to act with diligence or care. The summons was issued to the German Defendants in July 2019 and Tevra did not even begin to make attempts at service until a month later. Tevra attempted service through alternative means and, after that was refused, waited until the end of September 2019 to attempt service via the Hague Convention. After the first and second service packets were rejected by the German Central Authority, Tevra inexplicably waited another month before making a third attempt at service. All of these missteps took place before the COVID-19 pandemic caused any disruptions to the service of process in Germany. The court rejected Tevra's argument that Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief,' but merely one means among several which enables service of process on an international defendant. Tevra only submitted correct service

packets to the German Central Authority in March and there is no allegation that the German Defendants and BHC are the same entity, or that the German Defendants are evading service or cannot be located. More importantly, the court agreed with BHC that the court in Dusseldorf has not even had adequate time to process Tevra's third request for service. Although the Hague Convention does not explicitly specify a timeframe for a foreign country's Central Authority to effectuate service, there is a presumption that a Central Authority has six months before a party can use alternate methods of service. Courts have held that delays of four to six months warranted substituted service, but here, all delays up until Tevra's third submission to the Central Authority on March 9, 2020, were due to Tevra's errors and not evidence of delay by the Central Authority.

Because the German Central Authority has only been in possession of complete service packets since March 2020, an order for alternative service under Rule 4(f)(3) was premature at this time. Trial in this case is more than a year away, leaving more than enough time for Tevra to serve the German Defendants and litigate its case. However, the court did recognize that due to the ongoing ramifications of the COVID-19 pandemic, service on German Defendants may actually be delayed, and thus, denied Tevra's motion without prejudice. If and when service on the German Defendants is actually delayed, Tevra may renew its motion for alternative service.

The case is [No. 5:19-cv-04312-BLF](#).

Attorneys: Alexa Rae Dicunzolo (Polsinelli PC) for Tevra Brands LLC. Daniel B. Asimow (Arnold & Porter Kaye Scholer LLP) for Bayer Healthcare LLC.

Companies: Tevra Brands LLC; Bayer Healthcare LLC

Cases: Antitrust CaliforniaNews Covid19 GCNNews