UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-82357-CIV-SMITH

NOBLE PRESTIGE LIMITED,

Petitioner,

vs.

PAUL HORN, *et al.*,

Respondents.

_____/

ORDER GRANTING MOTION TO DISMISS PETITION, QUASH SERVICE OF PROCESS, AND FOR EXTENSION OF TIME AND PAGE LIMITS TO RESPOND TO PETITION

This matter is before the Court upon Respondents, Craig T. Galle and Galle Law Group's, Motion to Dismiss Petition, Quash Service of Process, and For Extension of Time and Page Limits (the "Motion") [DE 20], Petitioner's Response [DE 24], and Respondents' Reply [DE 28]. The Court heard oral arguments on September 17, 2021. For the reasons set forth below, the Motion is denied.

I. FACTUAL BACKGROUND

Petitioner, Noble Prestige Limited ("Noble"), a limited liability company incorporated under the laws of Hong Kong, filed its Petition to Confirm and Enforce International Arbitration Awards and for a Temporary Restraining Order ("Petition" [DE 1]). Noble seeks confirmation and the entry of judgment on three arbitration awards (Petition at 25-133), rendered against United States citizens, Respondent Paul Horn ("Horn") and Horn's representative, Craig T. Galle, Esq. ("Galle"), by an arbitration tribunal appointed by the Hong Kong International Arbitration Center ("HKIAC Tribunal" or "Tribunal"). In the arbitration before the HKIAC Tribunal, Noble sought US$ 5,000,000, plus interest and costs, from Horn pursuant to their Facility Agreement dated

December 19, 2011. (Facility Agreement [DE 1-1] at 4-18.) The Facility Agreement provided for the arbitration of disputes between Noble and Horn before the Tribunal applying Hong Kong law. (*Id.* at 19.)

Pursuant to the Facility Agreement, Horn agreed to repay a loan advanced to him by Noble, within five (5) business days of Horn's receipt of the Appreciated Value Interest ("AVI") from the sale of his interest in a cellular communications system. Horn agreed to repay the greater of US$ 5,000,000 or 5% of what Horn received as his AVI. Annex A to the Facility Agreement is an Irrevocable Letter of Instruction ("Letter"). (Facility Agreement, ¶¶ 9-21.) In the Letter, Horn irrevocably appointed the Galle Law Group, P.A. ("GLG"), of Wellington, Palm Beach County, Florida as the designated disbursing/closing agent for Horn's AVI. Horn also irrevocably instructed GLG to disburse via wire transfer to Noble, at an account designated by Noble, the sums due Noble under the Facility Agreement. Horn further instructed GLG to initiate the transfer of the money due to Noble no later than five (5) days after GLG's receipt of Horn's AVI. GLG agreed to abide by and comply with the Irrevocable Letter of Instruction. Annex B to the Facility Agreement is a Security Agreement. (Security Agreement [DE 1-1] at 22-24.) Horn granted Noble a security interest, by way of a lien, in the sums paid to Horn for his AVI in an amount equal to what Noble was due under the Facility Agreement—the greater of US$ 5,000,000 or 5% of Horn's AVI.

Five days after entering into the Facilities Agreement with Petitioner, Horn entered into another agreement with of Bruschnelli Advisors, LLC ("Bruschnelli Agreement") also in Wellington, Palm Beach County, FL. The Bruschnelli Agreement was executed by Horn and Galle, as manager of Bruschnelli Advisors, LLC. Bruschnelli Advisors, LLC was engaged by Horn to oversee the appraisal process for his AVI interest.

On March 7, 2017, a Denver probate court, after declaring Horn incompetent, appointed Galle as Special Conservator over certain of Horn's assets. That court also appointed James Britt as Horn's guardian. In his role as conservator, Galle notified Noble that he negotiated and received payment of US$ 57,500,000 for Horn's AVI interest.

Pursuant to the terms of the Facility Agreement, Horn is required to repay Noble US$ 5,000,000 in fulfilment of the Facility Agreement. Thus, Noble made a demand to Galle in the amount of US$ 5,000,000 for the repayment of the loan to Horn. To date, the loan to Horn remains unpaid. The loan repayment amount was disputed by Britt who counter offered US$ 2,000,000 only, as full repayment of the loan to Horn. Noble rejected Britt's counteroffer and submitted the dispute to the Tribunal for arbitration pursuant to the Facility Agreement. (Not. Arbitration [DE 20-1] at 35-66.)

In the subsequent arbitration proceedings, Galle filed an Answer on behalf of Horn in his capacity as Special Conservator. (Answer to Not. Arbitration [DE 20-1] at 70-84.) Galle also notified the Tribunal that he was specially appointed by the Denver probate court to represent Horn at arbitration. Based on issues raised at arbitration, the Tribunal determined the following:

1) Galle was not authorized to represent Horn at arbitration based on Galle's failure to submit to the Tribunal requested proof of authorization and the inclusion of inaccurate and/or misleading statements in Galle's submission to the Tribunal.
2) The Facility Agreement was enforceable because: (i) Horn was not mentally incapacitated when he entered into the Facility Agreement; (ii) the Facility Agreement did not violate the rules of Champerty and Maintenance; and (iii) Noble did not violate the Money Lenders Ordinance (Chapter 163 Laws of Hong Kong).

Accordingly, the Tribunal issued: (1) the Interim Award on the Preliminary Issue (Interim Award [DE 1-1] at 25-66); (2) the Partial Award on Costs relating to the Interim Award on the Preliminary Issue (Partial Award [DE 1-1] at 67-86); and (3) the Final Award (Final Award [DE 1-1] at 87-133), as follows:

> a) as against Horn, US$ 5,000,000 under the Facility Agreement; US$ 817,761.90 as interest on that sum at a rate of HSBC Prime Rate +1%, from September 1, 2017 to May 14, 2020; the further sum of HK$ 3,800,530.05, for Noble's costs and expenses incurred in the arbitration (exclusive of costs previously awarded in the Partial Award on Costs); and interest on the above sums at the same rate as the Hong Kong judgment rate from May 14, 2020 until the time such sums are paid; and
>
> b) as against Galle, the sum of HK$ 3,250,000 (US$ 417,370.04) for Noble's costs and expenses incurred in the arbitration (exclusive of costs awarded in the Final Award) and interest on the above sum at the same rate as the Hong Kong judgment rate.

On December 18, 2020, Noble filed its two-count Petition [DE 1]. In the first count, Noble moves the Court to confirm and enforce the Interim, Partial, and Final Awards. In the second count, Noble moves the Court for a temporary restraining order to restrain the transfer of funds from the conservatorship accounts to protect Noble's interest in the AVI proceeds. On March 16, 2020, Respondents, Galle, individually and as Conservator for Paul Horn, and GLG filed their Motion to Dismiss the Petition.

II. LEGAL STANDARD

The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. *See*

id. The rule should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pleaded allegations are true and view the pleadings in the light most favorable to the plaintiff. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). However, once a court "identif[ies] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," it must determine whether the well-pled facts "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). A complaint can only survive a 12(b)(6) motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555. However, a well-pled complaint survives a motion to dismiss "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556.

III. DISCUSSION

Respondents move for dismissal of Noble's Petition as to Horn on grounds that Noble failed to effect proper service of process on Horn and that the Court lacks personal jurisdiction over Horn. Respondents also argue that the Court should dismiss the Petition for lack of subject matter jurisdiction over Galle and GLG because neither consented to be bound by the arbitrators' ruling and therefore, the Court may not confirm the Interim Award. Additionally, Respondents

move the Court to bifurcate the threshold issue as to whether the Court has jurisdiction to enforce the arbitration awards. The Court will consider each ground in turn.

A. Service of Process as to Paul Horn Is Sufficient

Respondents argue that the Petition should be dismissed as to Horn because he was not properly served with process and thus, the Court does not have jurisdiction of Horn. Under Rule 4 of the Federal Rules of Civil Procedure, "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a Respondent . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). "Service of process is a jurisdictional requirement: A court lacks jurisdiction over the person of a Respondent when that Respondent has not been served." *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313, 1317 (11th Cir. 1990).

Horn has been declared an incompetent person and was last known to be living in Thailand. "[A]n incompetent person not within any judicial district of the United States must be served in the manner prescribed by Fed. R. Civ. P. 4 (f)(2)(A), (f)(2)(B), or (f)(3)". Fed. R. Civ. P. 4(g). Rule 4(f) states in pertinent part:

> **(f) Serving an Individual in a Foreign Country**. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:
> * * *(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 reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
> * * *
> (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f)(2)(A)-B), (3). Noble purported to serve Horn by serving Galle, his Conservator. Respondents argue that Noble failed to properly serve Horn because Noble did not attempt to serve Horn as prescribed by Rule 4(f)(2)(A)-(B) in Thailand nor sought the Court's permission to serve Horn by other means.[1] Respondents argue that Noble has failed to serve process on Horn and thus, the Court does not have jurisdiction of Horn.

Noble acknowledges that email service on Horn failed because the email addresses were no longer operable. In response, Noble moves the Court for an order deeming service on Galle, Horn's conservator, valid service on Horn *nunc pro tunc*. Noble argues that Thailand is not a signatory to the Hague Convention and there is no agreement between the United States and Thailand concerning service of process. Under Rule 4(f)(3), service on Galle as Horn's representative would not be barred by international agreement. Thus, Noble seeks the Court's permission to deem Galle served *nunc pro tunc*. Galle objected to accepting service on behalf of Horn. He indicated that, under Rule (4)(f)(3), service was to take place outside of the United States. Galle also argued that neither he, as the Conservator, nor James Britt, the court appointed Guard ad Litem, is authorized to accept service on behalf of Horn. The Court disagrees that Horn, as Conservator, is not authorized to accept service.

Galle was initially appointed as Conservator on March 7, 2017, by the Denver probate court. The Conservatorship has been extended annually, to date. Under the appointment, Galle has broad powers to "make any decision or perform any act that Mr. Horn could perform himself in the absence of a special conservator." (Order Appointing Special Conservator, DE 20-1 at 17-

[1] Respondents acknowledge that Noble had earlier sought and received the Court's permission to serve Horn via two email addresses. However, Noble has not filed a return of service reflecting service by email.

18). Because in the absence of a special conservator Horn could accept service of process himself, the Court finds that Galle can accept service for Horn. Thus, Noble's service on Galle as representative of Horn is deemed valid *nunc pro tunc* such that service on Horn is sufficient.

B. The Court Has Personal Jurisdiction Over Horn

Next, Respondents move the Court for an order dismissing the Petition on grounds that the Court lacks personal jurisdiction over Horn. Respondents argue that although Horn is a United States' citizen, he was not resident in any judicial district. In an Affidavit attached to the Motion, Galle declares that Horn is last known to be a resident of Thailand. (Galle Aff. [DE 20-1] at 14-15 ¶ 72.) Horn has been Galle's client since 1996, and over the years of representing Horn, Horn has never visited the United States. (*Id.* ¶¶ 73-75.) Galle represents that he has never conducted business on behalf of Galle in Florida, never held or managed property for Horn in Florida, and that Horn has never traveled to Florida to sign or perform any actions in connection with the Facilities Agreement. (*Id.* ¶¶ 80-75.) Respondents argue that they are entitled to dismissal because Noble failed to file an affidavit controverting Galle's sworn jurisdictional challenge. *Venetian Salami Co. v. Parthenais,* 554 So. 2d 499, 502 (Fla. 1989) ("The plaintiff bears the burden of proving 'by affidavit the basis upon which jurisdiction may be obtained' [when] the defendant challenging jurisdiction files 'affidavits in support of his position.'").

Respondents argue that because Horn was a non-resident, the Court must evaluate whether jurisdiction comports with the due process clause. That is whether there are sufficient "minimum contacts" between Horn and Florida and whether exercising jurisdiction over Horn in Florida would violate "traditional notions of fair play and substantial justice." *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1220 (11th Cir. 1999). The Eleventh Circuit's three-part test to establish minimum contacts with a forum requires that: 1) the contacts must relate to the petitioner's cause of action,

2) the contacts must involve some act by which the defendant purposefully avails himself of the privilege of doing business the chosen forum, and 3) the contacts must be such that the defendant reasonably expects to be haled into court there. *Id.*

A review of the facts in the case reveals that Horn anchored the pursuit of his AVI through his attorney Galle/GLG in West Palm Beach, Florida. Under the Bruschnelli Agreement, Galle as manager of Bruschnelli Advisors, LLC, working out of West Palm Beach, FL, was engaged by Horn to oversee the appraisal process for his AVI interest. To underwrite the cost of what he anticipated would be a lengthy and costly appraisal process, Horn obtained a loan from Noble. Under the Facility Agreement, Horn negotiated for the loan to be disbursed to his attorney's IOTA trust account in Florida and which was "maintained in accordance with the Florida Bar Association Rules." Horn and GLG jointly issued to Noble the Irrevocable Letter of Instruction, which named GLG as the closing/disbursing agent and outlined the procedure for Horn's repayment of the loan. Loan repayment was to be handled by wire transfer directly from the IOTA trust account in Florida. Horn also granted a security interest in the AVI proceeds to Noble pursuant to the Security Agreement. The security interest was created pursuant to Florida law.[2]

Horn's contacts with Florida relate to his AVI for which he obtained the loan—the subject of Noble's cause of action. Horn purposefully availed himself of contact with Florida through the creation of the security interest, the requirement that all communication with him be through his Florida attorney, and naming his Florida attorney as the closing/disbursement agent for the loan. Horn, a resident of Thailand sought a loan from Noble, a Hong Kong company. Horn could have chosen anywhere in the world for the loan to be disbursed but Horn chose an IOTA trust account

[2] Defendants challenge the validity of the security interest. The validity of the security interest is not before the Court.

in Florida, "maintained in accordance with the Florida Bar Association Rules." Horn chose that both disbursement and repayment of the loan would be via a Florida IOTA trust account. Horn chose Florida as the place where obligations under the Facilities Agreement would be performed. Thus, Horn could anticipate that he would be haled into a Florida court if there was need to enforce the Facilities Agreement. Accordingly, suit against Horn in this judicial district comports with the due process clause and the Court has personal jurisdiction over Horn.

C. The Court Does Not Lack Subject Matter Jurisdiction Over Galle

Respondents argue that the Court lacks subject matter jurisdiction to enforce the Interim, Partial, and Final Arbitration Awards because neither Galle nor GLG were signatories to the agreement to arbitrate. Typically, to confirm or enforce an arbitration award, the petitioner must show that there was a written agreement to arbitrate. *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004). However, the absence of a written agreement is not fatal because the issue turns on the parties' consent. In the absence of a written agreement, consent to arbitration may be inferred from the conduct of the parties. *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985) ("An arbitration agreement, however, need not be express; it may be implied from the conduct of the parties"); *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) (finding that it would be unreasonable and unjust to allow a challenge to the legitimacy of the arbitration process, in which the challenger had voluntarily participated over a period of several months, before the arbitrator announced the decision.).

In the instant case, Galle admits that he voluntarily participated in the proceedings (albeit in his capacity as Conservator for Horn) before the HKIAC Tribunal. The absence of a written agreement is not fatal to the enforceability of the Arbitration Awards. Galle argues that he was not present before the Tribunal in his individual capacity, rather he was present in his capacity as

Horn's representative and, therefore, should not be individually liable for the Interim Award. Galle does not cite to authority which stands for the proposition that a representative may not be subject to the adverse arbitration awards entered against him. Thus, the Court has subject matter jurisdiction over enforcement of the arbitration awards even though Galle is not a party to a written agreement.

Galle also argues that GLG should not be subject to Petitioner's enforcement action because it was neither present at the arbitration nor was an award entered against GLG. The Court agrees. *See e.g.*, *United States for use & benefit of John A. Weber Co. v. Milcon Constr.*, CV 19-00637 JAO-WRP, 2021 WL 742867, at *5–6 (D. Haw. Feb. 25, 2021) (declining to confirm award against a surety which was neither named in the award nor a party to the arbitration). Thus, no award may be confirmed against GLG and GLG may be dismissed from the action.

Finally, Galle argues that the action should be dismissed because the Interim Award is not a final award and is therefore not confirmable. Galle is correct that, **if** an interim or interlocutory arbitration award is not final, the Court lacks jurisdiction to vacate or confirm the award. *Schatt v. Aventura Limousine & Transp. Serv., Inc.*, 603 F. App'x 881, 886 (11th Cir. 2015) (finding that because Interim Award was not a "final" award, "the district court was without jurisdiction"). However, the Preliminary and Interim Awards at issue here are final. "[A]n award which finally and definitely disposes of a separate independent claim may be confirmed although it does not dispose of all claims that were submitted to arbitration." *Ecopetrol S.A. v. Offshore Expl. & Prod. LLC*, 46 F. Supp. 3d 327, 336 (S.D.N.Y. 2014). Here, the Interim Award was the HKIAC Tribunal's final decision addressing the preliminary issue of whether Galle had the requisite authority to represent Horn at arbitration. In the instant case, the Interim Award is a final award

and is thus capable of this Court's enforcement. For this reason, the Petition should not be dismissed.

D. Respondent's Motion to Bifurcate Is Denied

Finally, Respondents move the Court to bifurcate adjudication of the Petition to first examine the Court's jurisdiction to enforce the arbitration awards outlined in count one of the Complaint. The Court find that there is no need for bifurcation because resolution of subject matter jurisdiction will resolve the entire action. Bifurcation neither promotes judicial economy nor efficiency, thus, Plaintiff's motion is denied.

Accordingly, it is

ORDERED that:

1. Respondents' Motion to Dismiss [DE 20] is **DENIED in part and granted in part**.
    a. Respondents' Motion to Dismiss is **granted as to Galle Law Group only**. Galle Law Group is dismissed from the action.
    b. The motion to dismiss is denied in all other respects.
2. Respondent Paul Horn is deemed served with process *nunc pro tunc* via service of process on Craig T. Galle, on February 16, 2021.
3. Respondents' Motion for Extension of Time [20] is **GRANTED**. Respondents shall file their Response to the Petition by **April 10, 2022**.
4. Respondents' Motion for Leave to File Excess Pages [DE 20] is **GRANTED**. Accordingly, Respondents' Response to the Petition **shall not exceed** 30 pages

5. Respondent's Motion to Bifurcate is **DENIED**.

6.

DONE and ORDERED in Fort Lauderdale, Florida, this 31st day of March 2022.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record