UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIBERTY'S OPPOSITION TO WHITE MOUNTAINS INSURANCE GROUP, LTD.'S MOTION TO DISMISS PETITION OF LIBERTY MUTUAL INSURANCE COMPANY FOR ORDER ENFORCING ARBITRATION PANEL'S SUBPOENA DUCES TECUM.

Respondent White Mountains Insurance Group, Ltd. ("White Mountains") has moved to dismiss the Petition of Liberty Mutual Insurance Company ("Liberty") for an order enforcing the arbitration panel's subpoena *duces tecum* to White Mountains. White Mountains argues that the subpoena was improperly issued and, in the alternative, that it was improperly served. Both arguments have been waived. Neither has merit. The Motion must be denied.

FACTUAL BACKGROUND

As stated in Liberty's Petition, Liberty (a Massachusetts corporation with a principal place of business in Boston) is currently a respondent in an arbitration proceeding (the "Arbitration") brought against it by One Beacon Insurance Company ("OBIC"). OBIC is a Pennsylvania corporation with a principal place of business in Philadelphia. *See* Complaint filed by OBIC in Philadelphia Court of Common Pleas, relevant portions of which are attached as Exhibit A, p. 2, ¶5. The Arbitration is being conducted in Boston, Massachusetts. OBIC is a wholly owned subsidiary of White Mountains. *See* Exhibit 4 to the Petition, p. 14.

The Arbitration arises from a transaction that was the subject of a so-called "Master Agreement" between White Mountains, OneBeacon Corporation (another wholly owned subsidiary of White Mountains), and Liberty. Pursuant to the Master Agreement, White Mountains and OneBeacon Corporation conveyed their insurance business located in 42 states and the District of Columbia to Liberty. *See* Exhibit 3 to the Petition. In order to effect this transaction, the Master Agreement required the parties to enter into, and to require their subsidiaries to enter into, a number of ancillary agreements. One such ancillary agreement was a Pre-Closing Serviced Policies Administrative Services Agreement (the "PCASA") between Liberty, OneBeacon Corporation, and certain subsidiaries of OneBeacon Corporation, including OBIC. *See* Exhibit 5 to the Petition. The subject of the Arbitration is OBIC's claim that Liberty breached its obligations under the PCASA to administer claims on behalf of OBIC, thereby allegedly causing millions of dollars in losses to OBIC. *Id.*

White Mountains is a public company. Its Form 10-K filing with the U.S. Securities and Exchange Commission ("SEC") for the fiscal year ending December 31, 2001, indicated that certain documents exist that are relevant to the claims and defenses of the parties in the Arbitration. *See* Exhibit 6 to the Petition. Consequently, Liberty sought the production of these documents from OBIC in the Arbitration. OBIC objected to this document production request on the ground that whatever responsive documents were in the possession of White Mountains were not within its control. Liberty thereupon moved to compel the production of these documents, arguing that documents within the possession of White Mountains were within the control of OBIC. The Arbitration Panel granted this motion. However, OBIC continued to object to the production of the documents, insisting that it had no obligation to produce documents within the possession of White Mountains.

In view of OBIC's persistence in this position notwithstanding the Panel's order, Liberty thereupon requested that the Panel issue a subpoena to White Mountains. In September, 2006, the Panel issued that subpoena. The subpoena was served on White Mountains at its principal place of business in Hanover, New Hampshire on September 25, 2006. *See* Subpoena, Ex. 2 to Petition. It required that White Mountains produce documents responsive to the subpoena at the offices of Liberty's New Hampshire counsel in Portsmouth, New Hampshire. Counsel for White Mountains responded to the subpoena by letter dated September 29, to Liberty's counsel. In that letter, White Mountains represented that it would comply with the subpoena and produce "non-privileged, responsive documents" sought by the subpoena on October 6, 2006. *See* Ex. 7 to the Petition. This letter contained no reservation of rights or objections.

On or about October 8, 2006, White Mountains did in fact produce documents responsive to the subpoena at the offices of Liberty's New Hampshire counsel. However, as stated in Liberty's Petition, White Mountains' document production consisted of a paltry 299 pages of documents – limited to its public filings and drafts of those filings, together with a handful of press releases. Given the nature of the requests in the subpoena, and the observations made in White Mountains' 10-K filing, it is impossible that White Mountains' minimalist production included all documents responsive to the subpoena. Consequently, Liberty filed the instant Petition seeking to enforce the subpoena under the applicable provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. White Mountains has moved to dismiss Liberty's Petition, arguing that the subpoena was improperly issued and improperly served. For the reasons set forth below, these arguments are without merit. White Mountains' motion to dismiss the Petition should be denied.

ARGUMENT

1. White Mountains Has Waived Its Objections to the Subpoena.

Section 7 of the FAA provides that, in arbitrations subject to the terms of the statute, the arbitrators may issue summonses to any person to appear before them and to bring such documents as the arbitrators may require. 9 U.S.C. § 7. The statute further provides that those summonses "shall be served in the same manner as subpoenas to appear and testify before the court." *Id.* The federal rules require that a person served with a subpoena object in writing to that subpoena within 14 days. Fed. R. Civ. P. 45(c)(2)(B). Failure to object within that time period constitutes a waiver of any right to object. *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48 (S.D.N.Y. 1996); *Creative Gifts, Inc. v. UFO*, 183 F.R.D. 568, 570-71 (D.N.M. 1998), *citing Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990); *see also Krewson v. City of Quincy*, 120 F.R.D. 6, 7 (D. Mass. 1988).

Here, the subpoena to White Mountains was served on September 25, 2006. Not only did White Mountains fail to object to the subpoena, it affirmatively represented that it would comply with the subpoena, and it made a document production that purported to be in compliance with the subpoena. Now, however, White Mountains has changed its mind; it wants to argue that the subpoena is invalid and, even if valid, was invalidly served. Those arguments come too late. White Mountains has waived its right to contest the validity of the subpoena or the validity of service.[1] *See Smith v. Mallick*, 2006 WL 2571830, at *2, case no. 96-CV-2211 (D.D.C. Sept. 6, 2006) ("By failing to object to the subpoena prior to the [return date], defendant waived any

[1] White Mountains erroneously relies on *Comsat Corp. v. National Science Foundation* for its assertion that it has not waived the right to object. 190 F.3d 269, 275-76 (4th Cir. 1999). In *Comsat*, the subpoenaed party sent a letter prior to the return date on the subpoena refusing to comply, citing specific reasons for that refusal. *Id.* The Court held that the subpoenaed party was under no *affirmative* duty to move to quash or otherwise challenge the subpoena prior to being faced with a motion to compel, but never had to reach the issue of whether a failure to object waives the right for later objections. *Id*. at 276.

objection based on defective service."); *see also Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 196 F.R.D. 1, (D.D.C. 2000) (objection based upon lack of service was waived when subpoenaed deponent appeared for deposition).

Attempting to avoid the consequences of its failure to have timely objected to the subpoena, White Mountains seeks to characterize its argument that the subpoena was invalidly issued as being an objection to this Court's subject matter jurisdiction (which, of course, cannot be waived). This characterization is unsupported by any authority cited by White Mountains, and is wholly misconceived. There is no question that the FAA applies to the arbitration between OBIC and Liberty, since that arbitration arises out of a contract evidencing a transaction involving interstate commerce. 9 U.S.C. § 2. Nevertheless, it is black letter law that the FAA does not provide an independent basis for the subject matter jurisdiction of a federal court, and therefore that an independent basis for such jurisdiction must exist for a federal district court to act. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 9 (1984). Here, the Arbitration is between parties of diverse citizenship and involves an amount far exceeding the jurisdictional requirement. Thus, subject matter jurisdiction exists under 28 U.S.C. § 1332(a). *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (2d Cir.2000).

Consequently, this Court has subject matter jurisdiction to determine whether a subpoena has been validly issued by the Arbitration Panel and to enforce it (if it has), or decline to enforce it (if it has not). Indeed, such an enforcement proceeding cannot be brought in any federal district other than the District of Massachusetts, since the Arbitration Panel is sitting in this District. 9 U.S.C. § 7. Thus, the question of whether the subpoena served on White Mountains was validly issued by the Panel does not go to the subject matter jurisdiction of this Court, and no case cited by White Mountains supports its novel argument that its section 7 objection to the

subpoena implicates this Court's subject matter jurisdiction over the Petition. Consequently, both of the objections to the subpoena that White Mountains seeks to raise belatedly are waivable. For the reasons indicated above, both in fact have been waived. For this initial reason, White Mountains' motion to dismiss the Petition should be denied.

2. The Subpoena Was Properly Issued.

Even if this Court permits White Mountains to raise objections to the subpoena for the first time in its motion to dismiss, that motion still must be denied. Relying on a narrow and literalist construction of FAA section 7, OBIC argues first that the FAA only authorizes subpoenas requiring the production of documents by third parties *at* an arbitration hearing, not *prior to* the hearing. Most courts that have considered this argument have rejected it, holding instead that the authority to issue a subpoena requiring the production of documents *at* a hearing necessarily implies the authority to issue a subpoena requiring the production of documents *prior to* the hearing. *See In Re Security Life Insurance*, 228 F.3d 865, 868 (8th Cir. 2000); *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F.Supp.2d 402, 403 (S.D.N.Y. 2005); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647, *1 (D.Minn. Jan 09, 2004); *In Re Brazell v. American Color Graphics*, 2000 WL 364997, *1 (S.D.N.Y. Apr. 7, 2000); *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F.Supp. 1241, 1242-43 (S.D.Fla.1988) (FAA permits prehearing document production from non-parties); *Integrity Ins. Co. v. Amer. Centennial Ins. Co.*, 885 F.Supp. 69 (S.D.N.Y.1995) (same); *compare Meadows Indemnity Co. v. Nutmeg Insurance Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (non-party can be subpoenaed to produce prehearing documents if "intricately related to the parties involved in the arbitration and [] not mere third-parties who have been pulled into the matter arbitrarily").

Security Life is illustrative of this line of cases. In a well-reasoned opinion, the Eighth Circuit upheld a subpoena requiring the pre-hearing production of documents issued by an arbitration panel to a third party reinsurer of one of the parties to the arbitration. *Security Life*, 228 F.3d at 868. Like White Mountains here, the reinsurer argued that section 7 of the FAA authorizes arbitrators to issue only subpoenas to non-parties that require them to produce documents at the hearing, not subpoenas requiring the prehearing production of documents. The Court flatly rejected this argument, instead holding "that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *Id*. at 870-71. That holding applies squarely here.

White Mountains argues that this Court should reject the Eighth Circuit's eminently sensible construction of section 7 and adopt instead a hyper-technical, theatre-of-the-absurd construction of the provision. Specifically, White Mountains urges that this Court hold that although the Liberty/OBIC Arbitration Panel may order White Mountains to produce documents at the hearing in that proceeding, it may not order White Mountains to produce documents at any other time or juncture of the proceeding. According to White Mountains, this position is supported by the Third Circuit's decision in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

White Mountains' reliance upon *Hay Group* is misplaced. In that case, the Third Circuit held that the Panel's authority over complete strangers to an arbitration proceeding must be narrowly construed. *Id.* at 409 (the FAA should not be read to provide authority to the panel to "affect those who did not agree to its jurisdiction.") But that logic has no application here, because White Mountains is not a stranger to the Arbitration. To the contrary, the claim against

Liberty in the Arbitration is that it breached the PCASA – an ancillary agreement to the Master Agreement entered into by White Mountains and Liberty (among others). In that Master Agreement, White Mountains "unconditionally and irrevocably guarantee[d] the prompt and faithful performance and discharge of the obligations, responsibilities, duties and liabilities of OneBeacon under [the Master Agreement] and of OneBeacon and the OneBeacon subsidiaries, as applicable, under the Ancillary Agreements," including the PCASA. *See* Master Agreement, § 5.16, attached to the Petition as Exhibit 3.

Moreover, White Mountains is more than just a guarantor of OBIC's performance under the PCASA. According to White Mountains' 2005 10-K filing with the SEC, it conducts its "principal businesses . . . through its subsidiaries and affiliates in the business of property and casualty insurance and reinsurance," including OBIC. *See* White Mountains Insurance Group, Ltd.'s Form 10-K Filing for year ending Dec. 31, 2005, at p. 2 (excerpts attached to the Petition as Exhibit 4). Thus, even if this Court were to accept the reasoning underlying the Third Circuit's narrow construction of FAA section 7 in *Hay Group*, that reasoning has no application here. Consequently, even under *Hay Group*, White Mountains' motion to dismiss must be denied.

3. Service of the Subpoena Was Proper.

White Mountains claims that because the subpoena was served outside of 100 miles from the city of Boston, where the Arbitration panel sits, it was invalid. In addition to having been waived, this argument is without merit. Even if it were to be assumed that the geographical restrictions embodied in Rule 45(b)(2) apply to subpoenas issued by an arbitration panel,[2] White

[2] A number of federal courts have held that they do not. *See Security Life*, 228 F.3d at 872 (rejecting a the argument that service was improper under Rule 45(b)(2) reasoning that the territorial limitation is unnecessary because the inconvenience of producing documents would not increase with distance from the location of the

Mountains' construction of the Rule is simply mistaken. Rule 45(b)(2) requires that judicial subpoenas be served either within the District which issued them, or, if not served within that District, that they be served "within 100 miles *of the place of the deposition, hearing, trial, production or inspection* specified in the subpoena." The "place of the production" specified in the subpoena with which White Mountains was served was Portsmouth, New Hampshire – a place within the 100 mile limit prescribed by Rule 45. Thus, White Mountains' improper service argument is without merit.

CONCLUSION

For the reasons stated above, Petitioner Liberty Mutual Insurance Company respectfully submits that the motion to dismiss of Respondent White Mountains Insurance Group, Ltd. should be denied.

Respectfully submitted,

LIBERTY MUTUAL INSURANCE CO.

By its attorneys,

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production); *SchlumbergerSema*, 2004 WL 67647, at *1 (same); *see also Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F.Supp. 69, 73 (S.D.N.Y. 1995).

REQUEST FOR ORAL ARGUMENT

In accordance with Local Rule 7.1(D), Liberty requests an oral argument on its Petition and White Mountains' Motion to Dismiss on an expedited basis. The arbitration hearing for which the subpoena was issued begins November 28, 2006, and therefore the documents White Mountains failed to produce are required as soon as possible.

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 November 22, 2006.

/s/Julie C. Rising
Julie C. Rising