IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

TUCKERBROOK ALTERNATIVE INVESTMENTS, LP, Plaintiff, v. SUMANTA BANERJEE, Defendant.	Case No. 1:09-cv-11672-WGY Leave to File Granted on October 4, 2010 REQUEST FOR ORAL ARGUMENT

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

Respectfully Submitted,
SUMANTA BANERJEE

By his attorney,

/s/ Mitchell J. Matorin
Mitchell J. Matorin (BBO# 649304)
Matorin Law Office, LLC
200 Highland Avenue
Suite 306
Needham, MA 02494
(781) 453-0100
mmatorin@matorinlaw.com

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Pursuant to Fed. R. Civ. P. 60(b), Defendant Sumanta Banerjee respectfully asks that the Court vacate the Default Judgment as void. Both service of process and the entry of the Default Judgment violated the Hague Convention.[1] Mr. Banerjee also submits that the Court erred as a matter of law in entering judgment for the amount that Plaintiff Tuckerbrook Alternative Investments, LP ("Tuckerbrook") demanded, absent evidence that it was an appropriate measure of damages. The Default Judgment should also be vacated under Rule 60(b)(1).

I. FACTS

Tuckerbrook filed its Complaint on October 6, 2009, alleging that Mr. Banerjee (i) breached non-competition and non-disparagement/non-interference clauses of a settlement agreement that resolved prior litigation; (ii) intentionally interfered with Tuckerbrook's contractual or business relations; and (iii) misappropriated certain unidentified trade secrets.

Mr. Banerjee is a citizen and resident of India, residing at 58/1 Ballygunje Circular Road, Kolkata (Calcutta), West Bengal, India 700019. On January 26, 2010, Tuckerbrook filed a Return of Service purporting to show that the Complaint had been delivered "to the letter box of Mr. S.K. Banerjee father of Mr. Sumanta Banerjee" on November 30, 2009. (Docket No. 5.) Mr. S.K. Banerjee returned the documents to the courier and reiterated what he had told the courier originally, that Mr. Banerjee did not live at that address. *See* Exh. C to Memorandum in Support of Plaintiff's Motion to Deem Service of Process Effectuated (Docket No. 14-6).

On February 5, 2010, Tuckerbrook filed a Request for Entry of Default Judgment for Sum Certain Pursuant to Fed. R. Civ. P. 55(b)(1), with an affidavit. (Docket Nos. 6, 7.) These motions were terminated on February 23, 2010, and instead the Clerk entered a default against

[1] The "good cause" standard for setting aside the entry of default is lower than that for vacating a default judgment. *Brand Scaffold Builders, Inc. v. Puerto Rico Elec. Power Auth.*, 364 F. Supp. 2d 50, 54 (D.P.R. 2005). Accordingly, if the Court vacates the Default Judgment, Mr. Banerjee asks that it also set aside the entry of default.

Mr. Banerjee under Fed. R. Civ. P. 55(a)(1). (Docket No. 8.) The following day, Tuckerbrook re-filed its motion for a default judgment and affidavit. (Docket Nos. 10, 11.)

On March 5, 2010, Mr. Banerjee, acting *pro se*, moved to set aside the entry of default (Docket No. 12). Mr. Banerjee affirmed that he had not received the Complaint and argued that Tuckerbrook had not legally served him under Fed. R. Civ. P. 4(f) and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention"). Mr. Banerjee asked the Court to order proper service. On March 9, the Court set aside the entry of default and ruled Tuckerbridge's motion for default judgment moot.[2]

Rather than follow the proper procedures, on March 24, 2010, Tuckerbrook filed a Motion to Deem Service Effectuated. (Docket No. 14.) Conceding its non-compliance with the Hague Convention, *id.* at 2 and n.1, Tuckerbrook nevertheless argued that Due Process was satisfied because Mr. Banerjee had received actual notice of the lawsuit, and requested that the Court order that Tuckerbrook had effectively served him. Alternatively, Tuckerbrook asked that the Court permit service by email pursuant to Fed. R. Civ. P. 4(f)(3). On April 2, 2010, the Court allowed Tuckerbrook's motion and ordered Mr. Banerjee to answer or otherwise respond to the Complaint within 45 days, *i.e.*, by May 17, 2010. (Order of April 2, 2010). On April 23, 2010, Mr. Banerjee advised that the Court's Docket Clerk had notified him of the April 2 Order on April 12, 2010. (Docket No. 15.) Mr. Banerjee reiterated the lack of proper service and, noting the difficulty of proceeding *pro se* from India, requested access to the CM/ECF system

[2] In its opposition to Mr. Banerjee's *pro se* motion to vacate the Default Judgment, Tuckerbridge repeatedly refers to this mooted motion for default judgment as an "initial" default judgment, and to the June 30 Default Judgment as a "second" default judgment. (Docket No. 31 at 6 ¶ 23 and at 7.) This is plainly wrong, misleading, and prejudicial; it is also simply odd, considering that Tuckerbridge recognizes that the Court declared its first motion moot. (*Id.* at 3 ¶ 9.)

and for a telephone conference to clarify the status of the case.[3] Later that day, the Court denied CM/ECF access and ruled "that it has acquired personal jurisdiction over Mr. Banerjee," but ordered Tuckerbrook to mail the Complaint to Mr. Banerjee via "certified mail or by an equally verifiable delivery service." (Order of April 23, 2010.)

Fed. R. Civ. P. 4(*l*) provides two ways to prove service abroad: (i) if there is a treaty, service is made under Rule 4(f)(1) and proof is made as specified in the treaty; (ii) if there is no treaty and service is made under Rule 4(f)(2) or (f)(3), then proof is made by a receipt signed by the addressee or by "other evidence" satisfactory to the court. Fed. R. Civ. P. 4(*l*)(2)(A) – (B). On April 30, 2010, Tuckerbrook filed an unsworn, unsigned letter from "Customer Service" at Mercury Business Services, stating that another entity, DHL, had attempted to deliver the Complaint to Mr. Banerjee in India, but that delivery was refused. (Docket No. 16.) The letter further stated that "Customer Service" had requested that DHL contact Mr. Banerjee and that DHL in turn reported to "Customer Service" that it had done so. Although Rule 4(*l*) does not permit proof of service abroad by affidavit and the letter was not the "server's affidavit" in any event but merely unsworn hearsay, Tuckerbrook's counsel filed this document using CM/ECF's "Affidavit of Service" category.[4] Despite the Court's April 2 Order setting May 17 as the deadline, the Court's docket shows a deadline of May 21, 2010. (*See* Docket Entry 16.)

On May 19, 2010, Mr. Banerjee advised the Court of a delivery attempt on April 30, 2010 when neither he nor his wife was home. Mr. Banerjee reiterated the lack of proper service

[3] *See* District of Massachusetts Electronic Case Filing Administrative Procedures, January 1, 2006, at 3, Section B.2 and at 12, Section U (*pro se* litigants may register with ECF).

[4] We do not imply any wrongdoing by Tuckerbrook's counsel; CM/ECF does not have a category for proof of service under Rule 4(*l*)(2). We simply note that the filing does not comply with the Rules and that the Court's Docket does not accurately reflect the nature of the filing.

but, in view of the Court's April 23 ruling that it had "acquired personal jurisdiction over Mr. Banerjee," requested clarification as to how he should proceed. (Docket No. 17-1.)

On May 27, 2010, Tuckerbrook filed a Request for Entry of Default Pursuant to Fed. R. Civ. P. 55(a) and an affidavit. (Docket Nos. 18, 19.) On June 1, 2010, the Clerk entered the default. (Docket No. 20.) On June 3, 2010, Tuckerbrook filed a Motion for Default Judgment for Sum Certain Pursuant to Fed. R. Civ. P. 55(b)(1), with an affidavit. (Docket Nos. 22, 23.) The Certificates of Service stated that Tuckerbrook had served the documents through the CM/ECF system (to which the Court had denied Mr. Banerjee access) and that "a hard copy has been forwarded directly to the Defendant." (Docket No. 22 at 3; Docket No. 23 at 4.) No method of service was specified, although "hard copy" implies service by some form of mail.[5] As noted below, service by mail violates the Hague Convention as India has adopted it.

On June 8, 2010, Mr. Banerjee again objected that he had not been served and requested additional time to respond. (Docket No. 24.) The Court treated this as an opposition to the Motion for Default Judgment and denied the extension. (Order of June 8, 2010.) Mr. Banerjee filed a formal Opposition on June 18, 2010, again challenging service. (Docket No. 25.)

The proposed Default Judgment that Tuckerbrook's counsel had prepared as if it were for a "sum certain" under Rule 55(b)(1) asserted that it had provided "an affidavit demonstrating that defendant owes plaintiff the sum of $209,028.00." In fact, the Affidavit simply stated that this was "a proper and appropriate measure of Tuckerbrook's damages in this matter, as it represents

[5] Service was required. Fed. R. Civ. P. 5(a)(2) provides an exception to service for a party "in default for failing to appear" and Rule 55(b)(2) requires service of a motion for default judgment if a party has "appeared." An "appearance" for Rule 55 purposes requires only that the party have "indicated to the moving party a clear purpose to defend the suit," which may be by informal communications between the parties and is different from an "appearance" in the action. *Key Bank of Maine. v. Tablecloth Textile Co.*, 74 F.3d 349, 353 (1st Cir. 1996). Though immaterial, a Rule 55 "appearance" thus does not waive defenses under Rule 12(b)(2) or (5).

a return of the cash component of the settlement which Tuckerbrook paid to Mr. Banerjee." (Affidavit of Sean T. Carnathan in Support of Motion for Entry of Default Judgment for Sum Certain Pursuant to Fed. R. Civ. P. 55(b)(1), Docket No. 23, at 2 ¶ 6.) Tuckerbrook did not try to show any relationship between that amount and its alleged damages. The Court granted the motion on June 29, 2010 and entered the Default Judgment for $254,307.39 (which included costs and $43,363.29 in prejudgment interest) on June 30. (Docket No. 26.) On August 18, 2010, Mr. Banerjee filed a Motion to Vacate Entry of Default Judgment, again challenging service of process.[6] (Docket No. 29.)

II. ARGUMENT

The Court must set aside the Default Judgment because it is void as a matter of law and dismissal is non-discretionary under Rule 60(b)(4). Proper service of process is a critical prerequisite to the exercise of personal jurisdiction, and as India is a signatory to the Hague Convention and has expressly objected to service in any other manner, the Court had no authority to "deem" Mr. Banerjee served or to order any other form of service. Tuckerbrook admits that it never complied with the Hague Convention and therefore there is no room for disagreement as to whether Mr. Banerjee has been legally served. Absent legal service of process, the judgment is void and must be vacated under Rule 60(b)(4). In addition, the Default Judgment itself violates Article 15 of the Hague Convention, rendering it void.

The Default Judgment also must be vacated inasmuch as it improperly awards Tuckerbrook an amount of money not claimed in the *ad damnum* clause of the Complaint, that is not a "sum certain" within the meaning of Rule 55(b), and that has no logical relationship to any actual damages that Tuckerbrook allegedly suffered as a result of Mr. Banerjee's alleged actions.

[6] The Court's docket incorrectly describes this as a "Motion for Default Judgment as to Tuckerbrook Alternative Investments, LP". *See* Docket Entry 29.

At a minimum, applicable First Circuit authority required the Court to hold a hearing to establish damages, in the absence of which the Default Judgment must be vacated. Moreover, the Default Judgment awards prejudgment interest that was not demanded, in violation of Rule 54(c).

The Default Judgment also should be vacated under Rule 60(b)(1) in view of the Court's legal errors and Mr. Banerjee's mistake, inadvertence, or excusable neglect.

A. The Default Judgment Is Void For Lack of Service And Must Be Vacated.

1. A Judgment Based On Defective Service of Process Is Void.

Fed. R. Civ. P. 60(b)(4) requires a void judgment to be set aside:

> The governing principles are that a default judgment issued without jurisdiction over a defendant is void, that it remains vulnerable to being vacated at any time, and that such jurisdiction depends on the proper service of process or the waiver of any defect.

M & K Welding, Inc. v. Leasing Partners, LLC, 386 F.3d 361, 364 (1st Cir. 2004). *See also Shank/Balfour Beatty v. IBEW Local 99,* 497 F.3d 83, 94 (1st Cir. 2007)("When judgment is entered against an entity never properly served as a party to the case, the judgment is 'void' within the meaning of Rule 60(b)(4).")

Proper service of process is a prerequisite to the exercise of personal jurisdiction:

> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. ... [T]here must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (quotation omitted). *See also Jardines Bacata, Ltd. v. Diaz-Marquez,* 878 F.2d 1555, 1559 (1st Cir.1989) ("the district court acquires jurisdiction over a defendant only by service of process...."); *Williams v. Jones,* 11 F.3d 247, 254–55 n.11 (1st Cir. 1993) (vacating judgment and remanding for service of process).

Once service is challenged, it is the plaintiff's burden to prove proper service. *Rivera-Lopez v. Municipality of Dorado*, 979 F.2d 885, 887 (1st Cir.1992). Actual knowledge of the lawsuit is insufficient. *Omni Capital* 484 U.S. at 104; *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 24 (1st Cir.1992).

Absent proper service, the court may not exercise jurisdiction, and any judgment is void. Unlike other Rule 60(b) grounds, a motion under Rule 60(b)(4) leaves no room for discretion: if the judgment is void, the Court must vacate it. *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28 (1st Cir. 1988); *See also* 11 Wright, Miller & Kane, *Federal Practice & Procedure* § 2862 (2d ed.) ("Either a judgment is void or it is valid [and] … when that question is resolved, the court must act accordingly.").

2. The Hague Convention is Exclusive and Mandatory.[7]

Where process must be served abroad and the foreign nation is a signatory, the Hague Convention provides the mandatory and exclusive methods of service:

> Article 1 defines the scope of the Convention, which is the subject of controversy in this case. It says: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." ... **This language is mandatory, as we acknowledged last Term** in *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 534, n. 15 . . . (1987).… Schlunk does not purport to have served his complaint on VWAG in accordance with the Convention. Therefore, if service of process in this case falls within Article 1 of the Convention, the trial court should have granted VWAG's motion to quash.

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)(emphasis added). *See also id.* at 706 ("Those who eschew its procedures risk discovering that the forum's internal law required transmittal of documents for service abroad, and that the Convention therefore provided the exclusive means of valid service.").

[7] The Hague Convention and India's formal reservations described below are attached as Exh. A.

In *Société Nationale*, the Court contrasted the mandatory language of the Hague Convention with that of the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters and concluded that the latter was neither exclusive nor mandatory:

> As noted, *supra*, at 7, **the Service Convention** was drafted before the Evidence Convention, and its language **provided a model exclusivity provision** that the drafters of the Evidence Convention could easily have followed had they been so inclined. Given this background, the drafters' election to use permissive language instead is strong evidence of their intent.

482 U.S. at 533-34 (emphasis added).

This Court has similarly held that service abroad in signatory states must comply with the treaty. *See, e.g., Tabb v. Journey Freight Internations*, 584 F. Supp. 2d 334, 340 (D. Mass. 2008) ("It is undisputed that … to make effective service in a country that has joined the Hague Convention, a plaintiff must follow the provisions of the treaty.")(internal quotation omitted).

Similarly, in *Marcantonio v. Primorsk Shipping Corp.*, 206 F.Supp.2d 54 (D. Mass. 2002), the court vacated a default judgment where the plaintiff personally delivered the complaint to the ship's captain and the company's counsel. The court held that Rule 4(f)(1) required service under the Hague Convention and rejected the view that Rule 4(f)(2)(C)(i) authorized personal service. 206 F. Supp. 2d at 57-58 (quoting Advisory Committee Notes to 1993 Amendments to Rule 4(f)). The court also refused to order alternate service under Rule 4(f)(3):

> Nor is Marcantonio's alternative proposal, that this Court should ratify his attempt to serve Primorsk by mailing process to Primorsk's attorneys, convincing. …The Advisory Committee Notes on the provision state:
>
> Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit service within the time required by the circumstances.... [Under some circumstances], the court may direct

> a special method of service not explicitly authorized by international agreement if not prohibited by the agreement.

Id. at 58. The court held that, absent such urgency, Rule 4(f)(3) is inapplicable. *Id.* at 58-59.

Tuckerbrook admits that it did not comply with the Hague Convention, but complains that proper service would take time—which is no justification at all. *See Furukawa Elec. Co. v. Yangtze Optical Fibre & Cable Co.*, 2005 WL 3071244 (D. Mass. 2005) (that Hague Convention service may be "burdensome and expensive" does not excuse compliance). Tuckerbrook has not suggested that its claims were so urgent that "convention methods will not permit service within the time required by the circumstances." Indeed, the alleged acts had already occurred, and had there been any urgency, Tuckerbrook would have sought a preliminary injunction.[8]

In view of Tuckerbrook's non-compliance with the Hague Convention, Mr. Banerjee submits that the Court erred as a matter of law in ruling that it had "acquired personal jurisdiction over Mr. Banerjee" (Order of Aug. 2, 2010), and in ordering Tuckerbrook to serve the Complaint via "certified mail or other equally verifiable delivery service." (Order of April 23, 2010.)

3. Even If Rule 4(f)(3) Applied, Neither Certified Mail Nor DHL Are Permissible Methods of Service Under Rule 4(f)(3).

Even if the Hague Convention did not preempt Rule 4(f)(3), neither certified mail nor service via DHL were permitted because both are "prohibited by international agreement." Specifically, India has registered an objection to Article 10(a) of the Hague Convention, which permits "sending" judicial documents via postal channels provided that the receiving state does

[8] It is worth noting that when it filed its Complaint, Tuckerbrook was urgently seeking to force Mr. Banerjee to return to the U.S. to be deposed in Tuckerbrook's litigation with the Alkek Foundation, a limited partner in the investment funds, in which fact discovery was nearing an end. Mr. Banerjee's documented health problems prevented that, but he offered to testify by telephone or videoconference. Tuckerbrook refused, and filed this lawsuit instead.

not object. *See* Exh. A ("India is opposed to the methods of service provided in Article 10.").[9] Service via DHL is within the scope of Article 10(a) and is also prohibited. *Compare Mones v. Commercial Bank of Kuwait, S.A.K.*, 502 F. Supp. 2d 363, 370-71 (S.D.N.Y. 2007) (DHL service prohibited where signatory objected to Art. 10), *and RSM Prod. Corp. v. Fridman*, 2007 WL 1515068, at *2 (S.D.N.Y. May 24, 2007) (same, for FedEx), *with EOI Corp. v. Med. Mktg. Ltd.*, 172 F.R.D. 133, 143 (D.N.J. 1997) (DHL is permitted service by mail where signatory has not objected), *and R. Griggs Group Ltd. V. Filanto Spa*, 920 F. Supp. 1100, 1103 (D. Nev. 1996)(same, for FedEx). *Cf. Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002) (Art. 10 did not permit service of process by mail at all); *Intelsat Corp. v. Multivision TV LLC*, 2010 WL 3368655, at *7 (S.D. Fla. Aug. 24, 2010) (same).[10]

B. The Default Judgment Is Void Under Article 15 Of The Hague Convention.

In addition Mr. Banerjee respectfully submits that the Default Judgment itself violates the Hague Convention, rendering it void. Article 15 strictly limits the availability of default judgments. The first paragraph of Article 15 provides that a default judgment "shall not be given until it is established that" either (a) the document was served "by a method prescribed by the internal law" of the recipient state for service in domestic actions (as specified in Article 5(a) of the treaty), or (b) that the document was actually delivered "by another method provided for by this Convention." (Hague Convention, Art. 15(a) – (b).) Both sections require service through a method specified by the treaty – either service by the Central Authority itself in a manner

[9] Available at: http://hcch.e-vision.nl/index_en.php?act=status.comment&csid=984&disp=resdn.

[10] Whether Art. 10 even authorizes service of process through the mail as opposed to merely "sending" non-process documents is controversial, but the only authority in this District holds that it does not. *See Golub v. Isuzu Motors*, 924 F. Supp. 324, 327 (D. Mass. 1996) (noting split of authority but holding service of process by mail not authorized). *See also Nuovo Pignone, supra,*; *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (service by registered mail not permitted); *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17 (D. Me. 1987) (same).

prescribed by that country's internal law as specified in Article 5(a), or by "another method" specified in the treaty (*e.g.*, voluntarily via diplomatic/consular agents (Art. 8), using diplomatic/consular channels to forward complaint to Indian authorities (Art. 9), or Art. 10, if the recipient state does not object – as India has).[11] Neither of these applies.

The second paragraph of Article 15 provides an "escape hatch" in case the pertinent Central Authority fails to serve the document, but only if *each* of three conditions is fulfilled:

> a) the document was transmitted by one of the methods provided for in this Convention,
>
> b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
>
> c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

(Hague Convention, Art. 15, 2d ¶.) This paragraph plainly does not apply.

First, Tuckerbrook stated that it "hired an international process server to serve Mr. Banerjee both personally and through the Hague Service Convention, a process known to take up to nine months or more." Request for Entry of Default Pursuant to Fed. R. Civ. P. 55(a), ¶ 3 (Docket No. 18). But it has not asserted that the process server *actually* transmitted the Complaint to the Indian Central Authority under the treaty, and it has produced no evidence to support such a conclusion. In fact, even the assertion that Tuckerbrook transmitted the

[11] There is little authority interpreting Article 15, which might be read as permitting a default judgment if the complaint is served in a manner prescribed by the internal law of the recipient country for domestic litigation, even if not done by that country's Central Authority under Art. 5(a). Such an interpretation is implausible and would undermine the treaty by permitting default judgments where a plaintiff made no effort to comply but instead took it upon itself to serve the defendant as if it were being served in domestic litigation. Rather, section (a) of the first paragraph of Art. 15 must be read in conjunction with Art. 5(a), consistent with the reference in the next section to "another method" specified by the treaty. In any event, Tuckerbrook has not argued, let alone established, that India's internal law "prescribes" DHL service.

Complaint to a process server for service under the Hague Convention lacks any support. There is only a single unsworn and unsupported assertion in Tuckerbrook's brief. Notably, the Carnathan Affidavit in Support of the Request for Entry of Default (Docket No. 19) does not even mention that the alleged process server was to serve Mr. Banerjee under the treaty—it does not mention the Hague Convention at all. This divergence does not appear to be accidental. The Affidavit and the Request for Entry of Default track each other virtually *verbatim*, paragraph for paragraph, including with respect to complete irrelevancies. But on this *key* point, the Affidavit is silent. *Compare* Request for Entry of Default, ¶¶ 1-4 with Carnathan Affidavit, ¶¶ 1-4.

Second, absent evidence that Tuckerbrook transmitted the Complaint under the treaty and of the date it purportedly did so, the Court may not find that not less than six months has elapsed.

Third, Tuckerbrook has not asserted that it made any effort at all to obtain the required certificate, let alone that it made "every reasonable effort." In *Universal Trading & Inv. Co. v. Kiritchenko*, 2007 WL 660083 (N.D. Cal. Feb. 28, 2007), the plaintiff attested that he transmitted the complaint to the Antiguan Central Authority on August 2, 2000, and had "made various efforts to obtain the Certificates." The Court held that because he had not identified those "various efforts" beyond a single telephone call, the plaintiff had not expended "every reasonable effort" and therefore had not satisfied each requirement of Article 15. *Id.* at *3 - *4.

Accordingly, as Tuckerbrook has failed to satisfy any of the prerequisites to a default judgment under Article 15, the Hague Convention prohibited (and continues to prohibit) entry of the Default Judgment. It is, therefore, void and must be set aside under Rule 60(b)(4).

C. The Default Judgment Is Void As It Violates Fed. R. Civ. P. 54(c).

Under Fed. R. Civ. P. 54(c), "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Where a complaint does not demand prejudgment interest, a default judgment that includes it "differs in kind from" the relief

requested, and also causes it to exceed the amount demanded. As such, it violates Rule 54(c), and is "null and void." 10 Wright, Miller, & Kane, *Federal Practice & Procedure ("Federal Practice"),* § 2663 (2d ed.); *Silge v. Merz*, 510 F.3d 157, 159 (2d Cir. 2007); *Akula v. Airbee Wireless, Inc.*, 2009 WL 1248118, at *1 (E.D. Va. Mar. 3, 2009).

Tuckerbrook's Complaint does not demand prejudgment interest. Thus, even assuming there were some basis for Tuckerbrook to demand the amount released from escrow in the prior litigation (as to which, see below), the Default Judgment is void because it awards $43,363.29 in prejudgment interest not demanded in the Complaint, in violation of Rule 54(c).

D. The Court Should Vacate the Default Judgment Under Rule 60(b)(1) Because The Court Erred In Awarding Damages In The Amount of $254,307.39.

1. <u>The Complaint Did Not Demand A "Sum Certain" And The Court Was Required to Hold a Hearing to Establish Damages.</u>

Tuckerbrook cast its default judgment motion as for a "sum certain" under Rule 55(b)(1) and demanded the $209,028 that had been released from escrow as part of the settlement with Mr. Banerjee, based solely on Tuckerbrook's counsel's unexplained *opinion* that it "is a proper and appropriate measure of Tuckerbrook's damages in this matter, as it represents a return of the cash component of the settlement which Tuckerbrook paid to Mr. Banerjee." (Carnathan Aff. in Support of Motion for Entry of Default Judgment, Docket No. 23, at 2 ¶ 6.) Tuckerbrook provided no evidence of any damages at all, let alone precisely $209,028 worth of damages.

Tuckerbrook incorrectly invoked Rule 55(b)(1), which applies only to a defendant defaulted "for not appearing." The word "appearance" in Rule 55 has a broad meaning:

> Although appearance in an action typically involves some presentation or submission to the court-a feature missing here-we have held that a defaulting party "has appeared" for Rule 55 purposes if it has "indicated to the moving party a clear purpose to defend the suit."

Key Bank of Me. v. Tablecloth Textile Co. Corp., 74 F.3d 349, 353 (1st Cir. 1996) (quoting *Muñiz v. Vidal*, 739 F.2d 699, 700 (1st Cir.1984)). Although Mr. Banerjee unwaveringly challenged service of process, he had certainly demonstrated a clear purpose to defend the suit if and when Tuckerbrook served him. Rule 55(b)(1) was thus inapplicable by its terms to the determination of damages after entry of default and inasmuch as the judgment awards damages in misplaced reliance on Mr. Banerjee's alleged default "for not appearing," it lacks any legal basis. *See KPS & Assocs, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 18 n. 6 (1st Cir. 2003).

Even if Rule 55(b)(1) applied, Tuckerbrook appears to interpret it as "a certain sum that Tuckerbrook thinks is appropriate." This is flatly incorrect: "In the Rule 55 context, a claim is not a sum certain unless there is no doubt as to the amount to which a plaintiff is entitled as a result of the defendant's default." *KPS*, 318 F.3d at 19. That a complaint demands a particular amount or that an affidavit attests to that amount does not make it a "sum certain." *Id.* at 20 n.9; *accord Hasbro, Inc. v. Chang*, 2006 WL 1549052, at *2 (D.R.I. May 31, 2006). Tuckerbrook does not claim that there was a liquidated damages clause—there was not. A default judgment establishes liability only, *KPS*, 318 F.3d at 19, and Tuckerbrook may not avoid its burden to prove that it suffered quantifiable damages and the specific amount. *Schmitt v. Seward*, 2010 WL 3001188, at *1 (D. Mass. July 28, 2010) (default judgment damages must be proved "to a reasonable certainty") (citing *Allens Mfg. Co. v. Napco, Inc.*, 3 F.3d 502, 505 (1st Cir. 1993)).

Under Rule 55(b)(2), the court "may conduct hearings or make referrals" to determine the proper amount of damages. The Rule on its face does not *require* the court to conduct hearings; however, failure to do so typically is an abuse of discretion. *KPS*, 318 F.3d at 19. Only in "limited situations" may a court determine damages without an evidentiary inquiry, such as when a "sum certain" is demanded, there is a liquidated damages clause, or damages are fixed by

operation of law. *Id.* at 20. Otherwise, a court may dispense with hearings only rarely, such as where the record already reflects sufficient evidence to support the amount demanded. *Id.*

Mr. Banerjee respectfully submits that, in entering a default judgment based on Tuckerbrook's incorrect representation that its damages were for a "sum certain" and without conducting evidentiary hearings on both the existence and the amount of the purported damages, the Court abused its discretion. There is no evidentiary—or even logical—support for the conclusion that $209,028 is the proper amount of damages based only on Tuckerbrook's counsel's unsupported opinion that it is "appropriate." Tuckerbrook does not explain why, absent a liquidated damages clause, it is appropriate to assume that it suffered any damages at all. It would be beyond remarkable if Tuckerbrook were to prove that its alleged damages corresponded even generally to the amount released from escrow in the prior litigation. It would be nothing short of stunning if Tuckerbrook were to prove damages in that exact amount.

2. The Court May Correct Its Mistake Of Law Under Rule 60(b)(1).

Rule 60(b)(1) allows relief from a judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect." The First Circuit has held that, in the context of *non*-default judgments, Rule 60(b)(1) may not be used to correct a court's mistake of law. *Silk v. Sandoval*, 435 F.2d 1266, 1267-68 (1st Cir.1971). Other Courts of Appeal have held otherwise. *E.g.*, *United Airlines, Inc. v. Brien*, 488 F.3d 158, 175 (2d Cir. 2009); *Benson v. St. Joseph Regional Health Center*, 575 F.3d 542, 547 (5th Cir. 2009); *Pierce v. United Mine Workers of Am.*, 770 F.2d 449, 451 (6th Cir. 1985); *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838, 839 (11th Cir. 1982). More recently, however, the First Circuit has suggested that, in the case of default judgment damage awards, a court may correct its error under Rule 60(b)(1).

> If *Silk* is correct about the limited scope of Rule 60(b) and so are the courts that say that Rule 59(e) may not be used to challenge a default judgment, then a party in default would never be able, by motion in

> the district court, to bring to that court's attention an error of law in the default judgment. Of course, the party could appeal the judgment to the court of appeals, but it would be odd and inefficient to preclude the party in default from first seeking relief based on error of law from the district court. … That particular problem would be exacerbated if, as happened here, the defaulted party also failed to appear at the hearing on the amount of the default judgment. In such circumstances, the defaulting party could never get a hearing before the district court on its argument that the amount embodied in the default judgment is based on an error of law. That might make sense as a strong medicine to encourage parties not to default, but it also could lead to uncorrected basic legal errors.

Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 189 (1st Cir. 2004).

Mr. Banerjee respectfully submits that, under *KPS*, the First Circuit will conclude that the failure to hold an evidentiary hearing was an abuse of discretion and will vacate and remand for a proper determination. As the *Venegas-Hernandez* court observed, this would be inefficient and would deprive the Court of its ability to correct legal errors. If the Court does not vacate the Default Judgment as being void, Mr. Banerjee asks that it vacate under Rule 60(b)(1) and hold Tuckerbrook to its burden of proving both the existence and the amount of its alleged damages.

E. The Default Judgment Should Be Vacated Under Rule 60(b)(1) On The Basis Of Mr. Banerjee's Mistake, Inadvertence, Surprise, Or Excusable Neglect.

Whether or not the Court ultimately agrees with Mr. Banerjee's position on service of process and voidness, his belief that he had not been legally served was well-reasoned and based on detailed legal analysis of the Hague Convention and the Federal Rules of Civil Procedure. If the Court should disagree, Mr. Banerjee's failure to appear and defend was inadvertent, a good faith mistake, and excusable neglect. Mr. Banerjee communicated extensively with the Court with respect to service of process, and has never exhibited any contumacy. He has consistently demonstrated his intention to defend Tuckerbrook's baseless charges once he is properly served.

Courts addressing Rule 60(b) motions consider various factors: (i) timeliness; (ii) exceptional circumstances; and (iii) the absence of unfair prejudice to the other party.

Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 20 (1st Cir. 1992). The moving party must provide "reason to believe that vacating the judgment will not be an empty exercise" by showing that it has a "potentially meritorious claim or defense." *Id.* at 21. The court "should assume the truth of fact-specific statements contained in a Rule 60(b)[] motion and determine whether these facts, as alleged, warrant relief." *Marderosian v. Shamshak*, 170 F.R.D. 335, 338 (D. Mass. 1997).

Mr. Banerjee's motion is clearly timely. Rule 60(c)(1) sets a one-year limit for motions under Rule 60(b)(1), but otherwise requires only that they be filed within a reasonable time. Mr. Banerjee filed his motion less than six weeks after learning of the Default Judgment via an email from the Court's docket clerk on July 2, 2010. He promptly sought counsel, and this memorandum is being filed promptly after he retained the undersigned. Exceptional circumstances exist because Mr. Banerjee was seriously prejudiced by Tuckerbrook's refusal to comply with the Hague Convention and by the difficulties receiving notice and filing documents from India without access to CM/ECF. Mr. Banerjee's efforts to communicate with the Court and to press his arguments demonstrate his intention to litigate the merits if and when Tuckerbrook legally served him. In view of his *pro se* status, his diligence in making his arguments, and the preference for resolving matters on the merits, it would be a serious miscarriage of justice to deprive Mr. Banerjee of his right to defend. *See, e.g.*, *Triestman v. Fed. Bur. of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) ("implicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.").

Tuckerbrook will suffer no "unfair prejudice" if the Default Judgment is vacated and the case proceeds along the ordinary course. Moreover, Tuckerbrook is responsible for any delay, as

it twice deliberately chose to bypass the Hague Convention procedures. The Supreme Court warned against precisely this in *Schlunk*, 486 U.S. at 706 ("Those who eschew its procedures risk discovering that the forum's internal law required transmittal of documents for service abroad, and that the Convention therefore provided the exclusive means of valid service.").

Mr. Banerjee has meritorious defenses. Mr. Banerjee notes that the Complaint is highly non-specific as to the alleged conduct, substantially hindering his ability to show that he has meritorious defenses. With respect to disparagement, "derogatory and disparaging" are not defined in the settlement and given Tuckerbrook's extreme hostility toward Mr. Banerjee, it is fair to assume that it is taking an extremely broad view of them. However, it is Tuckerbrook's burden to prove the content of the statements and that they fell within the scope of those terms as the parties understood them. Tuckerbrook also must prove that it suffered non-speculative damages from the alleged statements. Tuckerbrook will not be able to satisfy either burden.

As for the non-competition part of Count I, Mr. Banerjee is alleged to have "competed with Tuckerbrook *or made significant efforts* to compete." None of the factual allegations allege that he literally worked for or received payment from any of the prohibited entities. (*See* Complaint ¶ 20.) And Massachusetts law is crystal clear that preparation to compete does not violate a non-competition clause. *Brooks Automation, Inc. v. Blueshift Technologies, Inc.*, 868 N.E. 2d 953, 2007 WL 1713370 (Mass. App. Ct. June 14, 2007).[12]

[12] Tuckerbrook alleges that Mr. Banerjee violated the non-disclosure provision, but this allegation does not appear in any of the three counts. Assuming that it is part of Count I, Mr. Banerjee has a meritorious defense in that the settlement had few material terms most if not all of which were publicly disclosed by Tuckerbrook on the record in the proceeding before Judge Saris, when the parties publicly moved to release approximately $209,000 in escrowed funds. Tuckerbrook conveyed other information directly to the limited partners in the investment funds, including Alkek, in a memorandum. Without knowing precisely what information Mr. Banerjee is alleged to have improperly disclosed, it is impossible to respond further.

As to Count II and the portion of Count I alleging interference with business relations, Mr. Banerjee allegedly "assist[ed] and coordinat[ed] with Alkek in its lawsuit against Tuckerbrook." (Complaint ¶ 34.) The elements of the tort include that the alleged loss of the relationship directly resulted from the conduct, *Comey v. Hill*, 387 Mass. 11, 19 (1982), and that the interference was for an improper purpose. *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 652 (2003). But the Alkek lawsuit revolved around Alkek's (and other limited partners') exercise – *in May 2008* -- of their contractual right to withdraw from the investment funds in the wake of Tuckerbrook's termination of Mr. Banerjee.[13] Mr. Banerjee's alleged acts after September 23, 2008 came months after the relationship with Alkek had ended. Accordingly, Mr. Banerjee's alleged actions cannot possibly have interfered with Tuckerbrook's relationship.

Even if the Court were to accept the allegations of the Complaint as true (which is not the correct standard), it alleges that the motive for Mr. Banerjee's alleged "interference" was his supposed effort to compete. This is not sufficient under Massachusetts law. *See, e.g.*, *Hunneman Real Estate Corp. v. The Norwood Realty, Inc.*, 54 Mass. App. Ct. 416, 428-29 (2002)(no improper interference if conduct is directed even in part to advancing competitive interests). Moreover, the alleged interference must have directly caused "actual" and "non-speculative" damages. *See, e.g., Baxter, Inc. v. Landry*, 2007 WL 3015098 ,*4 (Mass. Super. 2007). As the relationship with Alkek had ended months before the settlement, Mr. Banerjee's alleged post-settlement actions could not possibly have directly caused any damages.

As for Count III, Mr. Banerjee denies that he appropriated any Tuckerbrook trade secrets. Indeed, Tuckerbrook had no prior experience in distressed investments before forming a partnership with Mr. Banerjee. All of the investment strategy, portfolio construction methods,

[13] A copy of the complaint in the Alkek litigation is attached as Exh. B; the Court may take judicial notice of it. *See E.I. Du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986).

etc., were the fruit of Mr. Banerjee's own long career managing distressed investment funds. To the extent that he brought that expertise to the relationship with Tuckerbrook, he was fully entitled to continue using it after his relationship with Tuckerbrook ended.

CONCLUSION

For the foregoing reasons, as well as those set forth in Mr. Banerjee's *pro se* Motion to Vacate Default Judgment (Docket No. 29), Mr. Banerjee requests that the Court: (i) vacate the Default Judgment; (ii) set aside the Entry of Default against him; and (iii) order Tuckerbrook to promptly serve the Complaint in accordance with the Hague Convention or have its Complaint dismissed for lack of service.

REQUEST FOR ORAL ARGUMENT

Pursuant to L.R. 7(d), Mr. Banerjee requests oral argument on his Motion to Vacate Default Judgment.

DATED: October 4, 2010

Respectfully Submitted,
SUMANTA BANERJEE

By his attorney,

/s/ Mitchell J. Matorin
Mitchell J. Matorin (BBO# 649304)
Matorin Law Office, LLC
200 Highland Avenue
Suite 306
Needham, MA 02494
(781) 453-0100
mmatorin@matorinlaw.com

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on October 4, 2010.

/s/ Mitchell J. Matorin

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.
If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.
That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.
The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.
The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.
The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.
The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.
Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.
Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.
The applicant shall pay or reimburse the costs occasioned by –-

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.
It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.
The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,
and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
c) the accessions referred to in Article 28 and the dates on which they take effect;
d) the extensions referred to in Article 29 and the dates on which they take effect;
e) the designations, oppositions and declarations referred to in Article 21;
f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic

channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

FORMS (REQUEST AND CERTIFICATE)
SUMMARY OF THE DOCUMENT TO BE SERVED

(annexes provided for Articles 3, 5, 6 and 7)

ANNEX TO THE CONVENTION

Forms

REQUEST
FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,
signed at The Hague, the 15th of November 1965.

Identity and address of the applicant	Address of receiving authority

The undersigned applicant has the honour to transmit – in duplicate – the documents listed below and, in conformity with Article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, *i.e.*,

(identity and address) .....
.....

a) in accordance with the provisions of sub-paragraph *a)* of the first paragraph of Article 5 of the Convention*.

b) in accordance with the following particular method (sub-paragraph *b)* of the first paragraph of Article 5)*: .....
.....
.....

c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of Article 5)*.

The authority is requested to return or to have returned to the applicant a copy of the documents - and of the annexes* - with a certificate as provided on the reverse side.

List of documents
.....
.....
.....
.....
.....
.....
.....
.....
.....

Done at ..... , the .....
Signature and/or stamp.

* Delete if inappropriate.

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with Article 6 of the Convention,

1. that the document has been served*
   - the (date) .....
   - at (place, street, number) .....
     .....
   - in one of the following methods authorised by Article 5:
     a) in accordance with the provisions of sub-paragraph *a)* of the first paragraph of Article 5 of the Convention*.
     b) in accordance with the following particular method*: .....
     .....
     c) by delivery to the addressee, who accepted it voluntarily* .

   The documents referred to in the request have been delivered to:
   - (identity and description of person) .....
     .....
   - relationship to the addressee (family, business or other): .....
     .....
     .....

2) that the document has not been served, by reason of the following facts*:
   .....
   .....
   .....

In conformity with the second paragraph of Article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*.

Annexes

Documents returned: .....
.....
.....

In appropriate cases, documents establishing the service:
.....
.....
.....

Done at ..... , the .....
Signature and/or stamp.

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,
signed at The Hague, the 15th of November 1965.

(Article 5, fourth paragraph)

Name and address of the requesting authority: .....
.....
.....

Particulars of the parties*: .....
.....
.....

JUDICIAL DOCUMENT**

Nature and purpose of the document: .....
.....
.....
Nature and purpose of the proceedings and, where appropriate, the amount in dispute: .....
.....
.....
Date and place for entering appearance**: .....
.....
Court which has given judgment**: .....
.....
Date of judgment**: .....
Time-limits stated in the document**: .....
.....

EXTRAJUDICIAL DOCUMENT**

Nature and purpose of the document: .....
.....
.....
Time-limits stated in the document**: .....
.....
.....

* If appropriate, identity and address of the person interested in the transmission of the document.
** Delete if inappropriate.

Declarations Reservations

Articles: 10,15,16

All requests for service of documents should be in English language or accompanied by an English translation;
The service of judicial documents through diplomatic or consular channels will be limited to the nationals of the State in which the documents originate;
India is opposed to the methods of service provided in Article 10;
In terms of Article 15, Indian courts may give judgment if all conditions specified in the second paragraph of that Article are fulfilled; and
For purposes of Article 16, an application for relief will not be entertained if filed after the expiration of one year following the date of the judgment.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ALKEK & WILLIAMS LTD. and ALBERT AND MARGARET ALKEK FOUNDATION, *Plaintiffs,* vs. TUCKERBROOK ALTERNATIVE INVESTMENTS, LP, TUCKERBROOK/SB GLOBAL SPECIAL SITUATIONS GP, LLC, and TUCKERBROOK/SB GLOBAL SPECIAL SITUATIONS FUND, L.P. *Defendants.*	§ § § § § § § § § § § § § § §	C.A. NO. _____

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs Alkek & Williams LTD. and Albert and Margaret Alkek Foundation (collectively "Plaintiffs" or "Alkek") file this complaint against Tuckerbrook Alternative Investments, LP ("Tuckerbrook"), Tuckerbrook/SB Global Special Situations GP, LLC ("GSS GP") and Tuckerbrook/SB Global Special Situations Fund, L.P. ("GSS").

PARTIES, JURISDICTION, AND VENUE

1. Alkek & Williams, LTD. is a Texas limited partnership with its principal place of business in Houston, Texas.

2. The Albert and Margaret Alkek Foundation is a charitable organization with its principal place of business in Houston, Texas.

3. Tuckerbrook is a Delaware limited partnership with its principal place of business in Marblehead, Massachusetts. Tuckerbrook has not registered to do business in the State of Texas, but it is amenable to process here.

4. GSS GP is a Delaware limited liability company with its principal place of business in Stamford, Connecticut. GSS GP has not registered to do business in the State of Texas, but it is amenable to process here.

5. GSS is a Delaware limited partnership with its principal place of business in Stamford, Connecticut. GSS has not registered to do business in the State of Texas, but it is amenable to process here.

6. This Court has subject matter jurisdiction over this matter because there is a complete diversity of citizenship between plaintiffs and defendants and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332.

7. Venue is appropriate in this district because a substantial part of the events or omissions giving rise to the claims occurred here.

NATURE OF THE SUIT

8. GSS is an investment "fund of funds" established in November 2007 to invest in "distressed" investments. The Plaintiffs are each limited partners in GSS, having invested substantial monies in GSS. GSS GP is the general partner of GSS. Tuckerbrook serves as the investment adviser for the fund and is the managing member of GSS GP.

9. Plaintiffs and other limited partners and GSS GP (acting through Tuckerbrook as its managing member) are parties to a Limited Partnership Agreement of GSS ("Agreement"), dated as of November 1, 2007. The Agreement sets out the rights and obligations of the parties.

10. This suit has become necessary because Tuckerbrook and GSS GP have failed to properly administer the Agreement and have failed to comply with Plaintiffs' requests to withdraw from GSS.

BACKGROUND FACTS

11. Tuckerbrook solicited accredited investors to invest in GSS. Tuckerbrook hired Sumanta Banerjee to launch and manage a distressed asset investment vehicle. Tuckerbrook and Banerjee eventually established GSS. Indeed, the name of the fund, Tuckerbrook/SB Special Situations Fund, LP, indicates that Tuckerbrook and Banerjee (whose initials are SB) were partners in the fund.

12. As set forth in the Confidential Memorandum for GSS, Banerjee controlled GSS GP and would be primarily responsible for the management of GSS' investment portfolio. Banerjee was critical to the success of GSS. He was a primary reason why Plaintiffs invested in GSS. He was so vital that the Agreement gives the limited partners, like the Plaintiffs, the automatic right to withdraw from GSS if Banerjee

> dies, becomes incompetent or disabled (i.e., unable, by reason of disease, illness or injury, to perform his functions as the managing member of the General Partner for 90 consecutive days), or ceases to be directly or indirectly involved in the activities of the General Partner.

Agreement, Sec. 5.03.

13. Based on the representations made by Tuckerbrook in the Confidential Memorandum, and based on the rights afforded to the limited partners in the Agreement, Plaintiffs each made seven-figure investments in GSS.

14. By letter dated March 25, 2008 (and received one day later by Plaintiffs), Tuckerbrook advised the limited partners that it had terminated its employment relationship with Banerjee. This news was a shock to Plaintiffs. The termination triggered the special withdrawal rights set out in the Agreement.

15. As set forth above, the special withdrawal rights are found in Section 5.03 of the Agreement. The terms of the withdrawal may be summarized as follows:

- Any limited partner can exercise the right to withdraw by giving notice within 30 days of learning of Banerjee's separation from GSS.
- The withdrawal is effective "at the end of the first full calendar month after the Notice Date."
- The limited partner who exercises a right to withdraw is entitled to receive 90% of the value of his capital account "promptly following the end of such calendar month."
- The balance of the capital account is to be paid 30 days after the completion of a special audit.

16. Plaintiffs each timely exercised their withdrawal rights by letters dated April 25, 2008. These withdrawals were to be effective May 31, 2008, the end of the first full calendar month after Plaintiffs sent their notice of withdrawal.

17. Defendants have tacitly acknowledged the withdrawal notices from the Plaintiffs, but they have wholly failed to act on them. Defendants have, in fact, treated Plaintiffs as if they remain as limited partners by continuing to charge, after May 31, 2008, management fees against Plaintiffs' capital accounts.

18. Defendants have so far paid Plaintiffs less than 2% of their capital accounts, substantially less than the 90% of the accounts that is required.

19. Defendants have failed to provide basic information relating to the performance of Plaintiffs' withdrawal rights, despite repeated requests from Plaintiffs.

COUNT ONE: BREACH OF CONTRACT

20. Defendants have breached the Agreement (a) by failing to return Plaintiffs capital accounts in accordance with the exercise of their special withdrawal rights, and (b) charging management fees against the Plaintiffs' accounts after May 31, 2008.

21. Plaintiffs seek to recover the monetary value of their capital accounts as of May 31, 2008, plus interest as allowed by the Agreement and/or by law. Plaintiffs further seek restitution by GSS of any management fees charged to Plaintiffs' accounts after May 31, 2008.

22. Plaintiffs seek to recover the reasonable and necessary attorneys fees incurred in the prosecution of this claim.

COUNT TWO: DECLARATORY JUDGMENT

23. Defendants apparently dispute that the withdrawal by Plaintiffs from GSS is effective as of May 31, 2008. Plaintiffs therefore seek a declaration that they have withdrawn as limited partners effective May 31, 2008, that they are entitled to the value of their capital accounts as of that date, and that they do not bear any fees or expenses of GSS after that date.

24. Plaintiffs seek to recover the reasonable and necessary attorneys fees incurred in the prosecution of this claim.

COUNT THREE: ACCOUNTING

25. Because of Defendants' refusal to provide information concerning the value of Plaintiffs' capital accounts as of May 31, 2008, Plaintiffs seek an accounting of their capital accounts.

26. Plaintiffs further seek to compel Defendants to perform the special audit required as a result of the exercise by Plaintiffs of their withdrawal rights.

CONCLUSION AND PRAYER

27. Plaintiffs pray that the Defendants be cited to appear and answer and upon final hearing that Plaintiffs have and recover judgment against Defendants, as follows:

- A declaration that Plaintiffs are entitled to withdraw from GSS, effective as of May 31, 2008, with no further liability for any management fees incurred after that date;
- For recovery in full of their capital accounts, valued as of May 31, 2008;
- For recovery of any management fees improperly charged to Plaintiffs' accounts after May 31, 2008;
- For recovery of all reasonable and necessary attorneys' fees;
- For costs of court;

- For pre-judgment and post-judgment interest; and
- For such other and further relief, both legal and equitable, special and general, to which Plaintiffs may be justly entitled.

Respectfully submitted,

BECK, REDDEN & SECREST, LLP

/S/ Murray Fogler

Murray Fogler
State Bar No. 07207300
One Houston Center
1221 McKinney Street, Suite 4500
Houston, Texas 77010
713.951.3700
713.951.3720 (Fax)
ATTORNEY-IN-CHARGE
FOR PLAINTIFFS

DATE: November 26, 2008.