IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLIC OF KAZAKHSTAN	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No. 1:17-cv-02067-ABJ**
ANATOLIE STATI, et al.,	)	
	)	
Defendants.	)	
	)	

REPUBLIC OF KAZAKHSTAN'S OPPOSITION TO
DEFENDANTS' MOTION TO VACATE ENTRY OF DEFAULT
AGAINST ASCOM GROUP, S.A. AND TERRA RAF TRANS TRAIDING LTD.

Plaintiff Republic of Kazakhstan ("Kazakhstan") respectfully submits this Opposition to Defendants' Motion to Vacate Entry of Default Against Ascom Group, S.A. ("Ascom") and Terra Raf Trans Traiding Ltd. ("Terra Raf") (ECF 13-14).

INTRODUCTION

Defendants attempt to dismiss this case as the "latest chapter" in a multi-year, multi-jurisdictional dispute concerning the recognition and enforcement of a "duly-rendered" foreign arbitral award and claim that the conduct at issue "primarily" is "lawful" litigation conduct that occurred outside of the United States. ECF 14 ("Motion" or "Mot.") at 2, 5. This characterization of the Complaint is self-serving and patently incorrect. The conduct at issue is anything but "lawful." Indeed, the Complaint alleges that Defendants have and continue to be engaged in a wide-ranging and sophisticated fraudulent scheme, a significant part of which was carried out in the United States. *See* ECF 1(Compl.), ¶¶ 1-2.

Kazakhstan filed this action against Ascom, Terra Raf, and the two individuals who control those entities, Anatolie and Gabriel Stati, alleging that Defendants, acting in concert with

others, have and continue to be engaged in a fraudulent scheme to injure Kazakhstan, and other victims, in their money and property and/or to unjustly enrich themselves. *See id.* ¶¶ 1-2. To carry out this scheme, Kazakhstan alleges that Defendants have and continue to be engaged in an illegal pattern of racketeering consisting of multiple acts of mail fraud, wire fraud, and money laundering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. *Id.* ¶ 2. Specifically, Kazakhstan alleges that Defendants fraudulently obtained a bid for the purchase of a liquefied petroleum gas plant (the "LPG Plant") by falsifying costs and financial statements, and fraudulently used that bid as evidence in a subsequent arbitration against Kazakhstan. *Id.* ¶¶ 5-6. In addition, during the arbitration, Defendants concealed the fraud, made affirmatively false representations regarding the amount of their investment in the LPG Plant, and withheld relevant documents from production, thereby procuring the arbitral award through fraud. *Id.* ¶ 7. Defendants continued their fraudulent scheme by seeking to enforce and/or collect on the award in multiple jurisdictions, including in an action pending before this Court, *Anatolie Stati et al. v. Republic of Kazakhstan*, No. 14-1638 (D.D.C.). *Id.* ¶ 8.

While Defendants try to minimize the scope and nature of their actions, the conduct at issue is serious. In proceedings concerning the enforcement of the award pending in London, England (the "London Proceedings"), the High Court of Justice, Queen's Bench Division, Commercial Court (the "London Court") found that these same allegations establish a "*sufficient prima facie case*" of fraud and set the matter for a trial on the merits. *Id.* ¶¶ 214-219. In a shocking recent move, Defendants have attempted to discontinue their action to enforce the

award in England altogether. *See* Exhibit A (Feb. 26, 2018 Notice of Discontinuance).[1] Evidently, Defendants want to avoid a trial on their allegedly fraudulent conduct. The Motion conspicuously fails to reference the London Proceedings.

The Motion likewise misleadingly claims that the "highest level of the Swedish judiciary" "firmly rejected" Kazakhstan's claim that the arbitral award was procured by fraud. *See* Mot. at 1. That is not accurate. The Swedish Supreme Court determined that the Svea Court of Appeals, the intermediate appellate court, did not make a "grave procedural error" when rendering its decision, and neither court made factual findings regarding the merits of Kazakhstan's fraud allegations. *See* Republic of Kazakhstan's Resp. to November 6, 2017 Minute Order (ECF 65), No. 14-1638 (D.D.C.). The merits of Kazakhstan's fraud allegations thus have yet to be adjudicated.

Ascom's and Terra Raf's failure to timely respond to the Complaint is therefore not surprising. Ascom and Terra Raf evidently ignored service of the Complaint and failed to contact their U.S. counsel upon receiving it. The defaults, in other words, were willful. What is more, Ascom and Terra Raf have not presented meritorious defenses, or the verified answer required by LCvR 7(g), and Kazakhstan would be prejudiced if the defaults are set aside. Accordingly, good cause does not exist to vacate the entries of default, and this Court should deny the Motion.

ARGUMENT

This Court may only set aside the entries of default against Ascom and Terra Raf for "good cause." Fed. R. Civ. P. 55(c). Whether good cause exists is a decision committed to the sound discretion of this Court. *Int'l Painters & Allied Trades Union & Indus. Pension Fund v. H.W. Ellis Painting Co., Inc.*, 288 F. Supp. 2d 22, 25–26 (D.D.C. 2003) (citing *Keegel v. Key*

[1] Kazakhstan has filed an application to set aside this Notice of Discontinuance and undersigned counsel understands that a hearing on this application will be held by the English court on April 1, 2018.

West & Caribbean Trading Co., 627 F.2d 372, 373 (D.C. Cir. 1980)). In exercising that discretion, this Court must consider whether (1) the default was willful; (2) the alleged defenses are meritorious; and (3) a set-aside would prejudice Kazakhstan. *Id.* All three factors weigh against vacating the defaults, and in favor of denying Defendants' Motion.

I. Defendants Have Failed to Show Good Cause

A. The Defaults Were Willful

The boundary of willfulness lies between a negligent filing error (which is excusable) and a deliberate decision to default (which is not). *Id.* at 26 (citing *Gucci Am., Inc. v. Gold Ctr. Jewelry*, 158 F.3d 631, 634 (2d Cir. 1998)). Defendants proffer two reasons that purportedly show that their defaults were not willful, but both compel the opposite conclusion—that Defendants' failure to timely respond to the Complaint was inexcusably deliberate.

First, Defendants claim there was a "misunderstanding by Terra [Raf] and Ascom concerning service." Mot. at 4. But that assertion is wholly unsupported by a declaration from Defendants or their counsel. And the Motion is silent as to the basis for the purported "misunderstanding." Indeed, Defendants admit that Ascom received its service package from the Moldovan Judicial Court of Chisinau (which they do not and cannot argue was improper service under the Hague Convention), and did nothing in response, not even consult counsel. *Id.* at 2 (Defendants' counsel claim that they learned of service not from Ascom, but from Kazakhstan's filing of requests for default). This is not plausible, or at minimum is inexcusable, given that Ascom is involved in multiple legal proceedings around the world against Kazakhstan concerning these same matters, including the related case before the Court, and in those

proceeding is using the same law firm (King & Spalding).[2] Indeed, Defendants' counsel acknowledged in a November 13, 2017 filing in the related action before this Court that they were aware of this action and represented to the Court that Defendants would answer the RICO complaint when it was served. *See* Petitioners' Suppl. Submission in Opp. to Mot. for Reconsideration (ECF 66), No. 14-1638 (D.D.C.), at 10 n.2 ("Petitioners will answer the RICO case if and when it is served"). In sum, Ascom was properly served, willfully chose not to respond and there is no excuse for its conduct. *Int'l Painters*, 288 F. Supp. 2d at 26-27 (finding willfulness because defendant "had no basis to ignore its obligations to file an answer"); *see also United States v. Ponte*, 246 F. Supp. 2d 74, 81 (D. Me. 2003) (finding willfulness where defendant had knowledge of complaint and refused to retain counsel).

As to Terra Raf, it asserts that it "did not believe that [Federal Express delivery] constituted good service under Gibraltar law." *Id.* at 2. As a threshold matter, this assertion is wholly unsupported: there is no declaration from Terra Raf attesting to this "belief" and the Motion includes no explanation of the basis for it. Moreover, Terra Raf's apparent "belief" is incorrect as a matter of law.[3] Finally, simply believing service was improper does not excuse

[2] King & Spalding represents the Stati Parties in two U.S. actions concerning the enforcement of the award. *See Anatolie Stati et al. v. Republic of Kazakhstan*, No. 14-cv-1638 (D.D.C.); *Anatolie Stati et al. v. Republic of Kazakhstan*, No. 17-cv-05742 (S.D.N.Y). King & Spalding also represents the Stati Parties in multiple U.S. actions seeking discovery pursuant to 28 U.S.C. § 1782 for use in foreign proceedings concerning the attachment and enforcement of the award. *See, e.g., In re Application of Anatolie Stati et al. for an Order Directing Discovery from Bank of New York Mellon Corporation Pursuant to 28 U.S.C. § 1782*, No. 1:14-mc-000425 (S.D.N.Y.); *In re Application of Anatolie Stati et al. for an Order Directing Discovery from State Street Corporation Pursuant to 28 U.S.C. § 1782*, No. 1:15-mc-91059 (D. Mass.); *In re Application of Anatolie Stati et al. for an Order Directing Discovery from Union Bancaire Privee Asset Management LLC Pursuant to 28 U.S.C. § 1782*, No. 1:18-mc-77 (S.D.N.Y.); *In re Application of Anatolie Stati et al. for an Order Directing Discovery from Amundi Investments USA Pursuant to 28 U.S.C. § 1782*, No. 1:18-mc-00078 (S.D.N.Y.); *In re Application of Anatolie Stati et al. for an Order Directing Discovery form Euroclear Bank Pursuant to 28 U.S.C. § 1782*, No. 1:18-mc-00079 (S.D.N.Y.). Further, King & Spalding represents the Stati Parties in multiple foreign proceedings concerning the attachment and enforcement of the award.

[3] Defendants claim that there is a "debate" as to whether service by Federal Express meets the requirements of the Hague Convention. Mot. at 4 n.2. There is no debate. Defendants cite one case, from the Northern District of

Terra Raf's failure to respond to the Complaint. If that were the case, every defendant could come to court and use an unsupported, incorrect, subjective "belief" to avoid a properly-entered default. This would make a mockery of the good cause standard and the Federal Rules of Civil Procedure's detailed timing requirements for answering a complaint. "A defendant who chooses to ignore a purported service of process does so at his own risk." *Paramount Packaging Corp. v. H. B. Fuller Co. of N. J.*, 190 F. Supp. 178, 181 (E.D. Pa. 1960) (a defendant cannot ignore service of process in mistaken belief process is invalid and then ask court to set aside default for "good cause"). Here, Terra Raf's default was plainly willful. *See Safdar v. AFW, Inc*., 279 F.R.D. 426, 433 (S.D. Tex. 2012) (finding willful default when defendant decided not to respond to suit, without hiring an attorney, based on his own conclusion that he had not been properly served).

Second, Defendants argue that "a miscommunication between Defendants and counsel" excuses their failure to timely respond. Mot. at 4.[4] This is yet another blanket assertion

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Illinois, that stated, in dicta, that Federal Express was not a "postal channel" (the term used in the Hague Convention). *NSM Music, Inc. v. Villa Alvarez*, 02 C 6482, 2003 WL 685338 (N.D. Ill. Feb. 25, 2003). That view has not been endorsed by any court in the United States District Court for the District of Columbia, and has been flatly rejected by other courts. *See Bidonthecity.com LLC v. Halverston Holdings Ltd*., 12 CIV. 9258 ALC MHD, 2014 WL 1331046, at *8 (S.D.N.Y. Mar. 31, 2014) (narrowly construing "postal channel" to exclude FedEx "seems contrary to one of the stated goals of the Service Convention"); *TracFone Wireless, Inc. v. Unlimited PCS Inc*., 279 F.R.D. 626, 631 (S.D. Fla. 2012) ("the Court concludes that FedEx is a permissible postal channel under Article 10(a)"); *Power Integrations, Inc. v. Sys. Gen. Corp*., No. C 04–02581 JSW, 2004 WL 2806168, at *2 n. 3 (N.D. Cal. Dec. 7, 2004) (rejecting argument that FedEx does not constitute "postal channel" under the Hague Convention); *R. Griggs Group Ltd. v. Filanto SPA*, 920 F. Supp. 1100 (D. Nev. 1996) (concluding that Federal Express was a "postal channel" for purposes of analyzing whether service was proper under Hague Convention); *cf. Lexmark Int'l, Inc. v. Ink Techs. Printer Supplies, LLC*, 1:10-CV-564, 2013 WL 12178588, at *4 (S.D. Ohio Aug. 21, 2013) ("the Court finds that service of process by international courier is permitted under the Hague Convention"); *In re Hawker Beechcraft, Inc*., 486 B.R. 264, 284 (Bankr. S.D.N.Y. 2013) (concluding that service by overnight international courier complied with Article 10(a) of the Hague Convention); *Wong v. Partygaming Ltd*., No. 1:06–CV–2376, 2008 WL 1995369, at *3 (N.D. Ohio May 6, 2008) (finding service complied with Article 10(a) where plaintiffs sent a copy of the complaint to each defendant via DHL). The other case cited by Defendants, *SignalQuest, Inc. v. Tien-Ming Chou*, 284 F.R.D. 45 (D.N.H. 2002), does not weigh in on the purported "debate" regarding service under the Hague Convention. *SignalQuest* concerned sufficiency of service under the Federal Rules.

[4] Defendants' reliance on cases regarding miscommunication ***among counsel***, are thus inapplicable. *See Kusi v. British Airways Corp.*, 1997 WL 420334, at *1 (D.D.C. July 17, 1997) (miscommunication between inside and outside counsel); *see also Wingate Inns Int'l, Inc. v. P.G.S., LLC*, 2011 WL 256327, at *4 (D.N.J. Jan. 26, 2011)

unsupported by a declaration from Defendants, which conveniently mirrors the language of the case law cited in the Motion. *Cf. id.* And, in any event, the Motion itself makes clear that there was no "miscommunication." Defendants evidently did not communicate with counsel ***at all*** until Kazakhstan sought the entries of default.[5] Mot. at 2. The resulting default thus was not the result of any miscommunication, but of the parties' willful decision not to respond to the Complaint. *Ponte*, 246 F. Supp. 2d at 81 (finding willfulness where defendant had knowledge of complaint and refused to retain counsel); *United States v. Dimucci*, 110 F.R.D. 263, 268 (N.D. Ill. 1986) (denying motion to vacate entry of default where the only "good cause" they presented for their actions was the alleged failure of their former counsel to keep them informed about the case); *cf. Keith v. Melvin L. Joseph Const. Co.*, 451 A.2d 842, 846 (Del. Super. Ct. 1982) (finding defendant's conduct culpable when defendant failed to consult an attorney upon service of process, even though he had one on retainer).

B. Defendants Have Presented No Defenses, Much Less Meritorious Ones

Defendants, in moving to set aside a default, were required to submit "a verified answer presenting a defense sufficient to bar the claim in whole or in part," as required by Local Rule 7(g), and assert a meritorious defense that they may prove at trial. *Nat'l Rest. Ass'n Educ. Found. v. Shain*, 287 F.R.D. 83, 87 (D.D.C. 2012) (citing *Whelan v. Abell*, 48 F.3d 1247, 1259 (D.C. Cir.

(retained out of state counsel advised no formal action required). It is true that "default judgments were not designed as a means of disciplining the bar at the expense of the litigants' day in court," *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980), but, here, the default was the result of the parties themselves, not their counsel.

[5] Defendants emphasize their counsel's "expeditious" action once counsel became aware of the entries of default. Mot. at 4-5. It is entirely irrelevant to the willfulness analysis that Defendants' attorneys performed legal services *after* they learned of the case. Relevant are Defendants' actions. *Jackson*, 636 F.2d at 836. And, here, Defendants deliberately chose not to inform counsel when they were served.

1995)). Defendants conspicuously did not submit a verified answer with their Motion.[6] This violation of Local Rule 7(g) alone compels denying the Motion.

Even if this Court decides not to deny the Motion for failure to comply with Local Rule 7(g), the result is the same because Defendants failed to present a meritorious defense. "'In order to make a sufficient showing of a meritorious defense, the defendant must present ***evidence of facts*** that, if proven at trial, would constitute a complete defense.'" *Gillespie v. Capitol Reprographics*, LLC, 573 F. Supp. 2d 80, 87 (D.D.C. 2008) (quoting *New York v. Green*, 420 F.3d 99, 109 (2d Cir. 2005) (emphasis added)). Defendants merely argue that meritorious defenses exist, but conclusory arguments are not evidence of facts. *Cf.* Mot. at 5 ("Defendants have yet to fully prepare their defenses to this action"); *id.* ("the complaint fails to allege, even prima facie, a cognizable RICO case); *id.* ("the complaint . . . is subject to a series of threshold legal defenses"). Defendants' explanations that "the vast majority of conduct complained of occurred outside the United States" and the RICO "pattern" consisted of "attempts to seek judicial relief," while less general, still fall well short of presenting a "meritorious defense." Defendants thus have provided no means by which this Court may assess their purported defenses, much less conclude they are meritorious. *See Nat'l Rest. Ass'n Educ. Found.*, 287 F.R.D. at 87-88 (denying motion to set aside default where defendants failed to supply any factual basis for their laundry-list of affirmative defenses); *see also Maine Nat. Bank v. F/V*

[6] Defendants rely on *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124, 128 (D.D.C. 2009), to attempt to excuse their failure to comply with Local Civil Rule 7(g). Mot. at 5 n.3. Indeed, the *Acree* court decided not to deny the defendant's motion to set aside entry of default for failure to comply with Local Civil Rule 7(g), and considered the merits of the motion instead. *Id.* at 128. But, the court's lenience was based on the "established presumption against granting default judgment against foreign nations." *Id.* Defendants, here, are not foreign nations. And, in any event, the defendant in *Acree* showed good cause to set aside the entry of default, as the failure of Iraq, the defendant, to respond to the complaint was inadvertent—attributable to the effect of war, reconstruction, and governmental reorganization. *Id.* at 130. Defendants, here, have not demonstrated such good cause. This Court should not allow Defendants to file a motion to dismiss in sixty days; doing so would only reward Defendants' failure to inform their counsel of this lawsuit.

Cecily B. (O.N. 677261), 116 F.R.D. 66, 69 (D. Me. 1987) (general denials or conclusory statements that defenses exist are insufficient to demonstrate existence of meritorious defense, as factor favoring setting aside default).

C. Kazakhstan Would Be Prejudiced if the Defaults Are Vacated

The third factor, prejudice to Kazakhstan, also supports denial of the Motion. Defendants' deliberate decision to delay the proceedings prejudices Kazakhstan. While "[d]elay in and of itself does not constitute prejudice," prejudice arises "from delay's attendant dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion." *Dullea v. Pension Benefit Guarantee Corp.*, 320 F.R.D. 100, 101 (D.D.C. 2016) (quoting *KPS & Assocs., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 15 (1st Cir. 2003)); *Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 159 (D.D.C. 2016); *Acree*, 658 F. Supp. 2d at 128–29. Defendants' willful delay enhances their opportunity to perpetuate their fraudulent scheme by seeking to enforce and/or collect on the fraudulently obtained arbitral award in multiple jurisdictions, Compl. ¶ 8, and so prejudices Kazakhstan.

In addition to the delay caused by Defendants' default, and putting aside Defendants' willful intent to avoid this litigation and their initial decision not to involve U.S. counsel, Kazakhstan has incurred significant fees and costs in serving Defendants, seeking entries of default when Defendants failed to respond to the Complaint, and in responding to the Motion. Courts in this District have found that such circumstances demonstrate the possibility of prejudice. *Nat'l Rest. Ass'n Educ. Found.*, 287 F.R.D. at 87.

The prejudice factor, in any event, is less significant than the other two factors, and the Court "has discretion to deny a motion to vacate if it is persuaded that the default was willful and that the defaulting party has no meritorious defenses." *Id.* (quoting *Int'l Painters*, 288 F. Supp. 2d

at 31 (citing *SEC v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998))). Such is the case here, as detailed above, and this Court should accordingly deny the Motion.

II. Vacating the Judgments Would Not Serve the Interests of Justice

Defendants argue that vacating the defaults would manifestly serve the interests of justice. Mot. at 6. On the contrary, vacating the defaults would reward deliberate disregard for this Court and the U.S. judicial system.

Defendants maintain, specifically, that all four Defendants intend to contest this case together, and "[f]orcing Terra [Raf] and Ascom to separately respond to a 93-page complaint before their co-defendants are even served" would be "a wanton waste of resources." Mot. at 7. First, the defaults against Ascom and Terra Raf may be maintained even if the case proceeds as to the individual defendants—Anatolie and Gabriel Stati. *See Carter v. D.C.*, 795 F.2d 116, 137 (D.C. Cir. 1986) (the D.C. Circuit bars entry of a default judgment against one of several defendants only if, as a matter of law, no one defendant may be liable unless all defendants are liable).

Second, Anatolie and Gabriel Stati control Ascom and Terra Raf, and therefore had full knowledge of the lawsuit as early as November 2017, when the entities received the Complaint. Mot. at 2. Yet, when both entities were properly served, Anatolie and Gabriel Stati willfully chose to not have their companies file an answer. Accordingly, any purported concern about the "wanton waste of resources" that may stem from not being able to respond to the Complaint together ring hollow. If Defendants were actually concerned about the efficient use of resources, Anatolie and Gabriel Stati would have consulted their counsel after their companies -- Ascom and Terra Raf -- were served, and would have timely filed an answer or responsive pleading.

Having not done this, they cannot now, after deliberately refusing to follow the Rules, protest about supposed judicial inefficiencies.

CONCLUSION

For the foregoing reasons, Kazakhstan respectfully requests this Court deny Defendants' Motion to Vacate Entry of Default Against Ascom Group, S.A. and Terra Raf Trans Traiding Ltd.

Respectfully Submitted,

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