

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**
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In re:

Procom America, LLC,

Debtor.

Case No.: 8:20-bk-03522-MGW
Chapter 7

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PETER GAAL’S MOTION FOR STAY PENDING APPEAL

Peter Gaal (“Gaal”), a citizen and resident of Hungary, by and through his undersigned counsel and pursuant to Fed. R. Bankr. P. 8007, specially appears¹ for the limited purpose of seeking a stay of the Civil Contempt Order and related Foreign Discovery Orders (defined below) pending appeal and, in support thereof, states as follows:

Factual and Procedural Background

1. On May 1, 2020, three creditors filed an involuntary petition for relief under Chapter 7 of the Bankruptcy Code against Procom America, LLC d/b/a Beyond Band of Brothers d/b/a BBOB (the “Debtor”) (Doc. 1).

2. Shortly thereafter, the Debtor filed its Consent to Order for Relief (Doc. 7) and the Court entered the Order for Relief (Doc. 9) and the Notice of Chapter 7 Bankruptcy Case (Doc. 10), appointing Douglas N. Menchise as the chapter 7 trustee for the Debtor’s bankruptcy estate (the “Trustee”).

3. Gaal is the manager and sole member of the Debtor. Gaal is not a United States national or resident but rather is a citizen and resident of Hungary.

¹ Gaal reserves all rights to contest jurisdiction of the Bankruptcy Court and personal jurisdiction and is appearing specially for the sole purpose of the Motion.

4. On April 29, 2021, the Trustee filed an Omnibus Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. 260) (the “Rule 2004 Subpoena”) seeking documents from and the examination via Zoom on May 28, 2021, of Gaal individually and in his capacity as corporate representative for the Debtor and certain related corporate entities.

5. Also on April 29, 2021, the Trustee purported to effectuate service of the Rule 2004 Subpoena on Gaal under Fed. R. Civ. P. 45 by emailing the Rule 2004 Subpoena to Gaal’s domestic counsel. Gaal’s counsel advised Trustee’s counsel that she was not authorized to accept service of the Rule 2004 Subpoena and directed Trustee’s counsel to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”) and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Evidence Convention”). The Trustee made no further effort to effectuate service of the Rule 2004 Subpoena by other means.

6. Instead, on June 1, 2021, the Trustee filed his Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. 263).

7. On June 10, 2021, the Court, without a hearing, entered its Order Granting Chapter 7 Trustee, Douglas N. Menchise’s Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. 265) (the “Rule 2004 Order”), directing (i) counsel for Gaal and counsel for Debtor to coordinate with Trustee’s counsel the scheduling of the examinations of Gaal and the corporate representative(s) of the Debtor, Procom Investments KFT, Procom Consulting KFT, Procom Consulting Utazasi Iroda KFT, and Procom Tours, LLC and (ii) Gaal and the designated corporate representative(s) to produce non-privileged documents responsive to the Rule 2004 Subpoena’s duces tecum requests and appear via Zoom for a Rule 2004 examination to provide sworn testimony within forty-five days.

8. On June 21, 2021, the Trustee filed his Renewed Notice of Rule 2004 Examination Duces Tecum of Gaal (Doc. 269).

9. On June 24, 2021, Gaal timely filed his Expedited Motion for Reconsideration of the Rule 2004 Order (Doc. 272) (the “Motion for Reconsideration”) asserting, among other things, (i) email delivery of a subpoena to a witness’s counsel is not an authorized method of service under Fed. R. Civ. P. 45, (ii) the Court’s subpoena power under Fed. R. Civ. P. 45 [made applicable by Bankruptcy Rule 9016] does not extend extraterritorially to foreign nationals living outside the United States (such as Gaal) and (iii) the Trustee must follow the procedures of the Hague Evidence Convention to obtain discovery from a non-party foreign national living abroad (such as Gaal).

10. On June 29, 2021, the Trustee filed his Response to the Motion for Reconsideration (Doc. 275), which the Trustee later supplemented with a Notice of Filing Supplementary Authority (Doc. 279) to which Gaal responded (Doc. 282).

11. On July 6, 2021, the Court held a hearing on the Motion for Reconsideration (Doc. 274), took the matter under advisement (Doc. 280), and requested the Trustee and Gaal to submit proposed competing orders (Docs. 283, 284).

12. On March 15, 2022, the Trustee filed his Complaint For Declaratory Relief, Substantive Consolidation and to Avoid and Recover Preferential or Other Actual or Constructive Fraudulent Transfers and Other Damages (the “Complaint”) against Gaal and other related defendants, initiating an adversary proceeding before this Court titled *Menchise v. Peter Gaal, Procom Tours, LLC, Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT and Procom Investments KFT*, Case No. 8:22-ap-00041-MGW (the “Avoidance Adversary Proceeding”).

13. On March 21, 2022, the Court issued its Memorandum Opinion on Service of a Subpoena on a Foreign National (Doc. 354) (the “Service Opinion”), holding that (i) the Trustee’s service of the Rule 2004 Subpoena on Gaal’s counsel by email was effective service of the Rule 2004 Subpoena on Gaal under Fed. R. Civ. P. 45, (ii) Gaal is subject to the Court’s subpoena power because substitute service of the Rule 2004 Subpoena on his domestic counsel constituted service within (rather than outside) the United States, and (iii) the Trustee is not required to comply with the Hague Evidence Convention to obtain documents and testimony from non-party Gaal.

14. On March 22, 2022, the Court entered its Order Denying Peter Gaal’s Expedited Motion for Reconsideration of the Order Granting Chapter 7 Trustee, Douglas N. Menchise’s Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. 357) (the “Reconsideration Order”)² denying the Motion for Reconsideration.

15. On April 4, 2022, Gaal filed a notice of appeal from the Foreign Discovery Orders (Doc 362) and, to the extent that the Foreign Discovery Orders might be considered to be non-final orders, also filed a motion for leave to appeal (Doc. 363).

16. On April 5, 2022, the Trustee filed his Omnibus Third Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. 364), unilaterally scheduling for May 3-4, 2022, the Rule 2004 examinations of Gaal, individually, and of Rule 30(b)(6) representatives of the Debtor and Procom Tours, LLC, a wholly owned subsidiary of the Debtor.

17. On April 5, 2022, Gaal filed his Emergency Motion for Protective Order (Doc. 365) (the “Motion for Protective Order”), seeking the entry of a protective order preventing the Trustee from conducting the Rule 2004 examination pursuant to the pending proceeding rule because the Trustee had initiated the Avoidance Adversary Proceeding and must now obtain discovery from

² The Rule 2004 Order, Service Opinion and Reconsideration Order collectively the “Foreign Discovery Orders”.

Gaal relating to the claims asserted in Complaint in accordance with the discovery provisions of the Federal Rules of Civil Procedure.

18. On April 6, 2022, Gaal filed his Emergency Motion for Stay Pending Appeal (Doc. 368) (the “Motion for Stay”) with the Court, seeking a stay of the Foreign Discovery Orders pending his appeal.

19. On April 8, 2022, the Trustee filed a Cross Notice of Taking Depositions Duces Tecum in the Debtor’s bankruptcy case (Doc. 376), noticing depositions in the Avoidance Adversary Proceeding of Gaal, individually, and of Rule 30(b)(6) representatives of the Debtor and Procom Tours, LLC for the same time as the Rule 2004 exams (May 3-4, 2022).

20. On April 14, 2022, the Court held a hearing on the Motion for Protective Order and Motion for Stay and held the Rule 2004 examination could proceed, with the Court later entering its Order Denying Emergency Motions for Protective Order and for Stay Pending Appeal (Doc. 385).

21. On April 14, 2022, the Trustee re-filed (and expanded) his Cross Notice of Taking Depositions Duces Tecum in the Avoidance Adversary Proceeding (Adv. Doc. 3), (a) noticing for the same time as the Rule 2004 examination the depositions in the Avoidance Adversary Proceeding of Gaal, individually, of Rule 30(b)(6) representatives of the Debtor and Procom Tours, LLC, and of Rule 30(b)(6) representatives of Procom Consulting KFT and Procom Investments KFT and (b) requesting the production of documents from Gaal and the other defendants.

22. On April 18, 2022, Gaal filed his Emergency Motion for Protective Order and to Quash Trustee’s Cross Notice of Taking Depositions Duces Tecum (Adv. Doc. 4) in the Avoidance Adversary Proceeding, arguing that discovery in the Avoidance Adversary Proceeding was not

permitted until service of the Complaint and compliance with Rule 26. The Court granted this motion for protective order prohibiting the Trustee from taking discovery in the Avoidance Adversary Proceeding prior to service of the Complaint, but reiterating that the Trustee was permitted to proceed with the Rule 2004 examination in accordance with its prior orders entered in the main case. (Adv. Doc. 10.)

23. On April 25, 2022, the Trustee unilaterally served his Omnibus Fourth Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. 386), re-noticing the Rule 2004 examination from May 3-4, 2022 to July 11, 2022.

24. On April 29, 2022, Gaal's appeal was dismissed as premature and his motion for leave to appeal was denied based upon the District Court's conclusion that the Foreign Discovery Orders were non-final orders that may not be appealed unless and until a contempt order has been entered against Gaal.

25. On May 6, 2022, the Trustee filed his Motion to Permit Alternative Service on Defendants (Adv. Doc. 11) (the "Alternative Service Motion") in the Avoidance Adversary Proceeding, which sought court approval and permission to effectuate service on (i) Gaal and (ii) Procom Tours LLC, Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT and Procom Investments KFT³ by serving the Summons and Complaint by email to Gaal's undersigned counsel. Gaal (Adv. Doc. 15) and the Hungarian Entities (Adv. Doc. 16) objected to the Service Motion. The Trustee then sought and obtained two successive continuances of the hearing on the Alternative Service Motion.

26. On July 7 and 8, 2022, the Trustee unilaterally served a flurry of amended omnibus notices of Rule 2004 examination. (Docs. 399, 402, and 403). The last iteration of the

³ Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT and Procom Investments KFT defined as the "Hungarian Entities."

Trustee's Rule 2004 notice (Doc. 403) provided for a materially different examination procedure than the one directed by the Court. Specifically, the Foreign Discovery Orders contemplated a Rule 2004 examination to be conducted by Zoom, with Gaal, Gaal's counsel, and the Trustee all appearing by Zoom. The Trustee, however, directed Gaal to travel to and appear in person at the offices of the Trustee's newly retained Hungarian counsel for the examination, with Gaal's counsel relegated to attending by Zoom.

27. Gaal did not attend the Rule 2004 examination on July 11, 2022, and the Trustee filed his Expedited Motion to Compel Examination Testimony from and for Sanctions Against Procom America, LLC, Peter Gaal, and Procom Tours, LLC (Doc. 405) (the "Motion to Compel Testimony"), with Gaal filing his response in opposition (Doc. 410).

28. On July 28 and 29, 2022, this Court held a hearing on (i) the Motion to Compel Testimony and (ii) the Alternative Service Motion. The Court orally granted in part, denied in part, and deferred in part the Motion to Compel Testimony, directing Gaal to sit for a Rule 2004 examination by Zoom. As for the Alternative Service Motion, the Court heard argument and continued the hearing to a to be determined later date.

29. On August 16, 2022, the Trustee issued his Fifth Notice of Rule 2004 Examination to Gaal (Doc. 420) for September 12-13, 2022, which notice the Trustee subsequently amended on August 23, 2022 (Doc. 422).

30. On September 2, 2022, counsel for Gaal provided email notice to Trustee's counsel that Gaal would not be appearing for the rescheduled Rule 2004 examination. Gaal did not appear for his individual Rule 2004 examination on September 12, 2022.

31. On September 14, 2022, the Court entered its Order Granting in Part and Deferring in Part Trustee's Motion to Compel Rule 2004 Examinations (Doc. 426), which memorialized the Court's oral ruling from July 29, 2022.

32. On September 16, 2022, the Trustee filed his Motion for Civil Contempt and Sanctions ("Civil Contempt Motion"). Gaal filed a response in opposition (Doc. 435) to the Civil Contempt Motion, in which he argued that his refusal to sit for the Rule 2004 examination was necessary in order to appeal the Foreign Discovery Orders and requested the entry of minimal monetary sanctions so Gaal could move forward with his appeal.

33. On October 5, 2022, this Court held a hearing on the Civil Contempt Motion and a continued hearing on the Alternative Service Motion.⁴ The Court orally granted the Civil Contempt Order, ordering Gaal to sit for a Rule 2004 examination and fining Gaal \$500 a day until he produces all documents requested and is examined under Rule 2004.

34. Based on a representation by Trustee's counsel at the hearing that in the interim the Trustee's Hungarian counsel served Gaal in compliance with Hungarian law,⁵ the Court also granted the Alternative Service Motion, permitting the Trustee to serve the Complaint and an alias summons (i) by email on Gaal's counsel and (ii) on Gaal by a method prescribed by Hungarian law for service in that country of a civil action in its courts of general jurisdiction.

35. On November 4, 2022, the Court entered its Order Granting Motion to Permit Alternative Service on Defendants (Adv. Doc. 34) (the "Alternative Service Order"). Gaal has

⁴ Although the Alternative Service Motion was not noticed for hearing for October 5, 2022, it did appear on the Court's calendar and was considered at the October 5, 2022 hearing.

⁵ "Your Honor, we have, through our Hungarian counsel, had the Adversary Complaint translated into Hungarian, through a certified translator in Hungary. Our Hungarian counsel has advised us that service of civil process in Hungary is accomplished by mail service, certified mail and regular mail. We complied with local service requirements by serving our Complaint with the translation to all Defendants at their last known address in accordance with local Hungarian law." October 5, 2022 hearing transcript, p. 54:8-17. (the "Representation").

filed a motion for reconsideration of the Alternative Service Order (Adv. Doc. 45), arguing the Court should reconsider the Alternative Service Order as the Representation by Trustee's counsel is inaccurate and the purported service of the Complaint on Gaal in Hungary did not comply with Fed. R. Civ. P. 4(f)(2)(A) because Hungarian law does not recognize effectuation of service by a party litigant or counsel sending judicial documents via mail.

36. On November 14, 2022, the Court entered its Order Granting Motion for Civil Contempt and Sanctions (Doc. 453) (the "Civil Contempt Order").

Legal Standard

37. Rule 8007 of the Federal Rules of Bankruptcy Procedure provides for a stay pending appeal of a bankruptcy court order when the movant can establish: (i) a likelihood of success on the merits; (ii) that the movant will suffer irreparable injury if the stay is not granted; (iii) that granting of the stay will not substantially harm the other parties; and (iv) that the stay would serve the public interest. *Tooke v. Sunshine Trust Mortgage Trust*, 149 B.R. 687, 689 (M.D. Fla. 1992); *see also In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 274-75 (D. Colo. 1991) (granting motion to stay Rule 2004 examinations pending appeal).

Basis for Relief

38. Gaal seeks entry of an order staying the Civil Contempt Order and Foreign Discovery Orders pending his appeal. Gaal is raising multiple issues in his appeal of the Civil Contempt Order and Foreign Discovery Orders, including:

(a) Did the Bankruptcy Court err in holding that Fed. R. Civ. P. 45(b)(1) does not require service of the Rule 2004 Subpoena on Gaal by personal delivery?

(b) Did the Bankruptcy Court err in holding that service of the Rule 2004 Subpoena on Gaal's domestic counsel by email is a permissible form of substitute service on Gaal under Fed. R. Civ. P. 45(b)(1)?

(c) Did the Bankruptcy Court err in holding that Gaal (a non-party foreign national living abroad) is subject to the Bankruptcy Court's subpoena power, absent personal service of the subpoena on Gaal within the United States?

(d) Did the Bankruptcy Court err in holding that the Trustee is not required to comply with the Hague Evidence Convention in order to obtain discovery from Gaal (a non-party foreign national living abroad)?

Substantial Likelihood of Success

39. There is a substantial likelihood that Gaal will be successful on the issues being raised in his appeal of the Civil Contempt Order and Foreign Discovery Orders.

40. The Service Opinion is premised on a chain of independent legal conclusions reached by the Court, and an error in any link within this chain requires reversal of the Foreign Discovery Orders and the Civil Contempt Order.

Ineffective Service of the Rule 2004 Subpoena

41. The Service Opinion incorrectly held that the Trustee's service of the Rule 2004 Subpoena by email on Gaal's domestic counsel was valid "substitute service" of the Rule 2004 Subpoena on Gaal. In so holding, the Court (i) departed from well-established law regarding the limits of its subpoena power over foreign nationals living abroad; (ii) adopted a minority position allowing "substitute service" of a subpoena by U.S. Mail rather than personal delivery under Fed. R. Civ. P. 45 and expanded this to include "substitute service" of a subpoena upon someone other than the witness (in this case, domestic counsel for Gaal); and (iii) improperly relied on cases permitting alternative service of a summons under Fed. R. Civ. P. 4.

42. First, the majority position (both within the Eleventh Circuit and in other circuits) is that Fed. R. Civ. P. 45(b)(1) requires personal delivery of a subpoena, and service by means of mail or email on the witness is not permissible. *See Green v. Pickens County School System*, 2021 WL 2559453, at *4-5 (N.D. Ga. Apr. 26, 2021) (collecting and discussing cases from within and outside the Eleventh Circuit and following majority position that personal delivery is required and

quashing subpoena served by mail); *Monex Financial Services Ltd. v. Nova Information Systems, Inc.*, 2008 WL 5235135, at *2 (M.D. Fla. Dec. 15, 2008) (finding that “in absence of controlling authority holding that a Rule 45 ... subpoena is effectively delivered via a Federal Express delivery ... Plaintiffs have failed to establish effective delivery of the subpoena.”). In the Service Opinion (pp. 7-9 and fn 25), the Court adopted the minority position permitting service of a subpoena within the United States by means other than personal delivery. This was in error.

43. After adopting the minority view that service of a subpoena under Fed. R. Civ. P. 45 may be made by means other than personal physical delivery to the non-party witness, the Service Opinion then departs from what appears to be the universal view of courts that have considered this issue by concluding that service of a subpoena on a witness’ counsel, rather than the witness, is a permissible means of service under Rule 45. In reaching the conclusion that substitute service on counsel is permissible under Rule 45, the Court rejected a slew of contrary decisions⁶ and acknowledged that it could not find any reported decisions holding that service of a non-party witness subpoena on counsel for the witness is permissible.⁷ Simply put, the Court erroneously departed from existing law from around the nation when it held that service of a

⁶ See *Monex Financial Services*, 2008 WL 5235135, at *2 (“binding precedent in this jurisdiction holds that service of a subpoena upon a witness’s attorney, instead of the witness himself, is ineffective”) (citing *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service of subpoena on plaintiff’s counsel, as opposed to plaintiff himself, renders such service a nullity under Rule 45); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 293, 304 (S.D.N.Y. 2009) (collecting cases); *Lehman v. Kornblau*, 206 F.R.D. 345, 346-47 (E.D.N.Y. 2001) (plaintiff’s service of subpoenas by certified mail on counsel of non-parties was improper); *Weiss v. Allstate Ins. Co.*, 512 F. Supp. 2d 463, 466 (E.D. La. 2007) (quashing subpoenas served on witness’ counsel rather than witness himself); *Rx.com, Inc. v. Medco Health Solutions, Inc.*, 2007 WL 9725101, at *2 (E.D. Tex. Jun. 8, 2007) (same); *United States v. Brennerman*, 2017 WL 4513563, at *1 (S.D. N.Y. Sep. 1, 2017) (collecting cases); *Inland Waters Pollution Contorl, Inc. v. Jigawon, Inc.*, 2008 WL 11357838, at *1 (E.D. Mich. Feb. 21, 2008) (collecting cases) (denying motion to compel witness’ attorney to accept service of a deposition subpoena for witness); *Fujikura Ltd. v. Finisar Corp.*, 2015 WL 5782351, at *5-6 (N.D. Cal. May 14, 2015) (even if attorney was representing non-party “for all purposes, he would not be a sufficient conduit for service of a Rule 45 subpoena on the company.”).

⁷ In the Service Opinion, the Court stated “the Court is unaware of any cases upholding service of a subpoena, under Rule 45, on a witness’ lawyer.” Service Opinion, p. 10.

witness subpoena under Rule 45 may be made by serving the witness' counsel and conflated the "how" of service with the "who" of service.

44. The Service Opinion then improperly relied on case law permitting alternative service of process under Fed. R. Civ. P. 4(f)(3), which allows a Court to approve alternate means for service of a summons, in concluding that a subpoena may be served on counsel for the witness. There is a significant distinction between service of a complaint, which is intended to provide notice, and service of a subpoena, which is intended to confer personal jurisdiction and compel a response. *See SiteLock, LLC v. GoDaddy.com, LLC*, 338 F.R.D. 146, 153-54 (D. Or. 2021) (collecting competing cases and holding methods for service of a subpoena under Fed. R. Civ. P. 45 are more restricted than the methods for service of a summons and complaint under Fed. R. Civ. P. 4). These distinctions are even more significant when the non-party witness is not a citizen or resident of the United States. As explained by the Court in *F.T.C. v. Compagnie De Saint-Goban-Pont-a-Mousson*, 636 F.2d 1300 (D. D.C. 1980):

The distinction between notice and compulsory process, and the implications of that distinction for permissible modes of service, is well illustrated in the context of civil litigation. Federal Rule of Civil Procedure 4, which governs service of process, is primarily concerned with effectuating notice. To that end, the rule provides for a wide range of alternative methods of service, including registered mail, each designed to ensure the receipt of actual notice of the pendency of the action by the defendant. By contrast, Federal Rule 45(c)⁸, governing subpoena service, does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness' dwelling place. Thus, under the Federal Rules, compulsory process may be served upon an unwilling witness only in person. Even within the United States, and even upon a United States citizen, service by registered U.S. mail is never a valid means of delivering compulsory process, although it may be a valid means of serving a summons and a complaint.

When the individual being served is not an American on U.S. soil but a foreign subject on foreign soil, the distinction between the service of notice and the service of compulsory process takes on added significance. When process in the form of summons and complaint is served overseas, the informational nature of that process

⁸ Now Fed. R. Civ. P. 45(b).

renders the act of service relatively benign. When compulsory process is served, however, the act of service itself constitutes an exercise of one nation's sovereignty within the territory of another sovereign. Such an exercise constitutes a violation of international law.

Id. at 1312-13.

45. Assuming *arguendo* it was proper for the Court to rely on Fed. R. Civ. P. 4(f)(3) in analyzing proper service of a subpoena under Fed. R. Civ. P. 45(b), service of a summons by alternative means under Fed. R. Civ. P. 4(f)(3) is only permitted *after* obtaining prior court authorization (which the Trustee did not obtain here for the Rule 2004 Subpoena).⁹ Furthermore, even assuming reliance on Rule 4(f)(3) is appropriate when analyzing service of a subpoena under Rule 45, courts are split on the issue of whether Fed. R. Civ. P. 4(f)(3) in fact permits effecting service of a summons on a foreign individual or entity by serving the foreign defendant's domestic counsel because such service would be accomplished within the United States and Rule 4(f) is limited to service outside the United States. *SeeCodigo Music, LLC v. Televisa S.A. de C.V.*, 2017 WL 4346968, at *13 (S.D. Fla. Sep. 29, 2017) ("Rule 4(f) is entitled "Serving an Individual in a Foreign Country." Fed. R. Civ. P. 4(f). That Rule and its subparts deal only with service by other means for purposes of service outside of the United States. Although some Courts have permitted alternative service pursuant to Rule 4(f)(3) even if the service sought was only going to be performed within a United States judicial district, at least two courts have observed that the plain language of Rule 4(f)(3) seemingly would preclude such service."); *Convergen Energy LLC v. Brooks*, 2020 WL 4038353, at *7 (S.D.N.Y. Jul. 17, 2020) (collecting cases and holding "[t]his

⁹ Fed. R. Civ. P. 4(f)(3) states: "Unless federal law provides otherwise, an individual – other than a minor, incompetent person, or a person whose waiver has been filed – may be served at a place not within any district of the United States: (3) by other means not prohibited by international agreement, as the court orders." *See De Gazelle Group, Inc. v. Tamaz Trading Establishment*, 817 F.3d 747, 750 (11th Cir. 2016) ("On appeal, Tamaz argues that the district court erred in concluding that De Gazelle effected good service on September 21, 2013, because De Gazelle failed to comply with Fed. R. Civ. P. 4(f)(3) by seeking prior court authorization for service via FedEx. We agree.").

Court joins those that have held that Rule 4(f) refers to the “place” of service and not the location of the individual or entity to be served and that, accordingly, the court cannot enter a Rule 4(f)(3) order permitting service on a foreign individual at a place not within a judicial district of the United States when the person to whom the complaint and summons is to be delivered and as to which service is deemed to be effective is at a place within the United States); *In re Fairfield Sentry Limited*, 2020 WL 7345988, at *12 (S.D.N.Y. Dec. 14, 2020) (collecting cases, noting “[c]ourts are split on the issue of whether domestic service on a foreign defendant’s U.S. counsel can constitute service “at a place not within” the U.S. under Rule 4(f)(3), and holding service on U.S. based counsel is a permissible method under Rule 4(f)(3)); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014) (noting that transmission of service papers to a foreign defendant via domestic conduct like a law firm or agent ultimately results in the foreign individual being served and thereby provides notice outside a United States judicial district, in accordance with Rule 4(f)(3)’s plain language).

46. Finally, the Service Opinion’s legal conclusion that the Court’s subpoena power extended to Gaal (a foreign national living abroad) simply because Gaal has counsel that is located within the United States (see Service Opinion, pp. 15-17) is at odds with the well-established rule that foreign nationals living abroad are not subject to subpoena service outside the United States. *KLP Indus., LLC v. Pelaez*, 2006 WL 8434699, at *5 (S.D. Fla. Dec. 19, 2006) (“[a]liens residing abroad cannot be compelled to respond to a subpoena from a U.S. court because they owe no allegiance to the United States”) (citing *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950)); *Maid of the Mist Corp. v. Alcatraz Media, LLC*, 2006 U.S. Dist. LEXIS 79872, at *5 (W.D.N.Y. Nov. 1, 2006) (“[T]hese individuals are Canadian citizens who reside and work in Canada. The Subpoenas, were served upon them outside of the United States and are therefore

unenforceable because this Court has no subpoena power or jurisdiction outside of the United States over these individuals.”); *see also Air Turbine Tech., Inc. v. Atlas Copco AB*, 217 F.R.D. 545, 546 (S.D. Fla. 2003) (“[T]here appears to be no authority which permits the court to circumvent the procedures required to compel testimony from non-United States citizens residing in foreign countries.”).

47. Importantly here, the cases relied upon by the Court for extending subpoena power over non-party foreign nationals (see Service Opinion, Sec. II.B., pp. 15-17) are readily distinguishable in that all of these cases involved circumstances where the non-party foreign national was personally served with the subpoena while he or she was temporarily present in the United States. In this case, Gaal was not physically present in the United States at the time of service and was not personally served with the Rule 2004 Subpoena.

48. The practical effect of the Service Opinion (and permitting service of a subpoena on a foreign national’s domestic counsel) means there are less stringent limitations on serving a subpoena on a foreign national living abroad than there are on serving a subpoena directed to a United States national or resident who is in a foreign country. Compare Fed. R. Civ. P. 45(b)(3) and 28 U.S.C. § 1783(b)¹⁰; *see also Balk v. New York Institute of Technology*, 974 F. Supp. 2d 147, 160-62 (E.D.N.Y. 2013) (denying request to effectuate service of subpoena on United States citizen living in Egypt by serving purported domestic agent; service of subpoena required to be made in accordance with the Hague Service Convention); *Estate of Ungar v. Palestinian Authority*, 412 F. Supp. 2d 328, 334-35 (S.D.N.Y. 2006) (requiring service of subpoena directed to United

¹⁰ 28 U.S.C. § 1783(b) provides: “The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.”

States citizen living in Egypt be made in accordance with Articles 5 and 6 of the Hague Service Convention as Egypt had objected to Article 10 and service by mail); *GMA Accessories, Inc. v. BOP, LLC*, 2008 WL 4974430, at *2 (S.D.N.Y. Nov. 19, 2008) (denying request to effectuate service of subpoena on United States citizen living in Argentina by serving his domestic counsel). *See also Aristocrat Leisure*, 262 F.R.D. at 305 (“It is unclear what, if any, provision of the Federal Rules Aristocrat believes controls the service of subpoenas directed at foreign nationals living abroad. If Aristocrat were correct, and 45(b)(3) was not relevant to the service of subpoenas on foreign nationals living abroad, it strains credulity to believe that this apparent silence in the Rules would result in the unlimited ability of litigants to serve trial subpoenas on any foreign national anywhere in the world, especially considering the more stringent limitations on serving United States nationals living abroad.”).

49. For the foregoing reasons, Gaal has a substantial likelihood of prevailing on the issue that the Court erred in holding the Trustee’s service of the Rule 2004 Subpoena by email on Gaal’s domestic counsel was valid service of the Rule 2004 Subpoena on Gaal, a foreign national living abroad at the time of service.

Gaal Will Suffer Irreparable Injury

50. Gaal will also suffer irreparable harm absent a stay by being forced into a Hobson’s choice of (i) submitting to a Rule 2004 examination despite improper service and the resulting lack of personal jurisdiction and forfeiting the rights afforded to him under the Hague Evidence Convention or (ii) be subject to the daily accruing monetary sanctions levied against him in the Civil Contempt Order.

51. As discussed above in paragraphs 41-49, the Trustee has never properly effectuated service of the Rule 2004 Subpoena on Gaal. It is axiomatic that a court must have personal

jurisdiction over a non-party to compel it to comply with a Rule 45 subpoena and the exercise of personal jurisdiction requires (1) the non-party must have been properly served, (2) the court must have a statutory basis for exercising personal jurisdiction, and (3) the exercise of personal jurisdiction must comport with constitutional due process. *Gucci Am., Inc. v. Li*, 135 F. Supp. 3d 87, 93 (S.D. N.Y. 2015). Absent proper service of the Rule 2004 Subpoena on Gaal, personal jurisdiction is lacking, the Federal Rules of Civil Procedure are not applicable and the Trustee must resort to the Hague Evidence Convention. *See In re 3M Combat Arms Earplug Products Liability Litigation*, 2020 WL 5578428, at *7 fn 6 (N.D. Fla. Feb. 18, 2020) (“There is no question that a party attempting to obtain discovery from a foreign nonparty must resort to the Hague Evidence Convention’s discovery procedures (where available) if the Court does not have personal jurisdiction over the non-party.”) (collecting cases). Mere notice of the subpoena is not a sufficient basis for conferring personal jurisdiction over the witness, and strict compliance with service rules is required. *See In re Rosen*, 542 B.R. 177, 180 (Bankr. E.D. Pa. 2015) (The fact that the IRS may have had actual notice of the subpoena does not obviate the requirement of proper service.) (citing *Alfamodes Logistics Limited Liability Company v. Catalent Pharma Solutions, LLC*, 2011 WL 1542670 (E.D. Pa. Apr. 25, 2011) (“evidence that indicates that at least some of the nonparties are aware of the existence of the subpoenas and attempts to serve such subpoenas does not satisfy Fed. R. Civ. P. 45”); *Smith v. Club Exploria LLC*, 2021 WL 4375907, at *3 (M.D. Pa. Sept. 24, 2021) (knowledge of the subpoena does not validate improper service) (“While the Court acknowledges Plaintiff’s difficulty in serving Mr. Merriam, Plaintiff must effectuate proper service upon him before the Court may compel him to testify as a non-party under Rule 45.”).

52. Forcing Gaal to comply with the Rule 2004 Subpoena that was not properly served in contravention of the Hague Evidence Convention causes Gaal irreparable harm that cannot be remedied by money damages and is an affront to international law and comity.

No Substantial Harm to Other Parties

53. The Trustee cannot point to any harm that would occur to him as the result of a stay of the Civil Contempt Order and Foreign Discovery Orders pending appeal. Any delay inherent in requiring the Trustee to comply with the Federal Rules of Civil Procedure does not constitute substantial harm. *See In re Blinder, Robinson*, 127 B.R. at 275 (“Furthermore, the bankruptcy court’s conclusions that the third and fourth elements weigh against Intercontinental are clearly erroneous. The bankruptcy court opined that the delay in conducting Rule 2004 examinations would prevent the Trustee from carrying out his statutorily mandated duty to investigate the debtor’s affairs and to locate hidden assets, and that this was, in turn, prejudicial to the public interest. The bankruptcy court erred in ignoring the fact that the Trustee is not prevented from conducting any discovery, he must simply comply with the Federal Rules.”). The Trustee is the master of his own destiny, and the delay in examining Gaal is attributable to the Trustee’s refusal to comply with the Hague Evidence Convention in seeking Rule 2004 discovery and the Hague Service Convention in serving the Summons and Complaint in the Avoidance Adversary Proceeding that has been pending since March of this year.

The Public Interest Will be Served by a Stay.

54. A bankruptcy trustee’s interests in locating potential assets of the bankruptcy estate does not trump the requirements of the Federal Rules of Civil Procedure and principles of international comity (the Hague Evidence Convention) and sovereignty of foreign nations (Hungary).

55. Thus, the public interest in requiring bankruptcy trustees to follow the same rules (including international treaties such as the Hague Evidence Convention) as other litigants must follow to obtain documents and testimony from foreign nationals living abroad will be served by the stay.

WHEREFORE, Gaal requests that this Court enter an order staying the Civil Contempt Order and Foreign Discovery Orders pending the appeal and grant such other and further relief as is just and proper.

Dated: November 16, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2022 a true and correct copy of the above and foregoing has been electronically filed with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to all CM/ECF registered recipients.

/s/ Lynn Welter Sherman
Lynn Welter Sherman