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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MF GLOBAL HOLDINGS LTD., et al.,	:	**Case No. 11-15059 (MG)**
Debtors.[1]	:	**(Jointly Administered)**
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC, Plaintiffs,	:	
vs.	:	**Adv. Proc. No. 16-01251 (MG)**
ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY, Defendants.	:	**Ref. Docket Nos. 174, 14**

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT ALLIED WORLD'S MOTION TO DISMISS FOR IMPROPER SERVICE OF PROCESS

[1] The debtors in the chapter 11 cases are MF Global Holdings Ltd.; MF Global Finance USA Inc.; MF Global Capital LLC; MF Global Market Services LLC; MF Global FX Clear LLC; and MF Global Holdings USA Inc. The Court entered an order of final decree closing the chapter 11 cases of MF Global Capital LLC, MF Global FX Clear LLC, and MF Global Market Services LLC on February 11, 2016.

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PRELIMINARY STATEMENT

At the outset of this adversary proceeding in the Fall of 2016, the MFG Parties served Defendant Allied World Assurance Company ("AWAC") in Bermuda in two separate ways: (1) by causing a DHL Express envelope containing the summons and complaint to be sent to AWAC's Bermuda headquarters, as permitted by Bermuda law and thus by Rule 4(f)(2)(A) of the Federal Rules of Civil Procedure; and (2) by providing the Bankruptcy Court Clerk with a DHL Express envelope containing these documents (which required a signed receipt) to mail to AWAC pursuant to Rule 4(f)(2)(C)(ii). In each instance, copies of the initiating summons and the complaint were transmitted to Bermuda in a DHL Express envelope, with a representative of DHL leaving the documents at AWAC's Bermuda headquarters after obtaining a signed receipt from one of AWAC's employees. AWAC admits that it received these documents. In its Reservation of Rights Regarding Ineffective Service of Process (Adv. D. I. 174), however, AWAC continues to claim that this service was improper because only personal service is allowed under Bermuda law.

AWAC is wrong both in the framework it applies and in its representation of Bermuda law. First, assuming Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017) applies retroactively, the MFG Parties satisfied both of its requirements. Bermuda has not objected to service by mail by signing the Hague Service Convention. And, contrary to AWAC's representations, Bermuda law affirmatively allows, and, *a fortiori*, does not prohibit, service on a corporation by leaving documents at its registered office. This is precisely what was done here. Second, at the time of the service, under the then-governing Second Circuit precedent, service by mail was permissible. In any event, if this Court concludes that service was not effectuated properly here, the MFG Parties are prepared to cure any such defect immediately, and respectfully request leave to do so.

RELEVANT PROCEDURAL HISTORY

AWAC's continued objection to the sufficiency of process in this case dates back to the start of this adversary proceeding in the Fall of 2016. As the docket reflects, the MFG Parties brought suit against AWAC (among other parties) on October 27, 2016. Upon filing suit, the MFG Parties served AWAC in two separate ways. First, on October 28, 2016, counsel for the MFG Parties caused a DHL Express envelope containing a copy of both the Complaint (Adv. D.I. 1) and the Summons (Adv. D.I. 2) to be served upon AWAC's Officers and General Counsel via delivery by a representative from DHL to AWAC's Bermuda office. Adv. D.I. 5 at 2; Declaration of Charles Wittmann-Todd (the "Wittmann-Todd Decl.") ¶ 3. Second, on November 1, 2016, the MFG Parties provided the Clerk of the Bankruptcy Court with a DHL Express envelope (which required a signed receipt) containing both the summons and the complaint, requesting that these documents be mailed to AWAC's Bermuda office. The Clerk complied with this request by causing a DHL representative to deliver these documents to AWAC's Bermuda office after obtaining a signature of receipt from one of AWAC's employees. Adv. D.I. 4; Wittmann-Todd Decl. ¶ 4. AWAC has previously conceded that it received these documents at its Bermuda headquarters. See Dec. 14, 2016 H'rg Tr. at 14:16-19 (Adv. D.I. 48) ("THE COURT: Do you agree that your client was served with the (indiscernible) complaint by overnight courier in the – in Bermuda? MS. KERSTEIN: Yes, sir.").

On November 28, 2016, AWAC moved to dismiss the MFG Parties' complaint for, among other reasons, improper service. Adv. D.I. 14. When AWAC subsequently refused to allow the MFG Parties to respond to this motion, "essentially muzzl[ing] the Plaintiffs," this Court concluded "based on the record before it" that "service of process on the Bermuda Insurers was proper" because "the Bermuda Insurers received service of process through overnight mail courier in compliance with Article 10(a) of the Hague Convention . . . ." Adv. D.I. 35 at 11, 14.

In a subsequent hearing on February 23, 2017, however, this Court made clear that the parties should provide full briefing on AWAC's motions to dismiss for lack of personal jurisdiction (including due to improper service) so that it could render an opinion with the benefit of such briefing. Feb. 23, 2017 Hr'g Tr. at 8:4-9:5.

AWAC has since unsuccessfully sought, on three separate occasions, leave to appeal to the district court this Court's orders due to alleged defects in service, and otherwise continues to assert that this Court lacks jurisdiction due to improper service of process. On June 30, 2017, AWAC submitted, pursuant to the Case Management Order entered on March 2, 2017, a "Reservation of Rights Regarding Ineffective Service of Process" in which AWAC reiterated its objections. The MFG Parties now submit this brief in opposition to raise, for the first time, their arguments in response to AWAC's longstanding objection to the sufficiency of service of process in this case.

ARGUMENT

I. SERVICE WAS PROPER UNDER WATER SPLASH, ASSUMING IT APPLIES

"Federal Rule of Civil Procedure 4(f) governs service upon [parties] in a foreign country," and "allows for service of process 'by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention.'" Burda Media, Inc. v. Viertel, 417 F.3d 292, 299 (2d Cir. 2005) (citing Fed. R. Civ. P. 4(f)); see also Fed. R. Bankr. P. 7004(a) (making the Federal Rules of Civil Procedure applicable to adversary proceedings). In Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017), resolving a conflict between Circuits, the Supreme Court held that "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law" of the forum jurisdiction. Id. at 1513. Assuming that Water Splash

applies to the MFG Parties' service of AWAC in Bermuda (which occurred before Water Splash was decided, see infra Part II), this test is met here.

First, there can be no dispute that Bermuda "has not objected to service by mail" under the Hague Convention. See id. Article 10 of the Hague Convention states: "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 . . . ." 20 U.S.T. 361, 363, T.I.A.S. No. 6638. Bermuda is a signatory to the Hague Convention, and via the United Kingdom, it has not objected to Article 10(a) of the Convention; New York courts have so recognized. See In re Am. Int'l Grp. Inc. Secs. Litig., 240 F.R.D. 608, 609 (S.D.N.Y. 2007) (noting that "[t]he United States and Bermuda are both signatories to the Hague Convention," and that "[t]he United Kingdom, on behalf of Bermuda, took a very limited reservation with regards to paragraphs (b) and (c) of Article 10" of the Hague Convention); SHLD, LLC v. Hall, No. 15 Civ. 6225 (LLS), 2016 WL 659109, at *3 (S.D.N.Y. Feb. 17, 2016) ("The U.K., a signatory to the Hague Convention, does not object to Article 10(a); U.S. Courts have construed this to mean that service of process by international mail is valid." (internal quotation marks omitted)). The accompanying declaration from Jayson Wood so confirms. Declaration of Jayson Wood (the "Wood Decl.") ¶ 4. Thus, the first requirement of Water Splash is satisfied.

The second requirement of Water Splash is also met here under two separate bases: (1) pursuant to Rule 4(f)(2)(A), applicable through Rule 4(h)(2), which allows service on a corporation "as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction" and (2) pursuant to Rule 4(f)(2)(C)(ii), also applicable through Rule 4(h)(2), via the clerk by "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt" because service by mail is not "prohibited by the

foreign county's [Bermuda's] laws." Fed. R. Civ. P. 4(f)(2)(ii), (h)(2). While the propriety of service under Rule 4(f)(2)(A) requires a showing that Bermuda *affirmatively allows* service that the MFG Parties effectuated here, service under Rule 4(f)(2)(C)(ii) requires a showing that Bermuda law *does not prohibit* the mode of service the MFG Parties used. See id. 4(f)(2)(A), (4)(f)(2)(c)(ii). The MFG Parties have satisfied both Rule 4(f)(2)(A) and Rule 4(f)(2)(C)(ii) because Bermuda law explicitly authorizes service upon a corporation by leaving initiating documents at the registered office of that Bermuda company. See id. 4(f)(2)(A), 4(2)(C)(ii).

As the Wood Declaration explains, Order 65 Rule 5(1)(b) of the Rules of the Bermuda Supreme Court 1985 (the "RSC") permits the service of documents by mail in Bermuda's courts of general jurisdiction except when personal service is required. Wood Decl. ¶ 5. Under Order 10 of the RSC, personal service of "originating process" is required "subject to the provisions of any enactment." Wood Decl. ¶ 6. Order 65 Rule 3 of the RSC further provides that "personal service of a document on a body corporate may, *in cases for which provision is not otherwise made by enactment*, [be] effected by serving in accordance with rule 2 on the president or vice-president of the body, or the secretary or other similar officer thereof." Wood Decl. ¶ 6 (emphasis added).

An "enactment" is defined under Order 1, Rule 4 of the RSC "as any statutory provision including any Act of Parliament of the United Kingdom having effect in Bermuda." Wood Decl. ¶ 7. As such, it includes provisions under the Companies Act 1981 (the "Companies Act"). Wood Decl. ¶ 7. Section 62A of the Companies Act, in turn, provides that "[a] document may be served on a company by leaving it at the registered office of the company," Wood Decl. ¶ 8, which is the company's physical office address, Wood Decl. ¶ 9.

The Bermuda Supreme Court has recognized that Section 62A of the Companies Act serves "to lighten the burden of personal service on officers of a local company under Order 65 Rule 3." Wood Decl. ¶ 10 (quoting In re Kingate Global Fund Ltd. (in liquidation) [2010] Bda LR 57 (at 88)).[2] Indeed, as the Bermuda Supreme Court has explained, "[w]here service is effected by leaving a document at the registered office" pursuant to Section 62A of the Companies Act, "it is virtually impossible for the company so served to successfully impugn the validity of service in accordance with the statute." Wood Decl. ¶ 11 (quoting Gleeson v Marshall Diel & Myers Ltd and Others [2015] Bda LR 7 (at 33)). Further, in Gleeson, the Bermuda Supreme Court contrasted service on companies under the Companies Act from service on "natural person[s]," where "the primary service rules are contained in the Rules," which require personal service. Wood Decl. ¶ 12 (quoting Gleeson, at 36).

Applying this framework here, the MFG Parties effected service of process upon AWAC in accordance with Section 62A of the Companies Act and thus in full compliance with Bermuda law (and, also, accordingly, in a manner not "prohibited" by Bermuda law). As the MFG Parties' affidavit of service explained, on October 28, 2016, counsel for the MFG Parties caused a DHL Express envelope containing a copy of both the Complaint (Adv. D.I. 1) and the Summons (Adv. D.I. 2) to be served upon AWAC's Officers and General Counsel via delivery from a DHL representative at AWAC's Bermuda office. Adv. D.I. 5 at 2; Wittmann-Todd Decl. ¶ 3. Likewise, on October 31, 2016, pursuant to Rule 4(f)(2)(C)(ii), the MFG Parties provided a DHL Express envelope (which required signed receipt) to the Clerk of the Bankruptcy Court containing these service documents to be mailed to AWAC. Wittmann-Todd Decl. ¶ 4. The

[2] Although the Declaration of Mark Chudleigh, Adv. D.I. 49 (the "Chudleigh Decl."), submitted in camera on December 28, 2016 in support of AWAC's motion to dismiss for improper service, makes no mention of this case, Mr. Chudleigh's firm, Sedgwick Chudleigh Ltd., served as counsel in the Kingate matter. Wood Decl. ¶ 17.

Clerk of the Bankruptcy Court, in turn, caused these documents to be served upon AWAC via mail and delivery by a representative from DHL, who obtained signed receipt of delivery from an AWAC employee. Adv. D.I. 4; Wittmann-Todd Decl. ¶ 4. AWAC admits that it received these documents. Decl. 14, 2016 H'rg Tr. at 14:16-19 ("THE COURT: Do you agree that your client was served with the (indiscernible) complaint by overnight courier in the – in Bermuda? MS. KERSTEIN: Yes, sir.").

Accordingly, because the MFG Parties caused the originating documents here to be left at AWAC's Bermuda registered office, and because it is "virtually impossible for [AWAC] so served to successfully impugn the validity of service in accordance with" Section 62A of the Companies Act, the MFG Parties properly served AWAC under Bermuda law (as required by Rule 4(f)(2)(A)), and, *a fortiori*, not in prohibition by Bermuda law (as required by Rule 4(f)(2)(C)(ii)). Wood Decl. ¶ 11 (quoting Gleeson, at 33). As a result, the MFG Parties complied with the second prong of Water Splash, and have properly effected service in two different ways pursuant to Rule 4(f).

AWAC's original motion to dismiss for improper service, Adv. D.I. 14, and accompanying declaration of Mark Chudleigh provide an incomplete and misleading picture of the Bermuda service rules. The Chudleigh declaration devotes a single paragraph to Bermuda's service rules, and cites only Order 10 Rule 1 of the RSC in support of its claim that "[s]ervice of originating process by mail is not permitted by Bermuda's procedural rules." Chudleigh Decl. ¶ 19. As explained above, these same rules expressly include an exception to personal service for "the provisions of any enactment" stating otherwise. Wood Decl. ¶ 6. The Companies Act is one such enactment and thus, personal service is not required here. Because the mail service

effectuated by the MFG Parties is not prohibited by Bermuda law, and is actually explicitly permitted by the Companies Act, service was proper.

II. WATER SPLASH DOES NOT APPLY RETROACTIVELY, AND SERVICE WAS PROPER UNDER THEN-EXISTING SECOND CIRCUIT LAW

Even though the MFG Parties satisfied the two-part test set forth in Water Splash, the Water Splash test is inapplicable here because, as a new procedural rule, it does not apply retroactively. Because the MFG Parties served AWAC in accordance with then-applicable Second Circuit law, service was proper.

Prior to Water Splash, the Second Circuit (in Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986)) and the Ninth Circuit (in Brockmeyer v. May, 383 F.3d 798 (9th Cir. 2004)) had developed different interpretations of Article 10(a) of the Hague Convention. The Second Circuit interpreted this provision to permit service on foreign defendants by mail as long as the country in which service is made does not object. Ackermann, 788 F.2d at 839-40 (stating that whether mail service of process made pursuant to Article 10(a) of the Hague Convention also satisfied service requirements under the Federal Rules of Civil Procedure was "irrelevant" because the Hague Convention "'supplements'—and is manifestly not limited by" a signatory's local rules for service of process) (emphasis omitted).[3]

In contrast, the Ninth Circuit held that service by mail is permissible under Article 10(a) only where (1) the receiving state has not objected to service by mail; and (2) service by mail is

[3] See also Papir v. Wurms, No. 02 Civ. 3273 (RCC), 2005 WL 372061, at *4 (S.D.N.Y. Feb. 15, 2005) ("The Second Circuit has interpreted [Article 10(a)] to permit service on foreign defendants by mail as long as the country in which service is made does not object.") (internal citations omitted); In re Hawker Beechcraft, Inc., 486 B.R. 264, 284 n.15 (Bankr. S.D.N.Y. 2013) (because "the focus is on the requirements of service in federal court under the Hague Convention—an international treaty—not the rules governing the service of process in proceedings in the Netherlands," it was irrelevant whether service of process on a Dutch defendant under Article 10(a) of the Hague Convention also complied with local law).

authorized under otherwise-applicable law. Brockmeyer, 383 F.3d at 803-04. "Ackermann and Brockmeyer are squarely at odds," and—at the time the MFG Parties served AWAC—courts within the Second Circuit were "bound by the Second Circuit's interpretation of federal law." Papir, 2005 WL 372061, at *4; see also id. ("Ackermann is the law of this Circuit and forecloses reliance on Brockmeyer."). In Water Splash, which was decided more than six months after the MFG Plaintiffs served AWAC, the Supreme Court adopted the Brockmeyer rule, thus changing the law in the Second Circuit. See Water Splash, 137 S. Ct. at 1513 (citing Brockmeyer, 383 F.3d at 803-04).

Given the MFG Plaintiffs' reliance on then-existing Second Circuit law, Water Splash cannot be applied retroactively to invalidate the propriety of service. Indeed, numerous courts have recognized that it would be inequitable and impractical to apply changes in service rules retroactively. See, e.g., In re Med-Atlantic Petroleum Corp., 233 B.R. 644, 653-54 (Bankr. S.D.N.Y. 1999) ("[T]o permit . . . retroactive application" to changes in service laws "would not be just and practicable, but rather, would work an injustice" to parties "who, in considering . . . in which manner they should effect service of process, relied upon the then-applicable" rules); Arrogar Distributors, Inc. v. Kis Corp., 151 F.R.D. 221, 225 (D.P.R. 1993) (new judicial test for service "would 'not be given retroactive effect as it was impossible for plaintiff to divine the law for the up to now tabula rasa of First Circuit jurisprudence'" (citing Borschow Hosp. & Med. Supplies v. Burdick-Siemens, 143 F.R.D. 472, 480 (D.P.R. 1992)); Fidelity-Phenix Fire Ins. Co. of N.Y. v. Penick, 401 P.2d 514, 518 (Okla. 1965) (overruling earlier decision regarding service of process, but holding that "the rule of law announced herein shall be prospective only and shall not invalidate the service of process in the instant action," which "was proper" based on the overruled decision). Basic fairness requires that litigants be allowed to rely on existing service

rules without worrying that a subsequent change in the law will render their service improper. Moreover, applying a new service rule retroactively to invalidate previously permissible methods of service would be overwhelmingly disruptive, as it would jeopardize the validity of service in hundreds (if not thousands) of pending cases. Consistent with the above cases, equitable principles, and practical considerations, this Court should determine whether service complied with the Second Circuit law as it existed when AWAC was served.

At the time of service, the Second Circuit permitted service on foreign defendants by mail as long as the country in which service was made had not objected to the Hague Service Convention. See Ackermann, 788 F.2d at 839-40; Papir, 2005 WL 372061, at *4; Hawker Beechcraft, 486 B.R. at 284 n.15. As noted above, neither the United Kingdom nor Bermuda (a British Overseas Territory of the United Kingdom) has objected to Article 10(a) of the Hague Service Convention. See supra at 4. Accordingly, under the Second Circuit law existing at the time of service, service was proper where a party served a Bermuda entity via mail. As explained above, on October 28, 2016, counsel for the MFG Parties caused a DHL Express envelope containing a copy of both the Complaint (Adv. D.I. 1) and the Summons (Adv. D.I. 2) to be served upon AWAC's Officers and General Counsel via delivery from a DHL representative at AWAC's Bermuda office. Adv. D.I. 5 at 2. Likewise, per Rule 4(f)(2)(C)(ii) of the Federal Rules of Civil Procedure, on October 31, 2016, the MFG Parties provided a DHL Express envelope containing the service documents (which required signed receipt) to the Clerk of the Bankruptcy Court. Wittmann-Todd Decl. ¶ 4. The clerk, in turn, caused these documents to be served upon AWAC via mail and delivery by a representative from DHL, who obtained signed receipt of delivery from an AWAC employee. Adv. D.I. 4; Wittmann-Todd Decl. ¶ 4. Accordingly, the service was proper under then-applicable Second Circuit precedent.

III. IF THIS COURT DETERMINES THAT SERVICE OF PROCESS WAS TECHNICALLY IMPROPER, THE MFG PARTIES RESPECTFULLY REQUEST, AT A MINIMUM, LEAVE TO RE-SERVE AWAC IN BERMUDA

If this Court holds that service was technically improper, the MFG Parties respectfully request that this Court nonetheless deny AWAC's motion to dismiss due to AWAC's actual notice of this adversary proceeding, or, at a minimum, grant leave to re-serve AWAC in Bermuda pursuant to any means that this Court deems appropriate. As courts in New York have recognized, "failure to strictly comply with the provisions of the Hague Convention does not automatically lead to the conclusion that service is insufficient"; to the contrary, "the Hague Convention should be read together with Rule 4, which stresses actual notice rather than strict formalism." Garg v. Winterthur, 525 F. Supp. 2d 315, 322 (E.D.N.Y. 2007) (citing, inter alia, Burda Media, 417 F.3d at 301) (internal quotation marks omitted). "Thus, where the plaintiff made a good faith attempt to comply with the Convention, and where the defendant received sufficient notice of the action such that no injustice would result, the court may deem service of process properly perfected." Id. (collecting cases).[4]

Here, AWAC concedes that it received the initiating papers in this action, and therefore cannot credibly contend that it did not have actual notice of this proceeding, or that it was prejudiced in any way by any claimed technical defect in service. Indeed, even before filing its various motions to dismiss, AWAC had already sought and obtained the Anti-Suit Injunctions in Bermuda in early November – days after service. AWAC also filed multiple memoranda of law and its motion to compel arbitration long before the Bermuda Anti-Suit Injunctions were lifted

[4] In addition to the formal service methods employed, the MFG Parties on November 3, 2016 provided a courtesy copy of the Summons, Complaint, and this Court's template Case Management Scheduling Order by electronic mail to Defendants' counsel of record from the MDL settlement proceedings (who subsequently appeared in this case) and sought to schedule a meet and confer in advance of the initial status conference. See Wittmann-Todd Decl. ¶ 5.

and the MFG Parties were permitted to prosecute this action in New York. AWAC therefore cannot reasonably claim that its ability to effect a fulsome defense was harmed by the manner of service of the summons and complaint.

In any event, even if this Court were to deem service of process to be deficient here, the proper remedy is to allow the MFG Parties to cure this defect by any method authorized by the Court. See, e.g., Jiao v. First Int'l Travel, Inc., No. 03 Civ. 0165(DF), 2004 WL 1737715, at *5 (S.D.N.Y. Aug. 4, 2004) (explaining that because "defects in service can be readily cured by re-serving the defendant in accordance with the governing rules," courts generally "allow the plaintiff an opportunity to effectuate service" upon a finding of improper service). Contrary to AWAC's assertion, there is no time limit "for service in a foreign country under Rule 4(f)." Fed. R. Civ. P. 4(m). Rather, this Court has recognized that the MFG Parties are "entitled to a 'reasonable time' to exercise due diligence to serve the foreign defendant." See, e.g., In re Bernard L. Madoff Investment Securities LLC, 418 B.R. 75, 83 (Bankr. S.D.N.Y. 2009). The MFG Parties are prepared to exercise such diligence to promptly cure any defect in service, if such a defect exists.

CONCLUSION

For the foregoing reasons, the MFG Parties respectfully request that this Court deny AWAC's motion to dismiss for improper service, or, at a minimum, grant the MFG Parties leave to cure any defect in service here.

Dated: July 21, 2017
New York, New York

Respectfully submitted,

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