UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 10-20560-CIV-HOEVELER-TURNOFF

FOLKSAMERICA REINSURANCE CO. n/k/a WHITE MOUNTAINS REINSURANCE COMPANY OF AMERICA, a New York corporation,

Plaintiff,

vs.

CONSTRUCTORA DEL LITORAL, S.A., an Ecuadorian corporation, and JOSE LEONARDO CARVAJAL HUERTA, an individual,

Defendants.
_____/

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR INSUFFICIENCY OF PROCESS

Plaintiff Folksamerica Reinsurance Co. n/k/a/ White Mountains Reinsurance Company of America ("Folksamerica") hereby opposes the Motion to Dismiss for Insufficiency of Service of Process (the "Motion to Dismiss") of Defendants Constructora Del Litoral, S.A. ("COLISA") and Jose Leonardo Carvajal Huerta ("Carvajal") (collectively, "Defendants"). In support of this opposition, Folksamerica states as follows:

BACKGROUND

This action was originally filed in the Circuit Court in and for Miami-Dade County, Florida on February 10, 2009. The dispute centers around Defendants' refusal to abide by their agreement to indemnify Folksamerica, a reinsurer, for any sums paid by Folksamerica in connection with its reinsuring surety bonds issued for a construction project in Ecuador of which COLISA was the developer.

Attempts to serve Carvajal and COLISA at Carvajal's residential address in Coral Gables, Florida were unsuccessful. Accordingly, Folksamerica amended its complaint to assert its intention to effect service in Ecuador pursuant to the Inter-American Convention on Letters Rogatory (the "Convention"), a multi-lateral convention ratified by both the United States and Ecuador, and filed a motion for permission to serve the Defendants pursuant to same.[1]

The state court granted Folksamerica's motion to effect service pursuant to the Convention and thereafter Folksamerica transmitted a valid letter rogatory in the form required by the Additional Protocol to the Convention to the United States Central Authority, the authority responsible for transmission of the service documents under the Convention. The United States Central Authority transmitted the documents to the Ecuadorian Central Authority. The Ecuadorian Central Authority transmitted the documents to an Ecuadorian court. The Ecuadorian court executed a summons and directed a process server to serve COLISA and Carvajal pursuant to Ecuadorian law. A process server served both Carvajal and COLISA. The Ecuadorian Central Authority then returned the letter rogatory to the United States Central Authority with a letter stating that the request for a letter rogatory had been processed. Upon receipt of the letter rogatory, the United States Central Authority transmitted the completed letter rogatory to Folksamerica, stating that Defendants had been served.

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[1] The Complaint and Amended Complaint differ only in that the latter includes a basis for service pursuant to the Convention. Both pleadings refer to the same exhibits, A and B respectively. Exhibits A and B were attached to the Complaint when filed. If they were omitted from the Amended Complaint as Defendants allege, this is a mere oversight easily corrected by a simple notice of filing. Contrary to Defendants' assertions, although a failure to attach Exhibits A and B to the Amended Complaint may be a basis to dismiss, Florida courts have not dismissed on such basis alone and have held that the failure is easily cured by a notice of filing. *See Eigen v. Fed. Deposit Ins. Corp.*, 492 So. 2d 826, (Fla. 2d DCA 1986) (noting that the failure to attach exhibits to an amended complaint was be cured by a "notice of filing"); *Hughes v. Home Savings of America*, 675 So. 2d 649, 650 (Fla. 2d DCA 1996) (noting that a failure to attach exhibits to an amended complaint may be cured by a notice of filing). In an abundance of caution, and simultaneously with the filing of this opposition, Folksamerica shall file Exhibit A and B to the Amended Complaint.

Defendants did not respond to the Amended Complaint and Folksamerica moved for the entry of a clerk's default on February 10, 2010. In good faith, Folksamerica forwarded a copy of the Amended Complaint, Summons, and other motions filed on the state court, including the motion for default, to the known addresses of Defendants and their attorneys in Ecuador via federal express.

Defendants made an appearance in this case by filing a Notice of Removal on February 23, 2010. Defendants then filed the Motion to Dismiss, claiming that: a) COLISA was not served at its place of business, and does not have an office where it was purportedly served and therefore was never served under Ecuadorian law and the Convention, b) that Carvjal was not served at his home in Ecuador and therefore he was not served under Ecuadorian law and the Convention), c) that a Certificate of Execution was not executed by he Central Authority in Ecuador and therefore service was deficient under the Convention, and d) the documents that form the basis for this action were not attached to the Amended Complaint and therefore, service was deficient under the Convention.

As set forth below, all of these arguments fail, and the Motion to Dismiss must be denied in its entirety. Folksamerica has a made a prima facie showing that service has been made under the Convention, and Defendants have not successfully rebutted that showing. Furthermore, Defendants have been served pursuant to Fed. R. Civ. P. 4(2)(A) and Article 84 of the Code of Civil Procedure of Ecuador. And, even of there was a defect in service (which there was not) Defendants have actual notice of this action, and they should be deemed served or, in the alternative, Folksamerica should be given an opportunity to cure any alleged defects in service.

THE OPPOSITION

I. SERVICE OF PROCESS HAS BEEN EFFECTUATED PURSUANT TO THE INTER-AMERICAN CONVENTION FOR LETTERS ROGATORY

A.) Both the American and Ecuadorian Authorities Have Recognized Service and So Should This Court

Folksamerica has made a clear and un-rebutted showing that service upon Defendants has been properly effectuated under the Convention. Specifically, Folksamerica transmitted a valid letter rogatory in the form required by the Additional Protocol to the Convention (along with copies of the Amended Complaint and Summons both in English and Spanish) to the United States Central Authority. A copy of the letter rogatory is attached as Exhibit A. The United States Central Authority transmitted the documents to the Ecuadorian Central Authority. The Ecuadorian Central Authority transmitted the documents to an Ecuadorian court, who executed a summons and directed a process server to serve COLISA and Carvajal pursuant to Ecuadorian law. A process server served both Carvajal and COLISA. The Ecuadorian Court returned the letter rogatory to the director of the Ministry of Foreign Affairs, Trade and Integration together with a letter dated December 1, 2009 stating that the letter rogatory was processed and that the Central Authority will fill out a certificate of compliance. The Ministry of Foreign Affairs, Trade and Integration then completed a certificate of compliance dated December 21, 2009, stating that the letters rogatory were duly processed. A copy of each letter is attached separately as Exhibit B and C respectively. The Ecuadorian Central Authority then returned the letter rogatory to the United States Central Authority with the December 1 and December 21 letters stating that the request for a letter rogatory had been processed. A translated copy of the documents transmitted by the Ecuadorian Central Authority are attached as Exhibit D, the Spanish language original documents are attached as part of Exhibit E. Upon receipt of the letter

rogatory, the United States Central Authority transmitted the completed letter rogatory to Folksamerica, together with a letter stating that Defendants had been served, a copy if which is attached as Exhibit E.

As both the American and Ecuadorian authorities have recognized that service has been effectuated, so should this Court. Federal courts have found prima facie evidence of good service where a foreign court or department returns the letter rogatory or completed a return of service certificate, regardless of its form. *Resource Trace Finance, Inc. v. PMI Alloys, LLC*, 2002 WL 1836818, *4 (S.D.N.Y. 2002) (holding that a Central Authority's return of a completed certificate of service is prima facie evidence that the Authority's service was made in compliance with the Hague Convention); *Chemical Waste Management, Inc. v. Hernandez* 1997 WL 47811, *2 (S.D.N.Y. 1997) (holding that valid service was effected under Fed. R. Civ. P. 4(f)(2)(B) and Mexican law where plaintiff filed a declaration in support of service and a Mexican court returned the letters rogatory to the U.S. Court). Accordingly, this Court should recognize that service has been effectuated pursuant to the Convention and deny the Motion to Dismiss.

B.) Defendants Fail to Properly Rebut Service and Use a False Statement in an Attempt to Evade Service

Defendants attempt to rebut the presumption of service with three assertions. First, Defendants claim that COLISA was not served at its legal domicile, does not have an office at the location where it was served on November 19, 2009 and therefore service was not effectuated under Ecuadoran law and is thus invalid under the Convention. Second, Defendants claim that Carvajal was not served at his home and therefore service was not valid under Ecuadoran law and thus invalid under the convention. Third, Defendants claim that the Ecuadorian Central

Authority did no execute a Certificate of Execution and therefore the service was invalid under the Convention. These arguments should be rejected for the following reasons:

Defendants' position that COLISA does not have an office located at Pedro Carbo No. 531 and Nueve De Octobre Edit Perez Quintero 8th Floor, Suite 801, Guayaquil, Ecuador (*See* Motion to Dismiss at ¶ 12) appears to be false. Indeed, Folksamerica discovered that both Defendants are subject to a labor dispute in the Ecuadorian Guayas Provincial Court. Copies of the Complaint, Notice of Service, Answer, and Notice of Hearing in the labor dispute are attached hereto as Exhibit F. Service in that action appears to have been effected on January 25, 2010, when a process server posted notice at Pedro Carbo No. 531 and Nueve De Octobre Edit Perez Quintero 8th Floor, Suite 801, the very same address that Folksamerica used to serve Defendants under the Convention. Neither COLISA nor Carvajal objected to service in that action and Carvajal actually made in appearance. *See* Notice of Service in Exhibit F.[2] Furthermore, Folksamerica's attorney in Ecuador personally visited the location at Pedro Carbo No. 531 and Nueve De Octobre Edit Perez Quintero 8th Floor, Suite 801 on April 6, 2010 and confirmed that COLISA has an office there. (*See* Affidavit of Galo Olmedo Suquinagua Ayavaca, at ¶¶ 5-6, attached hereto as Exhibit G).

Both COLISA and its principal Carvajal assertion that COLISA does not have an office at Pedro Carbo No. 531 and Nueve De Octobre Edit Perez Quintero 8th Floor, Suite 801, Guoyaquuil, Ecuador is simply false. As they are relying on this false statement to support their Motion to Dismiss, they have not properly rebutted the presumption of service established by the

[2] Pursuant to Fed. R. Evid. 201, this Court may take judicial notice of documents filed in other courts. *See Republic of Ecuador v. Chevrontexaco Corp.*, 376 F. Supp. 2d 334, 375 (S.D.N.Y. 2005) (noting that courts routinely take judicial notice documents filed in other courts. . . and taking judicial notice of pending litigation in Ecuador).

Ecuadorian and American service of process authorities. Accordingly, the Motion should be denied on that basis.[3]

Next, Defendants challenge service based on the Ecuadorian Central Authority's inadvertent failure to complete Form C of the letter rogatory, the standard form certificate of service. This failure, however, is not fatal given the clear language of the letters dated December 1 and December 21 reporting that the letter rogatory was processed pursuant to the Convention. *See* Exhibits B and C. Courts have consistently held that failure to comply strictly with a convention on service is not automatically fatal to effective service. *Greene v. Le Dorze*, 1998 WL 158632, *4 (N.D. Tex. 1998). In a similar circumstance, albeit under the Hague Convention, the Second Circuit held that failure of the French ministry of justice to complete a formal certificate of service did not render service invalid. *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 301 (2d Cir. 2005). In so holding, the *Burda* court recognized that it was not the plaintiffs fault that the foreign authority failed to return a formal certificate, stressing instead that defendant had actual notice of the lawsuit. The *Burda* court further found that the French police report returned with the letter rogatory established service, despite the fact it was not a formal Certificate. *Id.*

C.) Defendants Have Actual Notice of This Dispute and They Would Not be Prejudiced If the Court Were to Deem Service Valid

Courts hold that a prima facie showing of proper service may be rebutted by a lack of actual notice or some showing of prejudice. *Northrup King Co. v. Compania Productora Smillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1389 (8th Cir. 1995). Defendants have not and cannot

[3] Folkamerica concedes that Carvajal was apparently not served at his home. However, as set forth in the documents attached as Exhibit F, he apparently does accept service at the office located at Pedro Carbo No. 531 and Nueve De Octobre Edit Perez Quintero 8th Floor, Suite 801, Guayaquil, Ecuador, the same place he was served per the Convention. Accordingly, service under the Convention should be deemed valid.

make such a showing. Moreover, as Defendants have actual notice of this action and fail to show how they would be prejudiced if service were deemed valid, they should be deemed served.

Consistent with a policy favoring resolution on the merits, courts disfavor motions to dismiss for insufficiency of service where a plaintiff made a good faith effort to effect service, the defendant had actual notice of the action and actively participated in its defense, and there is a strong possibility that plaintiff could effect proper service. *Hein v. Cuprum, S.A. DE CV*, 136 F. Supp 2d 63, 70 (N.D.N.Y. 2001) (denying defendant's motion to dismiss for improper service where based on plaintiff's non-compliance with the Inter-American Convention on Letters Rogatory where plaintiff attempted to serve defendant by alternate means, defendant had actual notice of the action and participated in the litigation, and it appeared that it was possible for plaintiff to effect good service). In this case, a good faith effort has been made to effect service under the Convention, the Defendants have actual notice of this action, the Defendants are, and have indicated that they will to, vigorously defend this action, and there is a strong possibility that Folksamerica will be able to correct the alleged insufficiencies in process, if so ordered. In fact, in their Motion to Dismiss, Defendants identify their purported locations in Ecuador where they can be served. Accordingly, the Motion to Dismiss should be denied in its entirety.

II. DEFENDANTS WERE SERVED PURSUANT RULE 4(F)(2)(A) AND ECUADORIAN LAW

Defendants have also been served under Rule 4(f), which governs service of process on individuals or corporations residing in foreign countries. Specifically, Rule 4(f)(2)(A), reads as follows:

> **(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other**

> **means, by a method that is not reasonably calculated to give notice:**
> **(A) as prescribed by the foreign country's law for service in that country in an action in its court's of general jurisdiction.**

Essentially, Rule 4 permits service by a method prescribed by the foreign country's law for service.

Defendants argue that they have not been served under Ecuadorian law. However, the very law that they cite to for this proposition, indicates otherwise. Specifically, Article 84 of the Ecuadorian Code of Civil Procedure states:

> **Should one of the parties state that is has knowledge of a specific complaint or ruling, or make reference to it in writing or in an act that remains as evidence in the proceedings, such party shall be deemed to have been summoned or notified on the date when the writing was submitted or in the act which such party had attended.**

(*See* Certified Translation of Codico de Procedimiento Civil, Codificacion 11, Registro Oficial Suplemento 58, Titulo 1, Articulo 84 [Code of Civil Procedure, Art. 84], attached as Exhibit H. Article 84 dictates that where a party enters an appearance in an action, he or she is deemed served as of the date of the appearance. (*See* Exhibit G, Affidavit of Galo Olmedo Suquinagua Ayavaca, at ¶ 7). Defendants entered an appearance in this case when they filed a notice of removal on February 23, 2009, indicating that they had notice of this case. Therefore, they have been served under Ecuadorian law, the Convention and Rule 4, Fed. R. Civ. P.

III. EVEN IF SERVICE WAS DEFICIENT, FOLKSAMERICA SHOULD BE GIVEN AN OPPORTUNITY TO CORRECT ANY ALLEGED DEFECTS IN SERVICE

Even if the court were to conclude that service of process was technically insufficient (which it was not), the remedy is to permit the plaintiff a reasonable amount of time to correct the errors in process. *Competitive Technologies, Inc. v. Marcovitch*, 2008 WL 140073, *7 (D.

Conn. 2008) (stating in dicta that even if service was technically insufficient, the court would not dismiss the case but would instead order the plaintiff to cure the defect in service within a reasonable time)*;* *Hein*, 136 F. Supp at 70 (granting plaintiff a 60-day extension to perfect service); *Lord v. Living Bridges*, 1999 WL 528833, *3 (E.D. Penn. 1999) (denying defendant's motion to dismiss for improper service under the Inter-American Convention on Letters Rogatory and granting plaintiff 90-days to effect service by any means not prohibited by international agreement or applicable Mexican law).

CONCLUSION

Defendants have been served with the Amended Complaint under the Inter-American Convention on Letters Rogatory, Rule 4, Fed. R. Civ. P. and Article 84 of Ecuador's Law of Civil Procedure. Accordingly, the Motion to Dismiss should be denied, and this case should proceed on the merits. To the extent the Court finds a defect in service, Folksamerica should be given an opportunity to cure any such defect.

Date: April 19, 2010.

[Signature on Following Page]

Respectfully submitted,

Herron Jacobs Ortiz
Attorneys for Plaintiff
1401 Brickell Avenue
Suite 840
Miami, Florida 33131
(305) 779-8100
(305) 779-8104 (Fax)

s/ Jose A. Ortiz
Jose A. Ortiz
Florida Bar No. 182321
jortiz@hjo-law.com
Yolonda P. Jacobs
Florida Bar No. 188670
yjacobs@hjo-law.com

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Jose A. Ortiz
Jose A. Ortiz

SERVICE LIST

Folksamerica Reinsurance Co. v. Constructora del Litoral, S.A., *et al*
Case No.: 10-20560-CIV-Hoevler-Turnoff
United States District Court, Southern District of Florida

Mary Ann Huey, Esq.
Erica Canas, Esq.
M.A. Huey, P.A.,
Attorneys for Defendants
201 Sevilla Avenue, Suite 302
Coral Gables, Florida 33134.
(by CM/ECF)