

**Kazi v XP Inc.**

2020 NY Slip Op 33525(U)

October 26, 2020

Supreme Court, New York County

Docket Number: 651774/2020

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

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GULAM KAZI, on Behalf of Himself and All Others  
Similarly Situated,

Plaintiff,

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- v -  
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XP INC, GUILHERME BENCHIMOL, BRUNO DOS SANTOS, BERNARDO BOTELHO, CARLOS FILHO, GABRIEL LEAL, FABRICIO DE ALMEIDA, GUILHERME MONTEIRO DA SILVA, JULIO DA SILVA, MARIN LIFCHITZ, JARED WILSON, XP CONTROLE PARTICIPACOES S.A., GOLDMAN SACHS & CO. LLC, J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, XP INVESTMENTS US, LLC, ITAU BBA USA SECURITIES, INC., BOFA SECURITIES, INC., CITIGROUP GLOBAL MARKETS INC., CREDIT SUISSE SECURITIES (USA) LLC, and UBS SECURITIES LLC,

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MOTION DATE	
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**DECISION + ORDER ON MOTION**

Defendants.

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HON. BARRY R. OSTRAGER

Plaintiff Gulam Kazi commenced this action on behalf of himself and others similarly situated claiming violations of the Securities Act of 1933. By Decision and Order dated August 5, 2020, this Court denied defendants’ motion to stay this action in favor of a later-filed federal action (NYSCEF Doc. No. 51). Various defendants have appeared and filed a motion to dismiss pursuant to CPLR 3211(a)(1) and (7), which is not yet fully briefed (mot. seq. 003). Plaintiff moves herein for an order (1) pursuant to CPLR 308(5), authorizing service on the unserved defendants by email on the lawyers at Davis Polk & Wardwell LLC and Milbank LLP who have appeared in this action; and (2) pursuant to CPLR 306-b, granting a 180-day extension of the 120-day period for service for good cause shown and in the interest of justice. For the reasons that follow, this motion is granted in part and denied in part.

CPLR 308(5) empowers a court to permit service in any “such manner” it deems appropriate, “if service is impracticable” under the specified methods in the CPLR. The unserved defendants in this case, all based in Brazil, are: (1) XP Controle Participações S.A., (2) ITB Holding Brasil Participações Ltda., (3) Guilherme Dias Fernandes Benchimol, (4) Bruno Constantino Alexandre dos Santos, (5) Bernardo Amaral Botelho, (6) Carlos Alberto Ferreira Filho, (7) Gabriel Klas da Rocha Leal, (8) Fabrício Cunha de Almeida, (9) Guilherme Sant’Anna Monteiro da Silva, (10) Julio Capua Ramos da Silva, (11) Geraldo José Carbone, (12) Francisco Eduardo de Almeida Pinto, (13) Maria Helena dos Santos Fernandes de Santana, and (14) Geraldo Travaglia Filho (“the Unserved Defendants”). Plaintiff claims service on these parties is impracticable because plaintiff is unaware of any New York address and because service abroad under the Hague Convention – to which Brazil recently acceded – would implicate delays of unknown length. Because Brazil has objected to Articles 8 and 10 of the Hague Convention, which permit service by diplomatic agents or judicial or postal channels, service using Brazil’s Central Authority is necessary, but the timing and success of that method are inherently uncertain, particularly due to complications caused by the pandemic, plaintiff maintains.

Under the circumstances, plaintiff asks the Court to authorize email service on counsel for the appearing defendants. Davis Polk has a presence in Brazil and represented some of the Unserved Defendants in connection with the IPO at issue in this case. Plaintiff has requested counsel’s consent, but counsel have declined to accept service for the Unserved Defendants, despite their relationship with those parties, claiming a lack of authority. Thus, in addition to an order directing counsel to accept service, plaintiff asks the Court to exercise its power under CPLR 306-b to extend plaintiff’s time to complete service in the interest of justice so this case can proceed to a determination on the merits.

Counsel for the Unserved Defendants take no position on plaintiff's request for an extension of time to complete service. However, defendants assert that plaintiff has failed to make the requisite showing that service under the Hague Convention is "impracticable", as all they did was ask counsel to accept service (which counsel is not authorized to do) and research methods of service in Brazil. *See Invar Int'l, Inc. v. Zorlu Enerji Elektrik Üretim Anonim Şirketi*, 86 AD3d 404, 405 (1st Dep't 2011).

In reply, plaintiff points to the affidavit of Ann Mickow submitted in support of plaintiff's motion as proof that service by ordinary means is impracticable (NYSCEF Doc. No. 73). Ms. Mickow is employed as the International Department manager by Civil Action Group, Ltd., in Minneapolis, Minnesota, a company in the business of providing litigation support services to attorneys throughout the United States and Canada, including assistance in obtaining service of process upon foreign persons and entities. Ms. Mickow states she has caused thousands of documents to be served abroad, including in Brazil specifically and that "experience with Brazil has shown that service of process in Brazil in accordance with the Inter-American Convention (which governed prior to Brazil's accession to the Hague Convention) often took between one and two years, and that estimate is based on experiences before the onset of the Covid-19 pandemic. It is unknown how Covid-19 may now affect the relevant timeframes." (Aff at ¶ 6). Counsel adds that the court in *Invar*, cited by defendants, did ultimately permit service on counsel in the underlying arbitration, finding that such service was reasonably calculated to give defendants' notice of the lawsuit.

Defendants ask the Court to consider their sur-reply to "correct the record", which consists of an Affirmation from Antonio J. Perez-Marques, a member of Davis Polk, and a brief memorandum of law arguing again that plaintiff has failed to demonstrate sufficient efforts were

made to complete service under the Hague Convention before resort to CPLR 308(5) was made. Counsel represents that the Davis Polk firm is “attorneys for XP Inc., XP Investments US, LLC, Jared Wilson, **and the Unserved Defendants**” in this action (NYSCEF Doc. No. 85, ¶ 1, emphasis added). Counsel adds (at ¶ 2): “In the more than five months since initiating this action, Plaintiff has never requested, whether through the undersigned counsel or, to my knowledge, otherwise, that XP or the Unserved Defendants provide Brazilian service addresses for the Unserved Defendants. The Unserved Defendants are ready and willing to furnish addresses in Brazil to facilitate Convention service and would have provided them upon request at any time during the pendency of this action.”

The Court is somewhat dismayed that the communications between counsel have been so poor in this significant Securities Act case and that a motion such as this one was made in a time of limited court resources. In any event, the Court finds that the appropriate remedy is to grant plaintiff’s motion to the extent of directing defense counsel to provide to plaintiff within five (5) business days of the date of this Order Brazilian service addresses for the Unserved Defendants to facilitate prompt service. In the interest of justice, the Court is also extending through February 1, 2021 plaintiff’s time to complete service on the Unserved Defendants, without prejudice to the right to seek a further extension if the circumstances so warrant. Although the Court is a proponent of professional courtesies that allow a case to reach the merits expeditiously, the Court declines to direct counsel to accept service of process via email when their clients have not authorized them to do so, but the Court urges counsel to consult their clients again in the interest of having all motions addressed to the pleadings decided expeditiously.

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order authorizing an alternative means of service and an extension of time to serve is granted to the extent provided herein without prejudice to a further application, if necessary and appropriate, should plaintiff be unable to complete service at the address provided by defense counsel.

The November 17 conference is adjourned to December 22, 2020 at 10:00 a.m. Counsel shall efile a letter when the motion to dismiss has been fully briefed so oral argument can be scheduled.

Dated: October 26, 2020

*Barry R. Ostrager*  
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BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE