2020 WL 6390781 (C.A.2) (Appellate Brief)
United States Court of Appeals, Second Circuit.

MILBERG LLP, Petitioner-Appellant,

v.

Drawrah LIMITED, HWB Alexandria Strategies Portfolio, HWB Dachfonds-Venividivici, HWB Gold & Silber Plus, HWB Portfolio Plus, HWB Renten Portfolio Plus, HWB Victoria Strategies Portfolio, Klaus Bohrer, NW Global Strategy, UTE Kantner, U.V.A. Vaduz, Victoria Strategies Portfolio Ltd., Respondents-Appellees.

No. 20-2500-cv.
October 27, 2020.

On Appeal from the United States District Court
for the Southern District of New York

Brief for Respondents-Appellees

Jay S. Auslander, Scott Watnik, Wilk Auslander LLP, 1515 Broadway, 43rd Floor, New York, New York 10036, (212) 981-2300, for respondents-appellees.

*I *CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Drawrah Ltd., Victoria Strategies Portfolio Ltd. and U.V.A. Vaduz, Respondents/Appellees in this action, state as follows:

Drawrah Ltd. states that it does not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of the company's stock.

Victora Strategies Portfolio Ltd. states that it does not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of the company's stock.

U.V.A. Vaduz states that it does not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of the company's stock.

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Cases

***1** Respondents-Appellees HWB Alexandra Strategies Portfolio, HWB Dachfonds - Venividivici; HWB Gold & Silber Plus; HWB Portfolio Plus; HWB Renten Portfolio Plus; HWB Victoria Strategies Portfolio; Drawrah Limited; NW Global Strategy; U.V.A. Vaduz; Victoria Strategies Portfolio Ltd.; Klaus Bohrer; and Ute Kantner (collectively, "HWB"), respectfully submit this brief in opposition to Petitioner-Appellant Milberg LLP's ("Milberg") appeal from the July 8, 2020 order and judgment of the United States District Court for the Southern District of New York (Hon. Analisa Torres) granting with prejudice HWB's motion to dismiss, pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1) and 12(b)(6), Milberg's proceeding seeking vacatur of an arbitration award (the "Proceeding").

JURISDICTIONAL COUNTERSTATEMENT

In an order dated July 8, 2020 ("Dismissal Order", JA 189-198), the United States District Court for the Southern District of New York (Hon. Analisa Torres) (the "District Court") granted with prejudice HWB's motion, pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1) and 12(b)(6), to dismiss Milberg's Proceeding seeking vacatur of an arbitration award. The District Court also entered a judgment dismissing Milberg's proceeding on July 8, 2020. (JA 199).

***2** Milberg filed its notice of appeal on July 30, 2020 (JA 200). The District Court lacked subject matter jurisdiction: Milberg asserted diversity jurisdiction but failed to establish that it existed. *See* 28 U.S.C. § 1332(a)(2). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 given that Milberg has appealed from a final order and judgment.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Milberg (i) filed a petition in the District Court seeking vacatur of an arbitration award, which among other things failed to allege the citizenship of any party despite asserting diversity jurisdiction, prompting the District Court *sua sponte* to order that Milberg allege its entire citizenship and to expressly warn that it would dismiss Milberg's petition if Milberg failed to so amend or did not properly allege the District Court's jurisdiction; (ii) filed an amended petition alleging that Milberg had only one partner, who was a citizen of New York, subsequent to which the District Court ordered Milberg to amend again; (iii) filed a second amended petition alleging that it had "two or more partners" who, at all times relevant to the petition, were citizens of a state of the United States; and (iv) in opposition to HWB's motion to dismiss the second amended petition, filed a declaration containing statements concerning the purported citizenship of Milberg's partners although the declaring attorney lacked personal knowledge, did ***3** the District Court properly dismiss Milberg's proceeding for lack of subject matter jurisdiction?

2. Where Milberg failed to serve notice of its motion to vacate an arbitration award on HWB within three months of delivery of that arbitration award, as 9 U.S.C. § 12 explicitly requires, and where well-established law in the Second Circuit holds that the three-month limitation period set forth in 9 U.S.C. § 12 is "absolute," "not subject to extension," and has no exceptions, did the District Court properly dismiss Milberg's Proceeding as untimely?

COUNTERSTATEMENT OF THE CASE AND FACTS [1]

The Underlying Arbitration

On August 3, 2017, Milberg commenced the arbitration (the "Arbitration") that underlies its District Court Proceeding. (Second Amended Petition (the "Third Petition") ¶ 38) (JA 126); Award (JA 35)). Three arbitrators (the "Panel"), who were "duly appointed by the International Centre for Dispute Resolution," conducted the Arbitration in New York City. (JA 126 ¶ 38; JA 34, 36). The Arbitration consisted of a full "evidentiary hearing" in August 2018 that lasted for "over a week," during which, among other things, Milberg submitted into evidence "nearly 400 documentary exhibits" and the witness statements and direct testimony ***4** of five witnesses. (JA 128 ¶ 42; JA 36-37). On February 4, 2019, the Panel issued the final, fully signed arbitration award (the "Award"), which Milberg sought to vacate in the Proceeding pursuant to 9 U.S.C. § 10. (JA 128 ¶ 43; JA 116; JA 67-69).

AAA Delivers the Final Award to the Parties on February 5, 2019

On February 5, 2019, the American Arbitration Association ("AAA") emailed to counsel for all parties to the Arbitration: (i) the signed Award, together with (ii) affidavits that each of the three Panel members separately executed on February 4, 2019. (JA 139-179). In the affidavits, each respective Panel member swears that the Award is the "Final Award" in the Arbitration. (JA 177-179; JA 70-72).

Milberg Commences This Proceeding Over Three Months Later

Three months passed. Then, on May 6, 2019, Milberg commenced the above-referenced Proceeding in the District Court, in which it sought vacatur of the Award. (JA 12-27). Among the documents that Milberg filed was its initial Petition to Vacate Arbitration Award (the "First Petition") (JA 12-27), which asserted (among other things) the existence of diversity jurisdiction and federal question jurisdiction. (JA 13-14 ¶ 4).

***5** At 9:53 p.m. that same evening, May 6, 2019, Milberg's counsel sent HWB's' counsel an email asking whether HWB's' counsel was "authorized to accept service" of Milberg's First Petition. (JA 183).

The Court Orders Milberg to Amend

The next day, May 7, 2019, the Court *sua sponte* ruled that Milberg's subject matter jurisdiction allegations in the First Petition were deficient ("Order No. 1") (JA 81-82), pointing out (among other things) that a limited liability partnership - which Milberg had alleged it was - "has the citizenship of each of its general and limited partners" and that Milberg had failed to "allege the citizenship of any party." The Court gave Milberg the opportunity to amend, instructing that "[i]f [Milberg] wishes to assert diversity jurisdiction, it must allege the entire citizenship of [Milberg], and the individual citizenship of each Respondent separately." In addition, the Court held, "[i]f [Milberg] wishes to assert federal question jurisdiction, it must explain why such jurisdiction exists under federal law." The Court also warned that if Milberg failed to amend in compliance with Order No. 1 or did "not properly allege this Court's jurisdiction," the Court would dismiss Milberg's petition.

On May 8, 2019, counsel for HWB responded to Milberg's May 6, 2019 email: "We understand the Court has ordered Milberg to amend its Petition by May 14, 2019. In light of the Court's order, please confirm that your request regarding ***6** service is withdrawn." (JA 183). Thus, Milberg's assertion that "Wilk Auslander waited one week to respond" to its May 6, 2019 email (App. Br. at 10) is incorrect.

Milberg Files Two Amended Petitions With Contradictory Allegations Regarding Its Partnership And Citizenship

The Second Petition

On May 9, 2019, Milberg filed its Amended Petition to Vacate Arbitration Award (the "Second Petition".) (JA 83-99). This time, Milberg based its assertion of subject matter jurisdiction only on diversity jurisdiction, not on federal question jurisdiction. (JA 86 ¶ 17). This pleading contains an allegation that Milberg "is a citizen of New York, because it is a limited liability partnership organized under the laws of New York, *and its only partner is a citizen of New York State*." (JA 83 ¶ 1) (emphasis added).

Later that day, the District Court entered an order requiring Milberg to make its motion for vacatur in the form of a motion for summary judgment, setting forth a briefing schedule for such motion as well as a deadline for Milberg to serve the order and the Second Petition pursuant to New York Civil Practice Law and Rules § 311 ("Order No. 2") (JA 100-101).

Also on Thursday, May 9, 2019, in an email to HWB's counsel, Milberg's counsel renewed their "request as to whether you are authorized to accept service." (JA 183).

***7** On Monday, May 13, 2019, HWB's counsel advised that they were not authorized to accept service. (JA 183).

On May 14, 2019, Milberg filed a letter motion requesting that the District Court extend the deadlines set forth in Order No. 2 because HWB's counsel had advised they were not authorized to accept service; Milberg volunteered that "it may now resort to service under the Hague Convention which will take substantially longer." (JA 102-103). Citing Fed. R. Civ. P. 4(f)(3), Milberg requested in the alternative that the District Court "order that [its] service on [HWB's counsel] be deemed service on" HWB. (JA 103). [2]

The District Court denied Milberg's alternative request in an order dated May 15, 2019 ("Order No. 3") (JA 107) but ordered Milberg to suggest new dates for the briefing and service of its summary judgment motion, "allowing ample time for each Respondent to be served pursuant to the Hague Convention."

Milberg filed that proposed order on May 17, 2019 (JA 108-109) and the District Court entered an order setting forth a new briefing schedule and service deadline for Milberg's summary judgment motion on May 20, 2019 ("Order No. 4") (JA 110). Milberg sought reconsideration of one aspect of Order No. 4 on May 21, 2019 (JA 111-112) and, accordingly, the District Court on May 22, 2019 ***8** vacated all prior deadlines; set deadlines for Milberg to serve its Second Petition and other papers (but not its summary judgment motion) on HWB "pursuant to the Hague Convention," and to file affidavits of such service; and set a new briefing schedule for Milberg's summary judgment motion ("Order No. 5") (JA 113-114).

Milberg subsequently filed affidavits of service purporting to reflect service on HWB of, among other things, its Second Petition on June 28, 2019; July 5, 2019; July 22, 2019; and July 26, 2019. (Docs. [3] 18, 22-31) (JA 6-7).

The Third Petition

Between July 23, 2019 and September 20, 2019, the parties exchanged pre-motion letters; in accordance with Judge Torres' Individual Rules of Practice, the last two were filed.

In HWB's July 23, 2019 letter to Milberg, it set forth reasons warranting the dismissal of Milberg's Second Petition, including the untimeliness of the Proceeding and the insufficiency of Milberg's new allegation that it had just one partner, who was a citizen of New York State (JA 83 ¶ 1), despite the requirement under N.Y. Partnership Law § 10(1) that a partnership have at least two partners. (Doc. 20 n.1; JA 6). Thus, Milberg's suggestion in its brief that HWB did not raise these issues until mid-September 2019 (App. Br. at 12) is wrong.

***9** Milberg disagreed with HWB's arguments in a letter dated August 9, 2019. HWB replied by letter on August 20, 2019. In a letter dated September 3, 2019, Milberg reiterated its opposition to HWB's arguments. (Doc. 20 n.1, JA 6).

On September 13, 2019, HWB filed a pre-motion letter with the District Court requesting permission to file a motion to dismiss based on the untimeliness of the Proceeding as well as the then-current pleading's allegation that Milberg had just one partner. (Doc. 20; JA 6). Milberg responded on September 20, 2019. (Doc. 21, JA 6).

Ultimately, the Court ordered Milberg to amend again (JA 115), which Milberg did on October 11, 2019 [4] (JA 116-133) (the "Third Petition.").

In the Third Petition, Milberg alleges that it has "two or more partners" and that "[a]t all times relevant to this Petition, all of [Milberg's] partners *are, or were*, citizens of a state of the United States." (JA 116-117 ¶ 1) (emphasis added).

The District Court granted permission to move to dismiss on October 21, 2019. (JA 134).

***10** *The Dismissal Motion*

On November 8, 2019, HWB moved to dismiss Milberg's Proceeding under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (JA 135-136).

As part of its opposition to HWB's dismissal motion, Milberg attempted to augment its jurisdictional allegation through a declaration by attorney Michael C. Spencer dated December 5, 2019 (the "Spencer Declaration") (JA 185-186). Among other things, that declaration (i) states that in January 2018 "many Milberg partners organized a new firm with some incoming new partners" called Milberg Tadler Phillips Grossman LLP and that Milberg nevertheless remained as a separate, two-partner firm; and (ii) purports to identify Milberg's two United States partners as of May 2019 [5] and the United States partner who replaced one of those in June 2019. (JA 186 ¶ 4).

Mr. Spencer did not purport to make these statements on personal knowledge, however, and Milberg does not contend that he did so. Nor does the declaration contain any information from which his personal knowledge could reasonably be inferred: he provided no information explaining how he became aware of these details and merely stated that he was "Of Counsel" at Milberg. (JA 185 ¶ 1). Notably, Milberg chose to rely on statements by its Of Counsel ***11** concerning its partnership rather than submitting any declaration by the partners Mr. Spencer named in his declaration.

The District Court Dismisses Milberg's Proceeding With Prejudice

In the Dismissal Order dated July 8, 2020, the District Court granted HWB's motion and dismissed Milberg's Proceeding with prejudice. (JA 189-198). In a well-reasoned decision supported by ample precedent, the District Court first held that Milberg had failed to establish diversity jurisdiction under 28 U.S.C. § 1332(a)(2). The District Court noted that Milberg had failed to specify, in its Third Petition, "whether all of Petitioner's partners were citizens of a state of the United States *at the commencement of the action*," thus "render[ing] the petition defective on its face." (JA 193). Further, the District Court held that the Spencer Declaration was "insufficient": "The declaration does not indicate whether the statements regarding the citizenship of [Milberg's] partners at the time of the commencement of the action - and the facts subsidiary to those assertions, which include each partner's physical presence in a state and an intent to make the state a home--were made on the basis of Spencer's personal knowledge." (JA 194) (citation omitted). "Because the petition fails to adequately plead diversity citizenship and the Spencer Declaration does not indicate a basis in personal knowledge, the Court concludes that Petitioner has not carried its burden of establishing diversity jurisdiction." (JA 195).

***12** The District Court then went on to analyze the portion of HWB's dismissal motion concerning the Proceeding's untimeliness. "The Court cannot excuse Petitioner's tardiness," the District Court held. (JA 197). "Because the action to enforce or vacate an arbitration award is a 'creature of statute' and unknown in the common law, 'there is no common law exception to the three month limitations period on the motion to vacate.' " (JA 197) (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984)). "Thus, courts in this district have declined to find an 'equitable tolling' exception to the statutory deadline." (JA 197) (citing cases).

Finally, the District Court's dismissal was with prejudice "because amendment would be futile." (JA 198).

The District Court entered a final judgment dismissing the Proceeding, also on July 8, 2020. (JA 199). Milberg filed its notice of appeal on July 30, 2020. (JA 200).

SUMMARY OF ARGUMENT

This Court should affirm the District Court's with-prejudice dismissal of Milberg's Proceeding for two independent reasons.

First, the District Court lacked subject-matter jurisdiction and its dismissal of Milberg's Proceeding was therefore mandatory. Milberg has had three opportunities to allege properly the diversity jurisdiction it asserts yet has failed to ***13** do so. In Milberg's first pleading, it failed to allege the citizenship of any of its partners, prompting the District Court *sua sponte* to order Milberg to amend to allege its entire citizenship or face dismissal. Thus, Milberg was aware of this issue from the outset.

In its second pleading, Milberg alleged that it had only one partner -- which if accurate would mean that Milberg is not a partnership under New York law and has no ability to bring the Proceeding. The District Court ordered Milberg to amend again.

In its third pleading, Milberg invoked the District Court's jurisdiction based on a murky claim that all of its partners - whom Milberg declined to number or identify -- "are, or were" citizens of unidentified states in the United States at all times relevant to Milberg's Third Petition.

In order to plead diversity jurisdiction in this matter, Milberg had to show that all of its individual partners were citizens of a state of the United States when Milberg commenced the Proceeding but it failed to do so, three different times. Well-established law demonstrates that Milberg's evasive pleading was insufficient to satisfy its burden of establishing the District Court's subject matter jurisdiction. Nor did an attorney declaration that Milberg submitted in opposition to HWB's motion to dismiss cure this

pleading defect. The declaration contains statements concerning the composition of Milberg's partnership, but it is not made ***14** on personal knowledge and therefore, as a matter of law, the District Court properly disregarded it.

Second, Milberg's Proceeding is time-barred. 9 U.S.C. § 12 contains an absolute, unequivocal limitation period that requires parties seeking to vacate arbitration awards to serve notice of their motions to vacate within three months of the awards' delivery. This Court has also made clear that no exceptions to this three-month requirement exist.

Milberg nevertheless insists there is an exception: it claims that where respondents are located overseas, a petitioner seeking vacatur of an arbitration award is excused from the three-month limitation period set forth in 9 U.S.C. § 12. But the statute carves out no such exception and a long line of relevant case law contradicts Milberg's position. Moreover, the "support" on which Milberg relies for its argument is utterly inapposite: none sets forth the extraordinary exception that Milberg asks this Court to create and several have nothing at all to do with *timeliness* of service of a motion to vacate on a foreign respondent, instead focusing on what the proper *method* is for serving such a respondent.

Milberg's argument that "there is no way" for a petitioner to make timely service on foreign respondents is likewise flawed: as set forth below at 51-52, there are several options available to timely effect such service, and Milberg's failure to ***15** avail itself of any of them is not a basis for exempting it from the absolute three-month limitation period set forth in 9 U.S.C. § 12.

For all of the reasons set forth below, this Court should affirm the District Court's with-prejudice dismissal of Milberg's Proceeding.

ARGUMENT

STANDARD OF REVIEW

On appeal from a district court's dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, this Court reviews "factual finding for clear error and legal conclusions *de novo*." *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), *aff'd*, 561 U.S. 247, 130 S. Ct. 2869 (2010). While the Court must take facts alleged in a complaint as true and draw reasonable inferences in favor of the plaintiff, "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Id*. (internal quotation marks omitted).

This Court also reviews the dismissal of a complaint under Rule 12(b)(6) *de novo*. *See* *Chen v. Major League Baseball Properties, Inc.*, 798 F.3d 72, 76 (2d Cir. 2015).

This Court reviews a "district court's dismissal of a complaint with prejudice for abuse of discretion." *See* *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 106 (2d Cir. 1998).

***16** *POINT I THE DISTRICT COURT PROPERLY DISMISSED THIS PROCEEDING FOR LACK OF SUBJECT MATTER JURISDICTION*

A. *Subject Matter Jurisdiction Is a Threshold Question*

"[S]ubject matter jurisdiction is a 'threshold question that must be resolved...before proceeding to the merits.' " *Young-Gibson v. Patel*, 476 Fed. Appx. 482, 483, 2012 WL 2096939, at *1 (2d Cir. 2012) (Summary Order) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89, 118 S. Ct. 1003 (1998)). *See also* *3F Partners Ltd. Partnership v. Medtronic, Inc.*, 2018 WL 5266876, at *2 (S.D.N.Y. Oct. 23, 2018) ("The Court begins, as it must, with the issue of subject- matter jurisdiction."). Where subject matter jurisdiction is lacking, "dismissal is mandatory." *Manway Constr. Co. v. Housing Auth. of City of Hartford*, 711

F.2d 501, 503 (2d Cir. 1983). *See also Brady v. Goldman*, 2017 WL 111749, at *2 (S.D.N.Y. Jan. 11, 2017) ("federal courts have a duty to dismiss an action *sua sponte* where it lacks subject matter jurisdiction"), *aff'd*, 714 Fed. Appx. 63 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 329, 202 L. Ed. 2d 222 (2018); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")

Where diversity is the sole basis for a court's subject matter jurisdiction, that "diversity must exist at the time the action is commenced." *E.g.*, *Universal* ***17** *Licensing Corp. v. Paola del Lumtgo, S.P.A.*, 293 F.3d 579, 581 (2d Cir. 2002). [6] Thus, "[a] party's change of citizenship does not cure a jurisdictional defect that existed at the time of filing." *Jennison v. Dick's Sporting Goods, Inc.*, 2011 WL 6293061, at *1-4 (S.D.N.Y. Dec. 15, 2011). Accordingly, changing the internal composition of a partnership after an action has been filed cannot cure lack of diversity jurisdiction. *See* *Grupo Dataflux v. Atlas Glob. Group, L.P.*, 541 U.S. 567, 569-70, 579-80, 124 S. Ct. 1920, 1923, 1929 (2004) (in a case between a limited partnership created under Texas law and a citizen of Mexico, post-filing withdrawal from partnership by two partners who were Mexican citizens did not cure jurisdictional defect).

The party invoking subject matter jurisdiction bears the burden of establishing it. *See Shenandoah v. Halbritter*, 366 F.3d 89, 91 (2d Cir. 2004); *Brady*, 2017 WL 111749, at *2. *See also* *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) ("A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists."), *aff'd*, 561 U.S. 247, 130 S. Ct. 2869 (2010) (quoting *Makarova v United States*, 201 F3d 110, 113 (2d Cir. 2000).

***18** A plaintiff therefore must demonstrate federal jurisdiction "affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Brady*, 2017 WL 111749, at *2 (quoting *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003)). *See also* *Morrison*, 547 F.3d at 170 (jurisdiction must be shown affirmatively); *Simmons v. Rosenberg*, 572 F. Supp. 823, 825 (E.D.N.Y. 1983) ("Diversity must be alleged with detail and certainty."). Thus, although the Court in deciding a Rule 12(b)(1) motion to dismiss must accept all material factual allegations in the complaint as true, it must also "refrain from drawing any inferences in favor of the party asserting jurisdiction." *Brady*, 2017 WL 111749, at *2 (internal quotation marks omitted). *See also* *Shipping Fin'l Services Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) (no favorable inference applies to subject matter jurisdiction allegations); *Preston v. New York*, 223 F. Supp. 2d 452, 461 (S.D.N.Y. 2002) ("in resolving a challenge to subject matter jurisdiction, the Court does not draw inferences in favor of the plaintiff"), *aff'd sub nom. Preston v. Quinn*, 87 Fed. App'x 221 (2d Cir. 2004).

Courts frequently reject vaguely pleaded assertions of subject matter jurisdiction. *See*, *e.g.*, *Zimak Co. v. Kaplan*, 1999 WL 38256, at *3 (S.D.N.Y. Jan. 28, 1999) ("The issue which we raise *sua sponte* is that the pleadings and the record as a whole do not make explicit the citizenship of plaintiff Zimak, a general partnership."); *Simmons*, 572 F. Supp. at 825 (dismissing for lack of subject matter ***19** jurisdiction under 28 U.S.C. § 1132(a)(1) where plaintiff "merely averred that she was an American citizen and 'a citizen of a state other than the state of New York' ").

While a court may refer to "evidence outside the pleadings" such as affidavits in order to resolve jurisdictional questions, *Makarova*, 201 F.3d at 113; *Augienello v. F.D.I.C.*, 310 F. Supp. 2d 582, 588 (S.D.N.Y. 2004), "Rule 56 is relevant to the jurisdictional challenge in that the body of decisions under Rule 56 offers guidelines in considering evidence submitted outside the pleadings." *Kamen v. Am. Tele. & Tele. Co.*, 791 F.2d 1006, 1022 (2d Cir. 1986); *accord Lynch v. Patrolmen's Benevolent Association of the City of New York*, 1999 WL 713369 (S.D.N.Y. May. 18, 1999) (citations omitted) ("Rule 56 ... inform[s] [the Court's] view as to the procedure applicable to the [12(b)(1)] motion."). Thus, an affidavit or attorney affirmation submitted in support of subject matter jurisdiction must be based on "personal knowledge." *See* *Kamen*, 791 F.2d at 1011 (district court improperly considered attorney's affidavit where the affidavit "contain[ed] no information to indicate a basis in

personal knowledge for the affiant's conclusory statement"); *HB v. Monroe Woodbury Cent. Sch. Dist.*, 2012 WL 4477552, at *6 (S.D.N.Y. Sept. 27, 2012) (on motion to dismiss pursuant to, *inter alia*, 12(b)(1), refusing to consider attorney affirmation averring that it was based on attorney's " 'personal knowledge, [and] review of the files and conversations [she has] had ***20** with [Plaintiffs],' " because "it is clear that the vast majority of the statements contained in the Affirmation could not be based on personal knowledge"); *Ugarte v. Johnson*, 40 F.Supp.2d 178, 179 n.1 (S.D.N.Y. 1999) (granting 12(b)(1) dismissal where, in opposing the motion, the plaintiff submitted an attorney affidavit that, among other things, "improperly contain [ed] factual argument that is not based on personal knowledge....") (citing cases).

For the reasons set forth below, Milberg failed to satisfy its burden of showing, by a preponderance of the evidence, that the District Court had subject matter jurisdiction over the Proceeding. Subject matter jurisdiction is therefore lacking and dismissal was "mandatory." *Manway Constr. Co. v. Housing Auth. of City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983).

B. *Milberg Has Failed To Establish Diversity Jurisdiction*

1. A Partnership Has the Citizenship of Each of Its Partners

Here, Milberg's sole basis for the purported subject matter jurisdiction of the District Court is diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). (JA 119 ¶ 17). As a result, Milberg bears the burden of affirmatively showing that, at the time of filing this Proceeding, there was complete diversity between itself and HWB. *E.g.*, *Universal Licensing*, 293 F.3d at 581 (time of filing); *Jennison*, 2011 WL 6293061, at *1 (party seeking to invoke diversity jurisdiction "has the burden ***21** of proving that complete diversity of citizenship exists between the parties") (internal quotation marks omitted). Milberg fails to satisfy that burden.

Given Milberg's allegations that all respondents are citizens of foreign countries (JA 117-119 ¶¶4-15), Milberg's invocation of diversity jurisdiction must rely on 28 U.S.C. § 1132(a)(2), which provides for diversity jurisdiction in certain cases between "citizens of a State and citizens or subjects of a foreign state...." If Milberg is itself a citizen of a foreign country, however, that destroys diversity jurisdiction as a matter of law. *See, e.g., Flores v. Citizens Intern. Bank*, 1992 WL 309546, at *1 (S.D.N.Y. Oct. 15, 1992) ("Under Second Circuit law, 'the presence of aliens on two sides of a case destroys diversity jurisdiction.' ") (quoting *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980)).

Milberg's citizenship depends on that of its partners: "For the purposes of diversity jurisdiction, a partnership takes the citizenship of all of its partners." *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 615 (2d Cir 2019). *See also Milberg LLP v. HWB Alexandra Strategies*, 19 Civ. 04058 (AT) (S.D.N.Y. May 7, 2019) (JA 193) ("[f]or purposes of diversity jurisdiction, a limited partnership has the citizenship of each of its general and limited partners") (citing *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 52) (2d Cir. 2000); ***22** *Franklin v. Waters*, 2017 WL 10221324, at *1 (S.D.N.Y. Aug. 29, 2017) ("limited liability companies and partnerships are deemed to be citizens of all the states in which their constituents are citizens"). [7]

2. Milberg Had Three Opportunities To Properly Allege Diversity Jurisdiction And Failed Every Time

But Milberg has failed to sufficiently allege the citizenship of its partners at the time it commenced the Proceeding. In its First Petition, Milberg made no allegation concerning its partners' citizenship at all. Once the District Court *sua sponte* ordered Milberg to allege its "entire citizenship" or face dismissal for lack of subject matter jurisdiction (JA 81-82), Milberg filed an amended Petition (the Second Petition) that alleged that Milberg had only one partner, who was a citizen of New York. (JA 83 ¶ 1) (emphasis added). And even after the District Court yet again explicitly ordered Milberg to amend, Milberg's Third Petition contains only the vaguest of jurisdictional allegations, none of which demonstrates Milberg's citizenship status at any time - let alone as of May 6, 2019, the date it filed the Proceeding. Contrary to the allegation in its previous pleading that it had only one

partner, Milberg claims in its Third Petition that it actually has "two or more ***23** partners" and that "[a]t all times relevant to this Petition, all of [Milberg's] partners *are, or were*, citizens of a state of the United States." (JA 116-117 ¶ 1) (emphasis added). Milberg also makes a conclusory allegation that "[t]his Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because the amount in controversy exceeds $75,000 and the action is between diverse citizens of a State and citizens or subjects of a foreign state, none of whom is lawfully admitted as a permanent resident of the United States" (JA 119 ¶ 17), but the Court should not credit this purely conclusory allegation. *See*, *e.g.*, *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (court is "not bound to accept as true a legal conclusion couched as a factual allegation"). Moreover, this allegation sheds no light on Milberg's citizenship at the time of filing this Proceeding.

Thus, Milberg does not allege in its Third Petition that all of its partners were citizens of states in the United States at the time of filing - or, indeed, at any time. Without citing any case law in support, however, Milberg argues that "[t]here is no other reasonable interpretation of the language" in paragraph 1 of the Third Petition (App. Br. at 24) other than Milberg's. Milberg's conclusory assertion, however, is unavailing for three reasons. First, Milberg's statement that its partners "are, or were" United States citizens at all relevant times leaves open the possibility that at least some Milberg partners were citizens of other countries when it brought this Proceeding. That would render Milberg an alien, destroying ***24** diversity and this Court's subject matter jurisdiction as a matter of law. *See*, *e.g.*, *Flores*, 1992 WL 309546, at *1.

Second, to the extent that Milberg's allegation of "two or more partners" "at all relevant times" reflects that it had fewer than two partners when it commenced the Proceeding, Milberg lacked the capacity to bring it. *See* N.Y. Partnership Law § 10(1) (McKinney's 2019) ("A partnership is an association of *two or more* persons to carry on as co-owners a business for profit....").

Third, Milberg cannot rely on any favorable inference to save its insufficient allegation because, as a matter of law, none applies here. *See*, *e.g.*, *Shipping Fin'l Services*, 140 F.3d at 131; *Augienello*, 310 F.Supp. 2d at 588. As set forth above at 18, well-established law provides that it is Milberg's affirmative obligation to demonstrate subject matter jurisdiction and the Court should not grant Milberg any favorable inferences regarding such jurisdiction. *See*, *e.g.*, *Brady*, 2017 WL 111749, at *2. And Milberg's attempt to shift its burden to HWB ("the party attacking diversity has not presented any factual basis for doubting that diversity exists") (App. Br. at 24) is therefore without merit.

Moreover, any such favorable inference would be particularly unwarranted here given that (i) Milberg has already had *three* chances to properly plead subject matter jurisdiction yet has failed; (ii) the District Court *sua sponte* raised the issue of subject matter jurisdiction at the outset of the Proceeding and explicitly ordered ***25** Milberg to plead the citizenship of each of its partners; and (iii) Milberg's previous pleading (alleging one partner) directly contradicts its current one (alleging "two or more partners").

Given that the facts Milberg alleges in its Third Petition "suggest that there may not be complete diversity between the parties, the Court cannot fulfill its obligation to ascertain from the pleadings that it has subject matter jurisdiction over the instant action." *Richmond v. Int'l Bus. Machines Corp.*, 919 F. Supp. 107, 109 (E.D.N.Y. 1996). Milberg's continuing failure to properly allege any basis for this Court's subject matter jurisdiction mandated dismissal of the Proceeding, *see*, *e.g.*, *Manway Constr. Co.*, 711 F.2d at 503, and this Court therefore should affirm.

3. Milberg Proffered No Admissible Evidence Proving Subject Matter Jurisdiction

As set forth above at 10, Milberg attempted to augment its jurisdictional allegation through the Spencer Declaration (JA 185-86) when it opposed HWB's dismissal motion. Among other things, that declaration states that in January 2018 "many Milberg partners organized a new firm with some incoming new partners" called Milberg Tadler Phillips Grossman LLP; states that Milberg nevertheless remained as a separate, two-partner firm; and purports to identify Milberg's two United States partners as of May 2019 and the United States partner who replaced one of those in June 2019. (JA 186 ¶ 4).

***26** Mr. Spencer did not purport to make these statements on personal knowledge, however, nor does the declaration contain any information from which his personal knowledge can reasonably be inferred: he provided no information explaining how he became aware of these details and merely stated that he is "Of Counsel" at Milberg. (Spencer Decl. ¶ 1). Notably, Milberg chose to rely on statements by its Of Counsel concerning its partnership rather than submitting any declaration by the partners Mr. Spencer names in his declaration. Indeed, Milberg itself appears to concede that Mr. Spencer lacked personal knowledge. (App. Br. at 25) ("Spencer made the declaration in his capacity as a knowledgeable representative of Milberg."). Given the lack of personal knowledge from which Mr. Spencer's declaration suffers, binding precedent required the District Court to disregard it, *see*, *e.g.*, *Kamen*, 791 F.2d at 1011; *Ugarte*, 40 F.Supp.2d 179 n.1 (collecting cases), and dismiss the Proceeding due to lack of subject-matter jurisdiction. *See*, *e.g.*, *Manway Constr. Co.*, 711 F.2d at 503.

Relying on vague statements in the Spencer Declaration regarding Mr. Spencer's experience, *e.g.*, that he "remained close with the other senior lawyers at the firm" even after leaving the partnership in 2014 and "was generally familiar with the firm's structure," (JA 185 ¶ 3), Milberg argues on appeal that the declaration is sufficient, without citing any case law in support. (App. Br. at 25-26). Milberg also criticizes the District Court for applying a "personal knowledge" ***27** requirement to the Spencer Declaration. (App. Br. at 25-26). But the District Court was entirely right to do so: when confronted with evidence outside the pleadings on a Rule 12(b)(1) motion, courts turn to Rule 56 for guidance and disregard declarations that are not based on personal knowledge. *See*, *e.g.*, *Kamen v. Am. Tele. & Tele. Co.*, 791 F.2d at 1022. Moreover, the District Court's factual determination that Mr. Spencer did not allege a basis for personal knowledge (JA 194-195) certainly was not "clear error," *see* *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (on Rule 12(b)(1) motion, this Court reviews "factual findings for clear error"), *aff'd*, 561 U.S. 247, 130 S. Ct. 2869 (2010): it is plain from the face of the Spencer Declaration that the District Court was correct.

And Milberg's assertion that *Kamen* (cited in the Dismissal Order, JA 194) "was not a jurisdiction pleading decision" (App. Br. at 26) is irrelevant given that the decision (which reversed a sanctions order) arose out of the district court's grant of a motion to dismiss for, *inter alia*, lack of subject matter jurisdiction. Moreover, courts frequently require that affidavits concerning jurisdiction submitted in connection with Rule 12(b)(1) motions be made on personal knowledge. *See HB* at *6; *Dimodica v. U.S. Dep't of Justice*, 05 CIV. 2165 (GEL) (FM), 2006 WL 89947, at *2 (S.D.N.Y. Jan. 11, 2006) (in granting motion to dismiss based on lack of subject matter jurisdiction, noting that evidence such as a ***28** 'sworn statement of fact based on personal knowledge' is necessary because '[t]he burden of proving jurisdiction is on the party asserting it' "); *Ugarte*, 40 F.Supp.2d 179 n.1 (S.D.N.Y. 1999). *Cf. Neewra, Inc. v. Manakh Al Khaleej Gen. Trading and Contr. Co.*, 03 CIV. 2936 (MBM), 2004 WL 1620874, at *2 n.3 (S.D.N.Y. July 20, 2004) (on Rule 12(b)(2) motion, holding that "[t]o the extent that [plaintiff's attorney's] declaration asserts facts that are not based on [his] personal knowledge, this declaration will be disregarded").

Milberg also argues that *Kamen* is distinguishable because the Spencer Declaration "was not an 'attorney's affidavit' in the sense of an attorney testifying for his or her client, or even an in-house counsel testifying for his or her employer...." (App. Br. at 25). But nothing in *Kamen*, or in Rule 56, suggests that the "personal knowledge" requirement is limited to such instances. Further, to the extent that Milberg is suggesting there must be a showing that statements are "false or mistaken" in order for the personal knowledge requirement to apply (App. Br. at 26), such a prerequisite would contravene prevailing law, which holds that the party invoking subject matter jurisdiction bears the burden of demonstrating it by a preponderance of the evidence. *See* *Morrison*, 547 F.3d at 170.

Finally, Milberg's argument that "the fair step would have been to allow further amendment of the petition, or to require further evidence, or to hold a hearing" (App. Br. at 26) fails. First, Milberg did not request any of these from the ***29** District Court and therefore the Court should disregard this argument. *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal....

[T]he circumstances normally do not militate in favor of an exercise of discretion to address ... new arguments on appeal.") (internal quotation marks omitted).

Second, Milberg ignores that the District Court already allowed Milberg to amend *twice* and, further, Milberg *chose* to submit a declaration by Mr. Spencer rather than "first-person declarations by the two partners." (App. Br. at 2). *See* *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) ("A district court has discretion to deny leave [to amend] for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party."); *Drakakis v. ABM Janitorial Svcs.-Northeast, Inc.*, 09 CIV. 1884 LTS, 2011 WL 1219843, at *7 (S.D.N.Y. Mar. 24, 2011) (leave to amend "need not be granted when, as here, plaintiffs have had abundant notice of the insufficiency of their pleadings and multiple opportunities to seek to cure").

Third, additional amendments, evidence, or hearings would have been futile: not only did Milberg demonstrate its inability to properly allege subject matter jurisdiction given that it failed to do so even after three pleading attempts and submitting a declaration, but the untimeliness of the Proceeding (discussed below ***30** at Point II) is incurable. *See*, *e.g.*, *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 46 (2d Cir. 1999) (affirming the district court's denial of leave to replead on futility grounds); *3F Partners Ltd. Partnership v. Medtronic, Inc.*, 2018 WL 5266876, at *2-3 (S.D.N.Y. Oct. 23, 2018) ("despite the fact that Respondents raise that defect in their opposition to Petitioner's motion for leave to amend ... Petitioners give no indication that they are in possession of facts that would cure the defect....Accordingly, the Court concludes that it lacks subject-matter jurisdiction and that there is no basis to grant Petitioners leave, *sua sponte*, to amend.").

Fourth, contrary to Milberg's claim, *Van Buskirk v. United Group of Companies*, 935 F.3d 49 (2d Cir. 2019) does not establish the District Court's "approach was too hasty and constricted." (App. Br. at 26-7). To the contrary, *Van Buskirk* underscores the sound nature of the District Court's dismissal. In *Van Buskirk*, the district court raised the issue of subject matter jurisdiction eighteen months after the case commenced, then ordered the plaintiffs *sua sponte* to show cause why the case should not be dismissed, and did not provide the plaintiffs any other opportunity to amend. In stark contrast, the District Court here raised the issue of subject matter jurisdiction *one day* after Milberg commenced the ***31** Proceeding, provided Milberg with an opportunity to amend, and then provided Milberg with another opportunity to amend. (See above at 5-7, 9). [8]

POINT II THIS PROCEEDING IS TIME-BARRED AS A MATTER OF LAW

As set forth below, Milberg's Proceeding is also fatally defective because it was untimely as a matter of law. Thus, even putting aside the question of subject matter jurisdiction, the Court should affirm the District Court's dismissal.

A. *Untimeliness Is a Basis For Dismissal*

"Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate when a defendant raises a statutory bar, such as lack of timeliness, as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Lucesco Inc. v. Republic of Argentina*, 788 Fed. Appx. 764, 2019 WL 4896841, at *1 (2d Cir. Oct. 4, 2019) (Summary Order) (quoting *Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015)). On a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a court may consider not only the complaint's factual allegations and documents attached to, or incorporated by reference in, the complaint but also "matters of which judicial notice may be taken" and "documents...of which plaintiffs had knowledge and relied on in bringing the suit." ***32** *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). Courts may take judicial notice of any facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Cox v. Perfect Bldg. Maintenance Corp.*, 2017 WL 3049547, at *3 (S.D.N.Y. July 18, 2017) (quoting Fed. R. Evid. 201(b)). Materials appropriate for judicial notice also include arbitration

filings. *See, e.g., Plumbing Supply, LLC v. ExxonMobil Oil Corp.*, 2017 WL 3913020, at *6 n. 3 (S.D.N.Y. Sept. 5, 2017); *accord, Stephens v. Trump Org. LLC*, 205 F. Supp. 3d 305, 309 n. 5 (E.D.N.Y. 2016).

B. *Milberg's Proceeding Was Untimely*

1. There Is No Exception to Section 12's Three-Month Limitation

Pursuant to 9 U.S.C. § 12 ("Section 12"), "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within *three months after the award is filed or delivered*." 9 U.S.C. § 12 (emphasis added). Thus, "a party may not raise a motion to vacate ... an arbitration award after the three month period has run...." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984). *See also Wallace v. Buttar*, 378 F.3d 182, 197 (2d Cir. 2004) (same) (quoting *Florasynth*). Further, "Section 12's clock starts ticking the same day that an arbitration 'award is delivered [or filed], not the day after.' " *Anglim v. Vertical Group*, 2017 WL 543245, at *7 (S.D.N.Y. Feb. 10, 2017) (quoting ***33** *Triomphe Partners, Inc. v. Realogy Corp.*, 2011 WL 3586161, at *2 (S.D.N.Y. Aug. 15, 2011), *on reconsideration in part*, 10 CIV. 8248 PKC, 2012 WL 266890 (S.D.N.Y. Jan. 30, 2012)).

Contrary to Milberg's claim that a controversy exists regarding whether Section 12's three-month limitation period is absolute (App. Br. at 29), the law within the Second Circuit is crystal clear: there are no exceptions to the three-month limitation period set forth in Section 12. *See Florasynth*, 750 F.2d at 175 (holding that Section 12 contains no exception to the three-month limitation and, further, that "there is no common law exception to the three month limitations period on the motion to vacate"); *Marshak v. Original Drifters, Inc.*, 19 CIV. 7035 (PGG), 2020 WL 1151564, at *4 (S.D.N.Y. Mar. 10, 2020) ("The statute offers ['n]o exception' to the three-month service period."), *appeal withdrawn*, 20-1192, 2020 WL 3885892 (2d Cir. June 17, 2020); *Triomphe Partners*, 2011 WL 3586161, at *2 ("[T]here is no common law exception to the three month limitations period on the motion to vacate.") (quoting *Forsyth*); *Waveform Telemedia, Inc. v. Panorama Weather N. Am.*, 06 CIV. 5270 CMMDF, 2007 WL 678731, at *5 (S.D.N.Y. Mar. 2, 2007) ("There are no exceptions to this rule."); *Kruse v. Sands Bros. & Co.*, 226 F. Supp. 2d 484 (S.D.N.Y. 2002) ("The Second Circuit has made clear that there is no exception to this three month limitation period.") (citing *Forsyth*).

***34** Accordingly, Section 12's three-month limitation "is not subject to extension." *Barclays Capital Inc. v. Hache*, 16 CIV. 315 (LGS), 2016 WL 3884706, at *2 (S.D.N.Y. July 12, 2016). It is "absolute" and "strictly construed." *Anglim*, 2017 WL 543245, at *7 (internal quotation marks omitted); *see also Vector Media Group, Inc. v. MyLocker.com, LLC*, 20 CV. 5642 (JSR), 2020 WL 5371195, at *3 (S.D.N.Y. Sept. 8, 2020) ("In the Second Circuit, '[t]his three-month limitation is absolute and strictly construed.' ") (quoting Dismissal Order, at *4). "[T]he deadlines set forth in 9 U.S.C. § 12 are not subject to equitable tolling." *Marshak*, 2020 WL 1151564, at *6 (S.D.N.Y. Mar. 10, 2020), *appeal withdrawn*, 20-1192, 2020 WL 3885892 (2d Cir. June 17, 2020).

Milberg implies that one Southern District of New York case,[9] *Global Gold Mining LLC v. Caldera Resources, Inc.*, 941 F. Supp. 2d 375, 384 (S.D.N.Y. 2013), allows for extension of the three-month limitation period set forth in 9 U.S.C. § 12. (App. Br. at 29). Milberg misconstrues *Global Gold Mining*, which ***35** enforces the three-month limitation period. *See* 941 F. Supp. 2d at 384 ("the statute requires that a party wishing to vacate an award give *notice* within three months of the vacatur motion; it does not require that the motion itself be served within three months of the challenged award").

Milberg also implies that prejudice suffered by a respondent affects whether or not Section 12's three-month limitation period applies. (App. at 42). That is utterly wrong: as set forth above at 34, the limitation period is "absolute" and without any exception. Moreover, Milberg ignores that there is " 'good reason for the Act's three month limitation" on the motion to vacate, "namely, 'settling disputes efficiently and avoiding long and expensive litigation.' " *Vector Media Group*, 2020 WL 5371195, at *3 (quoting *Florasynth*, 740 F.2d at 175 and *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)). *See also*

Marshak, 2020 WL 1151564, at *4 ("While it may appear to be harsh to strictly enforce the time provision, it must be noted that the goal of arbitration is to settle disputes efficiently and to avoid the cost of long term, expensive litigation.") (internal quotation marks omitted).

C. There Is No "Foreign Resident" Exception To the Three-Month Limitation Period

Despite the long line of case law making clear that the three-month limitation is "absolute" and "strictly construed" within this jurisdiction, *e.g.*, *Anglim*, 2017 WL 543245, at *7, Milberg clings to the argument it made to the ***36** District Court that it is exempt from that limitation period because the respondents (HWB) are "foreign." (*E.g.*, App. Br. at 30). Notably, however, Milberg fails to cite any case holding that any "foreign respondent" exception to the three-month limitation period exists - because there is none.

1. Milberg's Reliance on *Intercarbon* and Its "Progeny" Is Misplaced

a. *There Is No "Gap" Regarding Three-Month Limitation Period*

Milberg claims that 9 U.S.C. § 12 "has a statutory gap with respect to service" in that it "is silent about service on foreign adverse parties" (App. Br. at 30) and that this supposed "gap" excuses it from compliance with Section 12's three-month limitation.

Milberg is wrong. Section 12 clearly defines the period in which service must be made on *any* respondent: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney *within three months after the award is filed or delivered*." 9 U.S.C. § 12 (emphasis added). Section 12 simply does not contain any language limiting application of the three-month period to cases involving domestic respondents. Courts have repeatedly rejected petitioners' attempts to get around this "absolute" limitation period. *Anglim*, 2017 WL 543245, at *7; see above at 33-34.

***37** Accordingly, courts have explicitly rejected the argument that the three-month limitation period in 9 U.S.C. § 12 melts away in cases that involve foreign respondents. For example, in *Argentine Republic v. Nat'l Grid PLC*, 637 F.3d 365 (D.C. Cir. 2011), [10] Argentina sought under Fed. R. Civ. P. 6(b) to extend its time to serve notice of the motion to vacate it had filed, arguing that "it would be impossible to complete service of notice within the three month period because [the respondent] was headquartered in the United Kingdom, and, under the Hague Convention ... proper service in the U.K. required using a central governmental authority." *Id.* at 367. The Court of Appeals affirmed the district court's denial of the motion to vacate as untimely, holding the district court lacked authority to extend the three-month statutory period. *Id.* at 369. [11]

***38** Earlier this year, in *Ballantine v. Dominican Republic*, 19-CV-3598 (TJK), 2020 WL 4597159, at *5 (D.D.C. Aug. 11, 2020), the court held the petitioner to Section 12's three-month limitation and denied her motion to vacate on that basis. Rejecting petitioner's argument for equitable tolling based on the alleged impossibility of effecting service on the Dominican Republic within three months, the court held that under prevailing case law equitable tolling did not appear to be available. The court also noted that even if it "had the power to equitably toll the service deadline, on the record here such tolling would be inappropriate, since the obstacles cited by the Ballantines were not the reason they missed the deadline. They moved to vacate on the last day of the service window, failed to request summonses until after the deadline, and did not even try to complete FSIA service by requesting foreign mailing until about a month later."

In *Grupo Unidos Por El Canal, S.A. v. Autoridad del Canal de Panama*, 2018 WL 3059649, at *4 (S.D. Fl. June 20, 2018), another case involving a foreign respondent, the court denied the motion to vacate as untimely, holding that "the three-month timeframe in the FAA [Federal Arbitration Act] is a limitations period" and that failure to effect proper, timely service meant the motion was "time-barred." 2018 WL 3059649, at *4-5. The court also emphasized that "Petitioners fail to point to any authority to support the notion that an equitable exception to the notice requirement under the FAA exists. Indeed, courts have

***39** found the opposite." *Id*. at *4 (citing cases). The *Grupo* court applied Fed. R. Civ. P. 4 only to the *method* according to which the extraterritorial respondent should have been served, *see id*. at *2; it did not excuse the petitioners from the three-month limitation set forth in 9 U.S.C. § 12. *See id*. at *5 ("Petitioners provide no authority to support the notion that this Court may extend the statutory deadline for service.").

b. Intercarbon *And Its "Progeny" Do* Not *Provide for Any "Foreign Respondent" Exception To Three-Month Limitation Period*

i. Intercarbon Is Inapposite

Milberg's "gap" argument relies heavily on *In re* *InterCarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp.*, 146 F.R.D. 64, 67 (S.D.N.Y. Jan. 12, 1993) (*e.g.*, App. Br. at 39). But its reliance on *Intercarbon*, as well as the other cases it cites, is misplaced because none of those cases holds that any "foreign respondent" exception to Section 12's three-month limitation period exists. Milberg misconstrues *Intercarbon* and other cases it cites, which address only the appropriate *method* by which to serve a respondent located outside the United States, not the timeliness issue that is before the Court here.

***40** In *Intercarbon*, [12] petitioner Intercarbon sought to vacate an arbitration award granted in favor of the respondents, which were foreign companies that had participated in an arbitration in the United States. *Id*. at 66. *Intercarbon* sent notice of the petition for vacatur to a respondent's attorney in New York, and that respondent moved to dismiss on the ground that Intercarbon's *method* of service was defective because "service was not carried out by a United States marshal in accordance with 9 U.S.C. § 12, or in any other manner as provided by Rule 4 of the Federal Rules of Civil Procedure." *Id*. at 66. In response, InterCarbon argued that service had been proper under Section 12 and that, in any event, the proper fallback provision regarding manner of service was Fed. R. Civ. P. 5 rather than Fed. R. Civ. P. 4.

The Court observed that insofar as 9 U.S.C. § 12 requires service by a United States marshal in any district where the respondent is found, service *by a United States marshal* may be "impossible" when it comes to foreign parties not located in any district. *Id*. at 67. Given that "Section 12 provides no *method of service* for foreign parties not resident in any district in the United States," the ***41** Court reasoned "that the proper fallback provision for service of process" was Fed. R. Civ. P. 4. Milberg's suggestion that the statutory "gap" discussed in *Intercarbon* concerns "timely service on foreign respondents" (Opp. Br. at 11) is wrong: there the question was only *how* to properly serve a respondent, not *when* to complete such service. [13]

Moreover, nothing in *Intercarbon* overturns the holdings of cases such as *Forsyth*, *Triomphe Partners* or, obviously, the subsequent *Anglim*, which hold that the three-month limitation period contained in 9 U.S.C. § 12 is "absolute," "strictly construed", *Anglim*, 2017 WL 543245, at *7, and has "no common law exception." *Florasynth*, 750 F.2d at 175; *Triomphe Partners*, 2011 WL 3586161, at *2.

ii. Milberg's Other Cases Are Inapposite

Like *Intercarbon*, the other cases Milberg cites do not set forth any "foreign respondent" exception to Section 12's three-month limitation.

***42** *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 2007 WL 1726565 (D.N.J. June 13, 2007) (cited in App. Br. at 20, 34, 38) focuses on method of service, not timeliness. There, the petitioner commenced a proceeding to vacate an arbitral award and for a declaration that Canada was the arbitration's "legal situs." *Canada Life*, 2007 WL 1726565, at *2 (D.N.J. June 13, 2007). The petitioner allegedly filed the action based on the respondent's attempt to reserve an argument that New Jersey was "the legal situs," which the petitioner argued could ultimately prevent it, due to the FAA's "*statute of*

limitations, 9 U.S.C. § 12, from seeking the same relief in this Court." *Id.* at *2 (emphasis added). The respondent moved to dismiss based on, among other things, inadequate service. The court held that F.R.C.P. "4(h) governs service of process on a foreign corporation," and consequently petitioner's attempted service by a U.S. Marshal on the respondent's law firm was deficient and it had to effect service under F.R.C.P. 4(h). *Id.* at *4, 9.

Milberg's reliance on *Possehl, Inc. v. Shanghai Hia Xing Shipping*, No. 00 Civ. 5157, 2001 WL 214234 (S.D.N.Y. Mar. 1, 2001) (cited in App. Br. at 33-34), in which the court denied a motion to vacate, is likewise baffling. The *Possehl* court *applied* Section 12's three-month limitation period. 2001 WL 214234, at *3 ("Possehl received the award on April 16, 2000. Therefore, Possehl had three months from April 16 to serve the petition on Shanghai, rendering the July 12, ***43** 2000, service timely."). The language Milberg cites concerning mail service on counsel (App. at 34) relates only to the manner of service, not Section 12's absolute three-month requirement.

Similarly, *Dalla-Longa v. Magnetar Capital LLC*, 2020 WL 4504901 (S.D.N.Y. 2020) (cited in App. Br. at 38-9) contains no support for Milberg's position. The *Dalla-Longa* court expressly acknowledged that Section 12's three-month limitation is "absolute" and "strictly construed," and dismissed the petition seeking vacatur of an arbitration award because the petitioner "failed to serve proper notice of the Petition within three months of the date the arbitration award was delivered." 20 WL 4504901, at *1, 4. The remainder of the decision focuses on manner of service: there, the petitioner sent an email to the respondent's counsel within three months of the award's delivery, but because the respondent had not consented in writing to service by email in the action and consent to service of notice of petitions to vacate arbitration awards by email cannot be implied by prior conduct in an underlying arbitration, 2020 WL 4504901, at *1, that was insufficient service.

Milberg latches onto dicta in which the *Dalla-Longa* court, in discussing manner of service, distinguished *InterCarbon* - which, as set forth above at 39-41, focused on manner of service rather than timeliness - because *InterCarbon* involved foreign parties not resident in the United States. (App. Br. at 39). That ***44** Milberg grasps at this straw only highlights the utter lack of case law supporting its position: none of the cases Milberg cites hold that any "foreign respondent" exception to Section 12's strict limitation period exists.

The other cases on which Milberg relies are non-binding ones from outside the Second Circuit, but even they do not hold that parties seeking vacatur in cases involving foreign respondents may escape the three-month limitation of Section 12. With respect to *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *rev'd*, 572 U.S. 25, 134 S. Ct. 1198, and *vacated*, 555 Fed. Appx. 2 (D.C. Cir. 2014), and *aff'd*, 555 Fed. Appx. 2 (D.C. Cir. 2014) (cited in the App. Br. at 35), Milberg zeroes in on a footnote containing dicta about that court's belief that Hague Convention service would be "virtually impossible" within three months. Milberg's reliance on this is misplaced because (i) it is dicta from another jurisdiction that does not trump the well-established case law in the Second Circuit holding that there are no exceptions to Section 12's three-month limitation period (nor even more recent case law from that jurisdiction); [14] and (ii) as set forth below at 51-52, Milberg had several options for carrying out timely service on HWB but failed to avail itself of any of them.

***45** *Power Electric Distribution, Inc. v. Hengdian Group Linix Motor Co.*, Civil No. 13-199, 2015 WL 880642 (D. Minn. Mar. 2, 2015) (cited in the App. Br. at 35-36) focuses entirely on manner of service, not timeliness; indeed, this case involves *confirmation* of an award and has nothing to do with 9 U.S.C. § 12. The case is further inapposite because, unlike the petitioner in *Power Electric*, Milberg has not asked to be excused from a defect in the manner of service: rather, it wants the Court to excuse it from a statute of limitations.

2. Milberg Failed to Serve Timely Notice of Its Motion to Vacate

a. *Milberg Did Not Effect Service Within Three Months*

Here, it is undisputed (and indisputable) that the AAA delivered the Award that Milberg seeks to vacate on February 5, 2019. (JA 139-179; App. Br. at 9). Under 9 U.S.C. § 12, Milberg's time to serve notice of its motion to vacate on HWB therefore expired exactly three months later, on May 5, 2019. [15]

But - and, again, this is undisputed - Milberg did not serve any such notice on any of the respondents by that date. As a matter of law, Milberg's failure to ***46** serve the required notice within the three-month statute of limitations period requires dismissal of the Proceeding. *See*, *e.g.*, *Vector*, 2020 WL 5371195, at *3 ("Here, the award was issued on March 17, 2020. It was sent, via email ... that same day. Thus, respondents had until June 17, 2020 to pursue vacatur. They did not. On a plain reading of the statute, then, respondents' motion must be denied as untimely.") (citations omitted); *Ward v. Ernst & Young U.S. LLP*, —— F. Supp. 3d ——, 2020 WL 3428162, at *7 ("to the extent that the plaintiff now seeks to vacate the March 4, 2019 Order, the plaintiff has failed to comply with the time limits imposed by the FAA on parties challenging arbitral rulings"); *Anglim*, 2017 WL 543245, at *7; 9 U.S.C. § 12.

b. *Milberg's May 6, 2019 Email To Counsel Did Not Satisfy Timeliness Requirement*

In its conclusion (App. Br. at 42), Milberg claims that HWB received "prompt notice through their attorney" of its challenge to the award. To the extent that Milberg intends to argue on reply (as it did before the District Court, Doc. 55 at 15-16; JA 10) that its email to HWB's counsel on the evening of May 6, 2019 (JA 183) asking whether they were "authorized to accept service" of Milberg's First Petition, complied with Section 12's three-month requirement, that argument fails for four reasons.

***47** First, the Court should disregard such an argument because Milberg omitted it from its initial brief. *See* *McBride v. BIC Consumer Prods. Mfg. Co., Inc.*, 583 F.3d 92, 96 (2d Cir. 2009).

Second, May 6, 2019 was more than three months after the February 5, 2019 delivery of the Award. Milberg argued to the District Court that Fed. R. Civ. P. 6(a)(1)(c) [16] extended its service deadline to May 6, 2019 because May 5, 2019 was a Sunday, but Fed. R. Civ. P. 6(a)(1) cannot extend a statute of limitations where the statute expresses a method of computing time. *See* *Joint Council Dining Car Emp. Local 370, Hotel & Rest. Emp. Int'l All. v. Delaware, L. & W.R. Co.*, 157 F.2d 417, 420 (2d Cir. 1946) ("Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action and to any statutes expressly applicable to such proceedings. It is not intended to modify and change existing statutes of limitation."). And courts have specifically refused to apply Fed. R. Civ. P. 6(a)(1) to extend the three-month limitation at issue here. *See* *Anglim*, 2017 WL 543245, at *7 ("Federal Rule of Civil Procedure 6(a)(1)(A) ... 'does not apply to [Section 12's] limitation period.' "); *Triomphe Partners*, 2011 WL 3586161, at *2 ***48** (declining to apply Rule 6(a)(1) to extend limitations period of Section 12 because "[t]he FAA provides other procedures for the calculation of time").

Third, even if Rule 6 had extended Milberg's deadline for service of notice until Monday, May 6, 2019, its email to HWB's counsel asking whether they were authorized to accept service was not proper service under 9 U.S.C. § 12. *See* *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1094 (2d Cir. 1990) ("service of process on an attorney not authorized to accept service for his client is ineffective"); (cited in Dismissal Order); *see generally* Fed. R. Civ. P. 4(e), (h) (setting forth methods of service).

D. Effecting Timely Service On Foreign Respondents Is Not "Impossible"

Milberg argues that "[t]he proceedings in this very case ... demonstrate that it would be essentially 'impossible' for a petitioner seeking vacatur, once an arbitration award is issued" to effect service on foreign respondents within three months. (App. Br. at 37). The "proceedings" to which Milberg refers appear to be the denial of its requests to HWB's counsel and, later, the District

Court (in the alternative) to deem service on HWB's counsel effective -- both of which requests were made *after* the three-month limitation period had already expired - and the District Court's order permitting Hague Convention service instead. (App. Br. at 36-37).

***49** Milberg's argument fails because, as set forth above, the three-month limitation period is absolute and, further, courts have expressly rejected arguments like Milberg's. *See*, *e.g.*, *Argentine Republic*, 637 F.3d at 367 (affirming dismissal of motion to vacate as untimely and rejecting petitioner's argument that "it would be impossible to complete service of notice within the three month period" under the Hague Convention); see above at 37-39. Indeed, Milberg does not identify a single case or other legal authority standing for the proposition that any of its excuses afforded the District Court a legal basis *not* to apply the statutory limitations period, which, as set forth above, is not subject to any "common law exception." *Triomphe Partners*, 2011 WL 3586161, at *2.

Further, Milberg's effort to use the Hague Convention as an excuse for its untimeliness overlooks that Milberg apparently did not even consider Hague Convention service until well *after* the three-month limitation period had expired. (JA 102-103) (letter from Milberg to District Court dated May 14, 2019, indicating that because HWB's counsel had advised they were not authorized to accept service, Milberg "may now resort to service under the Hague Convention which will take substantially longer").

And Milberg's reliance on the Hague Convention is misplaced for an additional reason: under Fed. R. Civ. P. 4(f)(3) and 4(h), petitioners can seek court orders permitting service by faster, alternate "means not prohibited by international ***50** agreement." Thus, a petitioner concerned that Hague Convention service may not be effected within the three-month statute of limitations is free to request a court order permitting service through appropriate alternate means that *can* be completed within that three-month period. But here, Milberg did not make such a request until *after* the three-month limitation period had run. (JA 102-103). Nor did Milberg contact HWB's counsel about accepting service until *after* the three-month limitation period had run. (JA 183).

Milberg's attempt to shift blame to HWB and the District Court also ignores the reality that petitioners have several options for effecting timely service on foreign respondents under Section 12, none of which Milberg pursued. [17]

***51** For example, where a party enters into an arbitration clause, it could at the same time contract for a speedy, alternative method of service of process, such as service on a domestically located agent. Or a petitioner seeking to vacate an arbitration award might request - well *before* the three-month statutory period has run - that the Court permit it to employ an appropriate alternative method of service under Fed. R. Civ. P. 4(f)(3) and 4(h), as set forth above. Or a petitioner seeking to vacate an arbitration award might ask the respondents' counsel - well *before* the three-month statutory period has run - to accept service on behalf of their clients. Or a petitioner seeking to vacate an arbitration award might commence service of notice under the Hague Convention early enough to complete it within the required timeframe, rather than after the three-month statutory period has already expired.

Milberg did none of these things. Instead, it waited until May 6, 2019 - *after* the expiration of the three-month limitation period - to commence the Proceeding and to send an email to HWB's counsel asking whether they were authorized to accept service. And it waited until May 14, 2019 to ask the District Court to permit an alternate means of service under Rule 4(f)(3). (JA 102-103). Milberg proffers no authority suggesting that such a circumstance enabled the District Court to ***52** disregard the three-month statutory limitation period set forth in 9 U.S.C. § 12, and HWB is not aware of any, either.

CONCLUSION

For all of the foregoing reasons, Respondents-Appellees respectfully request that the Court affirm the District Court's with-prejudice dismissal of the Proceeding.

Dated: New York, New York

October 27, 2020

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Footnotes

1 Milberg's brief in support of its appeal, dated September 22, 2020 (the "App. Br."), includes a lengthy and self-serving description of events preceding the underlying arbitration as well as of the arbitration award itself. HWB does not address this here, however, because it is irrelevant to the pending appeal.

2 Notwithstanding the foregoing, Milberg emphasizes in its brief that HWB "did not respond or object" to Milberg's May 14, 2019 request to the District Court (App. Br. at 11) even though as of that date HWB had neither appeared in the Proceeding nor received proper service of Milberg's pleadings.

3 "Doc." or "Docs." refers to the electronic case filing numbers in the Proceeding below.

4 Thus, Milberg's observation that HWB "had not raised lack of diversity of citizenship in its pre-motion letter, and did not claim that any Milberg partners were not citizens of a U.S. state" (App. Br. at 12) is meaningless: HWB's pre-motion letter pre-dated Milberg's Third Petition, which contains the allegation at issue here. At the time that HWB filed its pre-motion letter, the operative pleading was the Second Petition, which alleged that Milberg had only one partner, who was a citizen of New York State.

5 Mr. Spencer did not provide any specific date in May but rather referred to "[w]hen the present vacatur proceeding was commenced." (JA 186 ¶4).

6 There are two exceptions to this rule, neither of which applies here: a plaintiff may "cure a jurisdictionally defective complaint by establishing *ex post* the original existence of the required jurisdictional facts," and courts may "dismiss jurisdictional spoilers, *nunc pro tunc*, pursuant to Fed. R. Civ. P. 21." *Jennison*, 2011 WL 6293061, at *3 (internal quotation marks omitted).

7 "In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State....United States citizens who are domiciled abroad are neither citizens of any state of the United States nor citizens or subjects of a foreign state, and § 1332(a) does not provide that the courts have jurisdiction over a suit to which such persons are parties." *Jennison*, 2011 WL 6293061, at *1 (citations and internal quotation marks omitted).

8 To the extent that Milberg is requesting leave to amend " 'on appeal' " (App. Br. at 27), the Court should deny that request for the same reasons set forth above.

9 Milberg also relies on two cases from outside this jurisdiction (App. Br. at 29), which the Court should disregard given that they conflict with prevailing law in the Second Circuit. In addition, they are premised on facts wildly different from this case. *See* *Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1155 (9th Cir. 2016) (FINRA arbitrator "lied about being a licensed attorney"); *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1157 (10th Cir. 2007) (petitioner learned two months after receiving arbitration award that at the conclusion of the hearing, boxes containing exhibits and audiotapes of the hearing had been lost; the court declined to apply equitable tolling).

10 Although from outside the Second Circuit, this and the other cases cited on pages 38 and 39 concern the very issue confronting this Court and are thus instructive. *Cf. N.Y. Times Co. v. Cent. Intelligence Agency*, 314 F. Supp. 3d 519, 528 (S.D.N.Y. 2018) (referring to cases that "though not binding on this Court, are instructive"). Further, these cases are in line with the well-settled precedent within this jurisdiction holding that 9 U.S.C. § 12's three-month limitation is unequivocal and without common law exception.

11 Milberg paints *Argentine Republic v. Nat'l Grid PLC* as a sort of outlier in a sea of cases declining to grant motions to dismiss based on failure to comply with the three-month limitation period in 9 U.S.C. § 12. (App. Br. at 39). In reality, however, Milberg does not identify even one case holding that petitioners seeking vacatur of arbitration awards are excused from the three-month limitation period in cases involving foreign respondents. Nor does Milberg identify even one case from within the Second Circuit that extends or exempts a petitioner from Section 12's three-month limitation period under any circumstance.

12 Milberg's swipe at HWB for purportedly "not mention[ing] the *Intercarbon* line of cases ... which Milberg had fully aired in its pre-motion letter" (App. Br. at 13) -- is utterly unjustified: HWB *already* addressed these cases back in its pre-motion letter filed on September 13, 2019 (Doc. 20; JA 6), and HWB expressly explained in its initial brief (Doc. 48-1 at 14, n.5; JA 9): "To the extent that Milberg, in its opposition to this motion, cites the same cases set forth in its letter of September 20, 2019 (Doc. 21) - all of which Respondents distinguished in their September 13, 2019 letter - Respondents will address those on reply."

13 The full text of 9 U.S.C. § 12 is: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award."

14 Interestingly, Milberg ignores a more recent case from that jurisdiction, *Ballantine*, 2020 WL 4597159, which, as discussed above at 38, enforces Section 12's strict three-month limitation period in the face of an argument that service on a foreign respondent within that time period would be impossible.

15 In what appears to be an acknowledgment - but not approval -- of an argument Milberg made in the District Court that Fed. R. Civ. P. 6(a)(1) extended Section 12's three-month deadline to serve notice of the motion to vacate from Sunday, May 5, 2019 to Monday, May 6, 2019, the District Court stated in the Dismissal Order that the limitation period "expired, *at the latest*, on May 6, 2019". (JA 196) (emphasis added). The expiration date was May 5, 2019, because Fed. R. Civ. P. 6(a)(1) does not apply to the Section 12 limitation period for the reasons set forth below at 47-48.

16 Fed. R. Civ. P. 6(a)(1)(c) provides: "The following rules apply in computing any time period specified in these rules, in any local or court order, or in any statute that does not specify a method of computing time...(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday."

17 As set forth above, the Second Circuit *does not* permit equitable tolling of Section 12's three month limitation period, which it instead treats as absolute. Even if the law allowed such tolling, however, affirmance would still be required because Milberg has not demonstrated any equitable reason for it. *See Jenkins v. Greene*, 630 F.3d 298, 302 (2d Cir. 2010)

(in habeas corpus case, holding that a "litigant seeking equitable tolling must show both that he 'diligently' pursued his rights and that 'some extraordinary circumstance ... prevented timely filing."); *Ballantine*, 2020 WL 4597159, at *5 (even if equitable tolling had been available under the law, it would not have been justified where petitioners "moved to vacate on the last day of the service window, failed to request summonses until after the deadline, and did not even try to complete FSIA service by requesting foreign mailing until about a month later"). Indeed, the District Court noted in the Dismissal Order that even if it had had the power to equitably toll the limitation period - which it held it did not - it would have declined to do so. (JA 197 n.4). Given that Milberg simply waited for the three-month limitation period to expire before it even began to request alternative means of service and extensions, it would have had no basis to argue that the District Court abused its discretion in denying tolling even if the District Court had had the power to grant such tolling (which it did not have, as a matter of law). *See Jenkins*, 630 F.3d at 302 ("[i]f the district court declined to toll in the exercise of its discretion, we apply an abuse of discretion standard.").

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