UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LIBERTY MUTUAL INSURANCE COMPANY, Petitioner v. WHITE MOUNTAINS INSURANCE GROUP, LTD. Respondent	CIVIL ACTION NO. 06-CA-11901 GAO

RESPONDENT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS PETITION

Introduction

Respondent, White Mountains Insurance Group, Ltd. "(White Mountains"), submits this Memorandum in support of its motion to dismiss the Petition of Liberty Mutual Insurance Company ("Liberty") Under 9 U.S.C. §7 For Order Enforcing Arbitration Panel's Subpoena Duces Tecum To White Mountains Insurance Group, Ltd. ("the Petition").

Liberty predicates the Court's subject matter jurisdiction and power to grant the relief requested in its Petition entirely on a provision of the Federal Arbitration Act, 9 U.S.C. § 7. [1] However, as will be shown below, Liberty's Petition fails to satisfy key requirements of § 7: to be judicially enforceable, an arbitral subpoena must be for the attendance of a witness before the arbitration panel to testify rather than for pre-hearing discovery, and must be served within the

[1] The Petition, ¶¶ 3 and Prayer for Relief; Memorandum of Liberty Mutual Insurance Company In Support of Its Petition Under 9 U.S.C. §7 For Order Enforcing Arbitration Panel's Subpoena Duces Tecum To White Mountains Insurance Group, Ltd. ("Liberty's Memorandum"), pp. 1-2.

territorial limitations applicable to trial subpoenas. Therefore, while White Mountains is fully prepared, and reserves the right, to oppose Liberty's claims on the merits, it is submitted that the Petition should not proceed to consideration on the merits but, rather, should be dismissed for lack of subject matter jurisdiction and failure to state a claim for which relief can be granted.

Factual and Procedural Background

The subpoena that Liberty is asking this Court to enforce ("the Subpoena") was issued by the arbitral panel ("the Panel") in an arbitration being conducted in Boston, Massachusetts. [2] White Mountains is not a party to that arbitration. The Subpoena was addressed to a White Mountains office in Hanover, New Hampshire, and, without stating any legal basis for the Panel's authority to issue or serve it, the Subpoena commanded White Mountains to produce certain documents to an attorney at his firm's office in Portsmouth, New Hampshire. [3]

After agreeing voluntarily to cooperate by producing "non-privileged, responsive documents, obtained after a search of reasonable scope,"[4] White Mountains made its production. Apparently disappointed that this discovery did not yield certain hoped for evidence, Liberty responded by filing this Petition.

ARGUMENT

As this Court has previously ruled, both an arbitration panel's authority to subpoena evidence from third parties and a federal courts' jurisdiction and authority to enforce such

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[2] The Petition, ¶¶ 4, 14 and Exhibit 2 thereto; Affidavit of Natalie Tull Greene and Exhibit 1 thereto.

[3] Exhibit 2 to the Petition. Liberty's allegation that the Hanover office is White Mountains' principal place of business, the Petition, ¶ 2, is incorrect; as one of Liberty's exhibits (White Mountains' most recent Annual Report to the SEC) shows, White Mountains, a Bermuda limited liability company, maintains its headquarters in Bermuda and its principal executive offices in Jersey City, New Jersey. Exhibit 4 to the Petition, Cover and Item 1.

[4] Exhibit 7 to the Petition.

subpoenas derive from, and are circumscribed by, the Federal Arbitration Act, 9 U.S.C. § 7.[5] Section 7 provides as follows:

> The arbitrators . . . may summon in writing any person ***to attend before them or any of them as a witness*** and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or a majority of them, and shall be directed to the said person and ***shall be served in the same manner as subpoenas to appear and testify before the court***; if any person so summoned to testify shall refuse or neglect to obey said summons, ***upon petition to the United States District Court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators***, or punish said person or persons for contempt in the same manner provided for law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(Emphasis supplied).

On its face, then, Section 7 expressly prescribes (1) the class of subpoenas that may be issued and enforced, (2) the manner in which a proper subpoena must be served, and (3) the venue for enforcement actions. While Liberty's Petition complies with the venue requirement, the Subpoena neither fits into the authorized class nor was served in the required manner.

I. WHITE MOUNTAINS HAS NOT WAIVED OBJECTIONS TO JUDICIAL ENFORCEMENT OF THE SUBPOENA

As an initial matter, Liberty's suggestion that the fact that White Mountains refrained from objecting to the Subpoena and instead voluntarily undertook to produce "non-privileged,

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[5] *OneBeacon America Insurance Company v. Factory Mutual insurance Company*, C.A. No. 03-MBD-10239-GAO (D. Mass. 2003) (copy attached as Addendum 1).

responsive documents, obtained after a search of reasonable scope"[6] constitutes a waiver is wholly without merit. First, under the FAA,

> once subpoenaed by an arbitrator the recipient is under no obligation to move to quash the subpoena. By failing to do so, the recipient does not waive the right to challenge the subpoena on the merits if faced with a petition to compel. The FAA imposes no requirement that a subpoenaed party file a petition to quash or otherwise challenge the subpoena; the Act's only mechanism for obtaining federal court review is the petition to compel.[7]

Perhaps even more importantly, Liberty claims the applicability of Section 7 to the Subpoena as the basis for this Court's subject matter jurisdiction. Thus, the issues raised in this motion to dismiss - whether the Subpoena comports with the requirements of Section 7 so as to fall within its scope – go to subject matter jurisdiction and, as such, cannot be waived. It is beyond argument that

> no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant,...principles of estoppel do not apply,...and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings."[8]

II. SECTION 7 DOES NOT AUTHORIZE ISSUANCE OR ENFORCEMENT OF SUBPOENAS FOR PRE-HEARING DISCOVERY FROM THIRD PARTIES

By its plain terms, Section 7 applies only to arbitral subpoenas that "summon in writing any person to ***attend*** before [the arbitrators] or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper." Likewise, it confers on the federal courts only such enforcement powers as they otherwise have for "securing the

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6 Exhibit 7 to the Petition.

7 *Comsat Corporation v. National Science Foundation,* 190 F3d 269, 276 (4th Cir. 1999); cf. *In re Security Life Insurance Co. of America,* 228 F.3d 865, 870-71 (8th Cir. 2000) (compliance with an arbitral subpoena does not moot the subpoenaed party's objections to judicial enforcement).

8 *Insurance Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (internal citations omitted).

attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." To use the familiar federal civil procedure classification of subpoenas, the class of subpoenas covered by Section 7 is analogous to those "for attendance at a trial or hearing," but not to those related to discovery – i.e. subpoenas "for attendance at a deposition," or "for production and inspection … separate from a subpoena commanding a person's attendance."[9]

Here, since the Subpoena commanded White Mountains solely to produce documents, it is plainly a purely discovery subpoena. Liberty does not contend otherwise, nor, indeed, does it argue that the Subpoena fits Section 7's express description of authorized and enforceable subpoenas. Rather, Liberty concedes that the Subpoena is "for pre-hearing production," but insists that Section 7 should be construed to include "the lesser power to compel the pre-hearing production through subpoenas duces tecum issued to third parties."[10] While there is some authority supporting this proposition, most notably in the Eighth Circuit,[11] Liberty's assertion that the proposition is "well-established" is a vast overstatement.

None of the decisions upon which Liberty relies are binding on this Court and the issue of whether Section 7 authorizes the issuance and enforcement of arbitral pre-hearing discovery subpoenas to third parties is one of first impression in the First Circuit. In other circuits, however, the Eighth Circuit's view has been roundly rejected on grounds of sound statutory construction and policy considerations. These decisions represent the better view and should be followed by this Court because their reasoning is highly persuasive and far more consistent with the First Circuit's approach to statutory construction than that of the Eighth Circuit.

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9 Fed. R. Civ. P. 45(a) (2)(A), (B), and (C).

10 Liberty's Memorandum, p. 2.

11 *In re Security Life Insurance Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000); *Schlumbergersema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 (D. Minn. 2004).

In *Comsat Corporation v. National Science Foundation*, the Fourth Circuit reversed the lower court's order requiring a non-party to comply with subpoenas issued by an arbitrator during pre-hearing discovery.[12] Predicating its ruling squarely on the text of Section 7, the Court held that the language defining the power of arbitrators and providing for judicial enforcement limits the scope of both to compelling non-parties to appear before arbitrators, and precludes ordering them "to appear at depositions, or [to] provide the litigating parties with documents during pre-hearing discovery."[13]

More recently, in *Hay Group, Inc. v. E.B.S. Acquisition Corp,*[14] the Third Circuit , agreeing with the Fourth Circuit and declining to follow the Eighth, ruled that the District Court erred when it compelled two non-parties to comply with an arbitral subpoena commanding them to produce documents prior to the panel's hearing. The Third Circuit's careful and multi-faceted analysis bears extensive quotation:

> In interpreting a statute, we must, of course, begin with the text. "The Supreme Court has repeatedly explained that recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result." . . . . Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time. This interpretation is supported by the interpretation of similar language in a previous version of Federal Rule of Civil Procedure 45. From its adoption in 1937 until its amendment in 1991, Rule 45 did not allow federal courts to issue pre-hearing document subpoenas on non-parties.
> . . .
>
> Some courts have argued that the language of Section 7 implies the power to issue such pre-hearing subpoenas. *See* *In re Security Life Insurance Co. of America,* 228 F.3d 865, 870-71 (8th Cir. 2000).
> . . .

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12 190 F3d 269 (4th Cir. 1999).
13 Id. at 275-276.
14 360 F.3d 404 (4th Cir. 2004).

> We disagree with this power-by-implication analysis. By conferring the power to compel a non-party witness to bring items to an arbitration proceeding while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had been meant to confer the latter, broader power, we believe that the drafter would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items with him to an arbitration proceeding. As mentioned above, until its amendment in 1991, Rule 45 of the Federal Rules of Civil Procedure was framed in terms quite similar to Section 7 of the FAA, but courts did not infer that, just because they could compel a non-party witness to bring items with him, they could also require a non-party simply to produce items without being subpoenaed to testify.
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> Since the text of Section 7 of the FAA is straightforward, we must see if the result is absurd. … We conclude that it is not. Indeed, we believe that a reasonable argument can be made that a literal reading of Section 7 actually furthers arbitration's goal of "resolving disputes in a timely and cost efficient manner. First, as noted above, until 1991 the Federal Rules of Civil Procedure themselves did not permit a federal court to compel pre-hearing document production by non-parties. That the federal courts were left for decades to operate with this limitation of their subpoena power strongly suggests that the result produced by interpreting Section 7 of the FAA as embodying a similar limitation is not absurd. Second, it is not absurd to read the FAA as circumscribing an arbitration panel's power to affect those who did not agree to its jurisdiction. [15]

Further evidence buttressing the Third Circuit's analysis is the fact that in the 1998 legislation authorizing federal courts to use of ADR, including arbitration,[16] with Rule 45 already amended to provide for both trial and pre-trial discovery subpoenas, Congress still limited the use of Rule 45 subpoenas in arbitration to securing "the attendance of witnesses and the

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15 Hay Group, 360 F.3d at 406-409.

16 28 U.S.C. §§ 651 et seq.

production documentary evidence at an arbitration hearing under this chapter."[17] The use of subpoenas for pre-hearing discovery is clearly not part of Congress's conception of arbitration.

While the Second Circuit has questioned, but has not yet found necessary to decide, "whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties,"[18] Judge Rakoff of the District Court for the Southern District of New York was persuaded by the Third Circuit's textual analysis of Section 7 in *Hay Group* and denied a motion to compel a non-party to comply with an arbitrator's subpoena to appear for a pre-hearing deposition and produce documents.[19]

Like the courts in the above-discussed cases, the First Circuit firmly adheres to the principle of statutory construction that "absent ambiguity in the statutory language, our inquiry is complete and ends with the plain language of the statute."[20] There is nothing ambiguous in the express words of Section 7, as, indeed, even the Eighth Circuit acknowledged:

> Section 7 explicitly grants arbitrators authority to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." It does ***not***, however, explicitly authorize the arbitration panel to require the production of documents for inspection by a party.[21]

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17 28 U.S.C. § 656.

18 *Stolt-Nielsen SA v. Celanese AG*, 430 F. 3d 567, 569 (2d. Cir. 2005); see also, Dynegy Midstream Services, LP v. Trammochem, 451 F.3d 89, 96 (2d Cir. 2006).

19 Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D. NY 2004).

20 *U.S. v. Bohai Trading Co., Inc.*, 45 F.3d 577, 581 (1st Cir. 1995); see also, *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 50 (1st. Cir. 2006).

21 228 F.3d 865, 870-71 (8th Cir. 2000); see also *Schlumbergersema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647 at *1 (observing that Section 7 "on its face . . . appears only to authorize an arbitration panel to issue a subpoena for testimony and document production at a hearing").

The Eighth Circuit cited no rules of statutory construction or any other grounds for going beyond the express terms of Section 7 and engrafting onto it arbitral and judicial powers that the statutory provision by its terms did not confer. For this reason, the Eighth Circuit's view of Section 7 lacks persuasive power and this Court should join the other courts that have rejected it.

II. SECTION 7 DOES NOT PERMIT SERVICE BEYOND 100 MILES FROM THE PLACE OF THE ARBITRATION

As this Court recognized in *OneBeacon America Insurance Company v. Factory Mutual Insurance Company,* the Section 7 requirement that arbitral subpoenas "shall be served in the same manner as subpoenas to appear and testify in court" operates to subject such subpoenas to the territorial limitation of Federal Rule of Civil Procedure 45(b)(2).[22] Since a subpoena to appear or testify in court (with or without documents) must be issued by the court for the district where the trial or hearing to be held,[23] service of such a subpoena is proper only if made within that district or a place outside the district within 100 miles of the place of the trial or hearing.[24] For arbitral subpoenas, the relevant district is where the arbitration is to take place; therefore, service must be made within that district or no more than 100 miles of the place of the hearing.[25]

In *OneBeacon*, this Court denied a request to enforce a subpoena served on a company in Wisconsin in connection with a Boston-based arbitration, holding that

> [n]othing in 9 U.S.C. § 7 empowers the Court to authorize the service of a subpoena outside of the 100 mile territorial limitation described in Rule 45(b)(2). Therefore, the Court does not have the

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22 *OneBeacon America Insurance Company v. Factory Mutual insurance Company*, C.A. No. 03-MBD-10239-GAO (D. Mass. 2003) (Copy attached as Addendum 1).

23 Fed. R. Civ. P. 45(a)(2)(A).

24 Fed. R. Civ. P. 45(b)(2).

25 See, *Dynegy Midstream Services, LP v. Trammochem*, 451 F3d 89, 94-96 (2d Cir. 2006) (reversing an order entered by the District Court for the Southern District of New York, the place of the arbitration, enforcing a document subpoena served in Texas); *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 2002 WL 537652 (3rd Cir. 2002) (the 100-mile limitation in Rule 45 precludes the enforcement of a subpoena *duces tecum* issued in a Pennsylvania arbitration to a witness in Florida).

> authority to compel compliance with the panel's subpoena, which was served beyond that territorial limitation.[26]

In the case at bar, the Subpoena was addressed to White Mountains in Hanover, New Hampshire, which, however measured,[27] is more than 100 miles from Boston, Massachusetts.[28] Thus, the Court is without power to enforce it.

CONCLUSION

For the reasons stated above, Liberty's Petition should be dismissed.

Respectfully submitted,
White Mountains Insurance Group, Ltd.
By its attorneys,

/s/ Natasha C. Lisman
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Dated: November 10, 2006

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[26] Id. at p. 2.

[27] Compare, *Khaaliq v. Pennsylvania State University*, 2002 WL 1042349, *2 (E.D. Pa 2002) (driving distance) and Schwartz v. Marriot Hotel Services, Inc., 186 F. Supp.2d 245, 251 (E.D. N.Y 2002) (straight line).

[28] Affidavit of Natasha C. Lisman, ¶ 2 and Exhibits 1 and 2 thereto.

CERTIFICATE OF SERVICE

I hereby certify that the above document has been filed through the ECF system on the above date will be sent electronically to Michael Arthur Walsh, Esquire, Laurence D. Pierce, Esquire and Julie Rising, Esquire, Choate, Hall & Stewart, LLP, Two International Place, Boston, MA 02110, as identified on the Notice of Electronic Filing (NEF).

/s/ Natasha C. Lisman
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ADDENDUM 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-MBD-10239-GAO

ONEBEACON AMERICA INSURANCE COMPANY, f/k/a Commercial Union Insurance Company, as successor to Employers Liability Assurance Company; AMERICAN EMPLOYERS INSURANCE COMPANY; and NORTHERN ASSURANCE COMPANY OF AMERICA, as successor to Employers Surplus Lines Insurance Company,
Claimants

v.

FACTORY MUTUAL INSURANCE COMPANY,
f/k/a Protection Mutual Insurance Company, and
d/b/a FM Global,
Respondent

MEMORANDUM AND ORDER
October 6, 2003

O'TOOLE, D.J.

Claimants and Respondent are parties to an arbitration currently pending before a panel of arbitrators sitting in Boston. Invoking a provision of the Federal Arbitration Act, 9 U.S.C. § 7, the panel served a subpoena duces tecum on a third party, Employers Insurance Company of Wausau, at its offices in Wausau, Wisconsin. The subpoena instructed Employers Insurance to produce certain documents for inspection and copying in New York. Employers Insurance objected to the subpoena citing certain grounds set forth in Fed. R. Civ. P. 45(c)(3) and stated that it would not produce the documents sought. By this action, claimants ask the Court to compel Employers Insurance to comply with the panel's subpoena. Claimants' motion to compel is DENIED.

The panel's authority to subpoena documents from third parties derives from § 7 of the Federal Arbitration Act. See 9 U.S.C. § 7 (1999) ("The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."). A subpoena issued by the arbitrators "shall be served in the same manner as subpoenas to appear and testify before the court . . . ." Id. Fed. R. Civ. P. 45(b)(2) imposes a territorial limitation upon the Court's authority to issue a subpoena:

> a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena . . . . When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

Nothing in 9 U.S.C. § 7 empowers the Court to authorize the service of a subpoena outside of the 100 mile territorial limitation described in Rule 45(b)(2). Therefore, the Court does not have the authority to compel compliance with the panel's subpoena, which was served beyond that territorial limitation.

Fed. R. Civ. P. 45(a)(3) describes the process for issuing a subpoena outside of the forum where a matter is pending:

> An attorney as officer of the court may also issue and sign a subpoena on behalf of . . . . (B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

Here, the panel should issue and serve a subpoena on Employers Insurance consistent with that rule and returnable in the district from which it issues.

Claimants' motion to compel production of documents is denied.

It is SO ORDERED.

October 6, 2003
DATE

DISTRICT JUDGE