2020 WL 5709124 (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.
September 22, 2020.

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

Brief for Petitioner-Appellant

William F. Dahill, Dunnington, Bartholow & Miller LLP, 230 Park Avenue, 21st Floor, New York, New York 10169, (212) 682-8811, for petitioner-appellant.

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*1 JURISDICTIONAL STATEMENT

Petitioner-Appellant Milberg LLP ("Milberg") invoked diversity subject-matter jurisdiction under 28 U.S.C. § 1332(a)(2) because the amount in controversy exceeds $75,000 and the action is between citizens of a U.S. state and citizens or subjects of a foreign state. Second Amended Petition ("Petition") ¶ 17, Joint Appendix ("JA")-116. Milberg had two partners when the action was commenced, a citizen of New York and a citizen of Washington. Declaration of Michael C. Spencer ("Spencer Dec."), JA-139. The 12 respondents were entities and individuals that were citizens of Luxembourg or Germany ("HWB Investors"). Petition, ¶¶ 4-15, JA-117-119.

The district court granted HWB Investors' motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim by order dated July 8, 2020. Order, JA-189, *reported at Milberg LLP v. HWB Alexandra Strategies Portfolio*, No. 19-CV-4058, 2020 WL 3833829 (S.D.N.Y. July 8, 2020). A final judgment dismissing the action was entered the same day. JA-199. Milberg's notice of appeal was filed on July 30, 2020, JA-200, so this Court has jurisdiction under 28 U.S.C. §§ 1291 & 2107 and Fed. R. App. P. Rule 4. This appeal is from a final order and judgment that disposed of all parties' claims.

*2 STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding, on a motion to dismiss, that petitioner had not sufficiently pled diversity of citizenship with respect to itself (respondents were all foreign citizens) by alleging that the petitioner law firm's partners were citizens of U.S. states "at all relevant times," supported by a declaration by a long-time former partner and current of-counsel specifying each partner's name and state of citizenship at the time the proceeding was commenced? If that record was insufficient, did the district court err in not giving petitioner the opportunity to submit first-person declarations by the two partners?

2. Did the district court err in dismissing this Federal Arbitration Act ("FAA") vacatur proceeding for untimely service, by failing to take account of the seminal *InterCarbon* decision [1] and its numerous progeny, which have uniformly denied dismissal motions by foreign respondents because the service provisions in FAA § 12 (first enacted in 1925) do not address service on respondents outside the U.S., and Hague Convention service invariably takes longer than the three months allowed by § 12?

*3 STATEMENT OF THE CASE

This is an appeal from the district court's dismissal with prejudice of Milberg's action seeking vacatur of an arbitration decision (the "Award", JA-34) denying Milberg any *quantum meruit* fees from HWB Investors, Milberg's largest client group in the Argentine bond cases, beyond the fixed "start-up" fees the clients had paid early in the litigations.

A. Background of litigation by holders of defaulted Argentine bonds

Milberg is a New York law firm. It represented several hundred bondholder clients in the epic litigation, handled by Judge Thomas P. Griesa over the better part of two decades, seeking recovery on sovereign bonds issued by Argentina. Argentina defaulted on its foreign debt in late 2001 and its bonds remained unpaid thereafter. *See* Petition ¶¶ 19, 21, JA-120-121. In 2005 and 2010, many holders accepted settlements with Argentina for about 30 cents on the dollar. The "holdouts" - both individuals and fund investors - continued to prosecute their collection actions in the Southern District of New York in the hope of getting better recoveries, but were stymied when Argentina refused to pay the judgments entered against it and evaded judgment enforcement efforts. *Id*. ¶ 29, A-123.

*4 B. HWB Investors (based in Luxembourg and Germany) retain the Milberg, Rosito Vago, and Dreier law firms in 2007-2013 to bring seven SDNY bond recovery actions, with fees defined on a hybrid fixed / contingency basis

The HWB Investors are ten retirement funds and two individuals from Luxembourg and Germany. Those investors aggressively bought the bonds on the secondary market after default. Through their principal, H. Wilhelm (Willi) Brand, HWB Investors began retaining Estudio Rosito Vago, a Buenos Aires law firm, in 2007, to prosecute bond enforcement cases, after Rosito Vago had established a good record representing other bondholders. Rosito Vago originally had brought in Dreier LLP as counsel of record for the New York cases. In 2009, Dreier failed after a scandal, and Milberg substituted in with clients' consent, and continued litigating for new clients and cases as well. *Id*. ¶¶ 1, 23, A-116-117, 121-122.

Eventually, as Mr. Brand's funds acquired more bonds, they entered into 28 retainer agreements, seeking recoveries on some $90 million face amount of bonds. Seven S.D.N.Y. actions were filed for them in 2007-2013. The Brand group of funds ended up being the largest single client group for Milberg / Rosito Vago in the Argentine bond cases. *Id*. ¶¶ 16, 23, A-119, 121-122.

The retainers all had "hybrid" fixed / contingency fee provisions: fixed "startup" fees keyed to case milestones (retention, filing the complaint, obtaining money judgment) initially, and percentage-based contingency fees based on any recovery *5 or settlement ultimately obtained. The expenses of prosecuting the cases were borne by counsel and would not be added to any percentage fees paid by clients. *See* Petition ¶¶ 19, 25, JA-120, 122.

HWB Investors paid a total of $513,245 as start-up fees under the terms of their 28 retainer agreements over the period 2007-2012, representing about 0.0056 (a little over one-half percent) of the total face amount of their bonds. *Id*. ¶¶ 25-26, JA-122-123.

The contingency fees were keyed to settlement or recovery on the bonds in litigation. Because it was known from the outset that Argentina was resisting payment of judgments against it, the end game (if there was one) was uncertain and risky. As it turned out, years of post-judgment litigation was required, and ultimately the contingency fees owed by HWB Investors would have amounted to about 7.34% of the total settlement amounts offered to, and ultimately accepted by, them. *Id*. ¶ 27 & n.18, JA-123.

C. HWB Investors benefit from the legal services provided after the start-up fee case milestones had passed, including entry of the *pari passu* injunctions for them in October 2015, which ultimately enable them to qualify for higher recoveries under the government's *Propuesta* settlement offer announced in February 2016 (totaling $162.5 million for HWB Investors)

Milberg started the cases and defended against Argentina's dismissal motions in the actions it filed for the HWB Investors, and then obtained money judgments ***6** for them over several years, which Argentina fought and later ignored. After years of frustration, four large hedge funds, joined by Milberg, brought test cases and obtained *pari passu* injunctions, which were affirmed by this Court and *cert* was denied in 2014. Based on the test case results, Milberg then obtained injunctions for its clients, including HWB Investors, in October 2015. *Id*. ¶¶ 19, 28, 30-31, JA-120, 123, 124.

In early 2016, after a new administration took over in Argentina, the government made its *Propuesta* settlement offer to bondholders, which provided a "basic" recovery formula for bondholders generally and an "injunction" formula with enhanced consideration for those who had obtained *pari passu* injunctions in litigation. At that point, Argentina persuaded Judge Griesa to vacate the *pari passu* injunctions as no longer warranted or necessary, which was affirmed by this Court. Most remaining bondholders then accepted *Propuesta* settlements in the following months, and the Milberg clients paid their contingency fees virtually without exception or complaint.[2] *Id*. ¶ 32, JA-124. The total *Propuesta* settlement offer amount on HWB Investors' bonds was about $162.5 million. If Milberg had not ***7** obtained *pari passu* injunctions for HWB Investors, their *Propuesta* recovery offer would have been over $24 million lower. *Id*. ¶ 35, JA-125.

D. Shortly after the *Propuesta* is announced, HWB Investors ask Milberg about the amount of contingency fees they would owe ($11.9 million), then quickly discharge Milberg and Rosito Vago; a year later, using another law firm, they settle with Argentina on the same terms except $155,000 less, and refuse to pay any contingency fees to Milberg

In April 2016, HWB Investors inquired and were told by Milberg what their contingency fees would be if they accepted the *Propuesta* settlements ($11.91 million - *i.e.*, about 7.3% of the *Propuesta* settlement amount). *Id*. ¶ 19, JA-120.

Two weeks later, HWB Investors discharged Milberg, citing "early termination" provisions in the engagement agreements (which the arbitrators later found to be inapplicable). *Id*. ¶¶ 19, 34, JA-120, 125.

In April 2017, using a new law firm (Wilk Auslander), HWB Investors tried to execute on the judgments obtained for them by Milberg by attaching two Argentine military helicopter engines being repaired in Ohio; that effort immediately failed in court because assets "of a military character" are explicitly immune from execution under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b). Award ¶ 54, JA-55.

In May 2017, using the same new firm, HWB Investors announced they were settling with Argentina for $162.75 million. In October 2017, the settlement closed ***8** for $162.35 million - on the exact same settlement terms that had been achieved prior to HWB Investors' discharge of Milberg, except the new amount was some $155,000 less. Petition ¶¶ 35, 37, JA-125-126. HWB

Investors paid over $1.5 million in fees to their new law firm. Award ¶ 53, JA-55. They said they would not pay any contingency or other fees to Milberg. Petition. ¶ 36, JA-126.

E. Milberg commences an AAA/ICDR arbitration seeking *quantum meruit* fees; on February 5, 2019, the three arbitrators issue a 34-page decision that rejects all of the defenses raised by HWB Investors, but in the final two pages the arbitrators decline to award any fees beyond the start-up fees already paid, despite acknowledging Milberg's time spent and value provided long after the start-up fee milestones had been passed

All the HWB Investors' retainers contained provisions stating: "Any dispute relating to this engagement shall be governed by New York law and shall be resolved through binding arbitration before the American Arbitration Association in New York City." Final Arbitration Award ¶ 5, JA-40.

Milberg commenced an AAA arbitration under International Center for Dispute Resolution rules in August 2017 in New York, seeking fees in *quantum meruit*. Wilk Auslander represented the HWB Investors, who asked for a reasoned decision. Petition ¶ 38, A-126. A hearing was held in August 2018, with Mr. Brand appearing in person to testify for HWB Investors. *Id*. ¶ 42, JA-128. On February 4, 2019, the three panel members signed the Final Award (JA-34 at 67-72), which ***9** rejected all defenses raised by HWB Investors (¶¶ 62-72), and considered the *quantum meruit* factors favorably to Milberg (¶¶ 73-81), but then declined to award any fees to Milberg (¶¶ 82-83), despite acknowledging that Milberg's extensive litigation efforts resulted in the settlement offers to HWB Investors. *See* Petition ¶ 43, JA-43. The panel did not articulate any reason other than stating, without further explanation, that the start-up fees, paid years earlier and unrelated to Milberg's crucial *pari passu* injunction and settlement work, "represent a reasonable total fee recovery." Award ¶ 82, JA-63.

The AAA New York office delivered the panel decision to outside counsel for Milberg and outside counsel for HWB Investors by email on Tuesday, February 5, 2019. *See* Declaration, of Julie Cilia ("Celia Dec.") Ex. 4 (email from AAA/ICDR delivering the Award), JA- 140; *see also* JA-180-181 (letter).

F. Milberg files its petition and motion papers seeking to vacate the arbitration award and emails them to HWB Investors' attorney on Monday, May 6, 2019, then serves them in Germany and Luxembourg under the Hague Convention as ordered by the district court; HWB Investors move to dismiss, asserting lack of diversity of citizenship and untimely service

FAA § 12 provides that a notice of motion to vacate an arbitration award "must be served upon the adverse party on his attorney within three months after the award is filed or delivered." On Monday, May 6, Milberg commenced the vacatur ***10** proceedings by filing its petition and notice of motion for vacatur, and requested issuance of summonses for service. *See* ECF 1-6 (docket entries), JA-4.

On the same day, Milberg's outside counsel sent an email to HWB Investors' counsel from the arbitration, Wilk Auslander, attaching the papers that had been filed and asking whether they were authorized to accept service. Cilia Dec. Ex. 4, JA-183-84. Wilk Auslander waited one week to respond. *Id.*, Ex. 5, JA-183.

Milberg's motion sought vacatur of the zero-fee award, and remand with instructions to the panel to compute a fee consistent with the principles of *quantum meruit* and considering the contingency nature of the engagement and the facts surrounding HWB Investors' discharge of Milberg. Motion, JA-28; *see also* Petition ¶¶ 17, 51-end, JA-119, 132.

The original petition included diversity jurisdiction allegations. ¶ 4, JA-13. On May 7, the district court *sua sponte* required Milberg to make more specific allegations as to the "entire citizenship" of Milberg and the "individual citizenship of each Respondent separately." JA-100. Milberg did so in an amended petition on May 9. ¶¶ 1-15, JA-83.

Later on May 9, the district court entered an order requiring, among other things, that Milberg seek vacatur by way of a summary judgment motion, and that by May 16, Milberg "shall serve a copy of the amended petition and this order upon ***11** Respondents by personal service on an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service pursuant to N.Y.C.P.L.R. § 311." JA-100-101.

On May 13, Wilk Auslander advised by email that it was not authorized to accept service for HWB Investors. *See* Cilia Dec. Ex. 5, JA-183.

On May 14, Milberg by its outside counsel made a letter motion for more time for service because of the foreign status of HWB Investors, or alternatively for an order that service on HWB Investors' outside counsel, Wilk Auslander, be deemed sufficient. JA-102-104. HWB Investors did not respond or object. On May 15, the district court denied "at this stage" Milberg's request to deem service on Wilk Auslander sufficient; and granted more time for service, telling Milberg to "file a proposed order that - allowing ample time for each Respondent to be served pursuant to the Hague Convention - suggests dates for the briefing schedule on Petitioner's motion for summary judgment and for service." JA-107 (endorsement). Milberg filed a proposed order, JA-108-109, and on May 20 the court set a November 1 deadline for service of the petition and other listed papers. JA-110. In a letter to the court on May 21, Milberg asked for reconsideration of the district court's order so as to require service only of the documents specified by the Hague Convention, citing the extensive translations that would be required for further documents. JA- ***12** 111-112. In an order on May 22, the court amended the procedure so as not to require Hague Convention service of papers other than the notice of motion, petition, and summons, and re-set the service deadline to October 1. JA-113-114. Milberg arranged for service accordingly, and filed numerous translated certificates of service in September. ECF 22-31, 33 (docket entries), JA-6-8. Wilk Auslander then appeared for HWB Investors. ECF 39-41, 57-60 (docket entries), JA-8, 10.

In the meantime, in mid-September 2019, as the international service was being completed, HWB Investors' counsel sent a pre-motion letter to the court, contending for the first time that Milberg's petition was untimely and that the Milberg firm was "a legal nullity." *Id.*, ECF 20-21, JA-6. By order dated September 27, the court permitted Milberg to amend its petition to correct its initial allegation that Milberg had only one partner (the basis for the "nullity" assertion). JA-115. Milberg amended, stating that Milberg had two or more partners, and "[a]t all relevant times to this Petition, all of Petitioner's partners are, or were, citizens of a state of the United States."[3] Second Amended Petition ¶ 1, JA-116-117. HWB Investors 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.

***13** HWB Investors filed a motion to dismiss on November 8, 2019, under Fed. R. Civ. P. Rules 12(b)(1) & 12(b)(6). JA-135. They claimed the court did not have subject-matter jurisdiction due to lack of diversity of citizenship, contending that Milberg's pleading did not allege with sufficient particularity that its partners were citizens of U.S. states and hence diverse from the foreign HWB Investors; but they did not contend that any of the Milberg partners were not in fact citizens of a U.S. state. They also claimed that service of the notice of motion to vacate the arbitration award had not occurred "within three months" of the delivery of the arbitration award and thus service was untimely under FAA § 12. Their untimeliness argument cited cases saying the three-month limitation period was "absolute" and "strictly construed," but did not mention the *InterCarbon* line of cases on the timing and manner of service on foreign respondents, which Milberg had fully aired in its pre-motion letter. *See* ECF 48-1 (HWB Investors' Memorandum of Law, filed with JA-135, Notice of Motion).

In opposition, Milberg supported its diversity allegation by submitting a declaration from its of counsel, Michael Spencer, further describing its two partners by name and state of citizenship at the time the vacatur proceeding was commenced, JA-185, and argued that dismissal was unwarranted under the reasoning of *InterCarbon* and its progeny. ECF 55, JA-10.

***14 G. The district court dismisses the action with prejudice, holding that Milberg did not establish its partners were citizens of U.S. states, and that service of the notice of motion to vacate the award was untimely**

The district court granted the motion to dismiss by Order dated July 8, 2020. JA-189.

On diversity of citizenship, it noted that the citizenship of Milberg, as an LLP, was determined by the citizenship of its partners, and held that the petition's allegation that "At all times relevant to this Petition, all of Petitioner's partners are, or were, citizens of a state of the United States" was defective on its face because it did not specify whether all partners were citizens of a state of the United States "*at the commencement of the action*." Order at 5 (emphasis in original), JA-193. It noted that Milberg also submitted a declaration of its Of Counsel stating "[w]hen the present vacatur proceeding was commenced in May 2019, Milberg LLP had two partners: Ariana Tadler, a citizen of New York, and Glenn Phillips, a citizen of Washington." *Id*. at 6, JA-194. The district court accepted HWB Investors' assertion that the declaration did not state it was made on personal knowledge, including regarding "each partner's physical presence in a state and an intent to make the state a home." *Id*. The district court concluded Milberg had not carried its burden of establishing diversity jurisdiction. *Id*. at 7, JA-195.

***15** On timeliness of service, the district court relied on S.D.N.Y caselaw involving service on domestic respondents and stating that the three-month service period is "absolute" and "strictly construed"; a Second Circuit case stating that service of process on an attorney not authorized to accept it is ineffective; and another Southern District case stating there is no equitable tolling under FAA § 12. *Id*. at 8-9, JA-196-97. None of the cases cited by the district court involved foreign respondents. In a footnote, the district court said it "assum[ed]" that "the original petition's filing on May 6, 2019 was timely because May 5, 2019 was a Sunday," citing Fed. R. Civ. P. Rule 6(a)(1)(c) (when period ends on a weekend, the period continues to run until the end of the next weekday), and a contrary decision, Order at 8 n.3, JA-196 -- but the court's focus on "filing" seems misplaced, because FAA § 12' s "within three months" provision applies to service, not filing.

The district court denied leave to amend as futile (it is unclear whether that was meant to apply to pleading diversity jurisdiction as well as timeliness of service) and dismissed with prejudice. Order at 9, JA-197.

A final judgment of dismissal was entered on the same day as the Order, July 8, 2020. JA-199. The notice of appeal was filed on July 30, 2020. JA-200.

***16 SUMMARY OF ARGUMENT**

Diversity Jurisdiction

Milberg's vacatur petition pleads that the partners of Milberg were citizens of a state of the United States at all relevant times, and HWB Investors were funds and individuals from Luxembourg and Germany, thus establishing diversity jurisdiction under 28 U.S.C. § 1332(a)(2). Petition ¶¶ 1, 3-15, A-116-119.

The district court held that the phrase "at all relevant times" did not sufficiently specify "at the time of commencement of the action," which is the relevant time for diversity jurisdiction purposes. On the motion to dismiss, Milberg also had submitted a supporting declaration of Michael Spencer, of counsel to the firm, stating "When the present vacatur proceeding was commenced in May 2019, Milberg LLP had two partners: Ariana Tadler, a citizen of New York, and Glenn Phillips, a citizen of Washington." The district court did not accept the declaration on the ground that it did "not indicate whether the statements regarding the citizenship of Petitioner'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 [citation omitted] - were made on the basis of Spencer's personal knowledge." The Spencer declaration stated ***17** that he had been the Milberg lawyer principally responsible for the bond litigation since inception in 2009, and:

I joined Milberg in 1986 and became a partner that year. I was part of firm management for many years. At the end of 2014, I left the partnership but continued to work on cases in my present position as Of Counsel. I remained close with the other senior lawyers at the firm and was generally familiar with the firm's structure.

Milberg submits that its allegation and supporting evidence were sufficient under any reasonable application of the requirements for pleading diversity jurisdiction. The plain language of the allegation states that Milberg had solely U.S. partners when the action was filed, and that HWB Investors were all foreign. Moreover, there is no requirement that a "first person" declaration from one or more of the partners themselves was required to establish diversity in the context of a Rule 12(b)(1) motion under the circumstances here. If better evidence was required, at least the district court should have allowed a pleading amendment or supplemental declarations to confirm that the Milberg partners were citizens of a U.S. state when the proceeding was commenced.

HWB Investors never actually contended otherwise. There was no evidence, or even aspersion, that complete diversity was lacking.

***18 Timeliness of Service**

FAA § 12 provides that service of a notice of motion for vacatur must be made within three months after the adverse arbitration award is filed or delivered. Two sentences follow: one describing service on a respondent who is a resident of the judicial district where the arbitration award was issued, one describing service in other judicial districts. The statute is silent about service on foreign respondents - probably because arbitrations with foreign parties were not foreseen when the FAA (including this section) was originally enacted in 1925 and codified in 1947. That is a statutory gap with respect to serving foreign respondents.

The foreign respondent problem first received concerted attention in 1993 from Judge Mary Johnson Lowe of the Southern District (d. 1999). In her *InterCarbon* decision, she noted that FAA § 12 provided "no method of service for foreign parties not resident in any district of the United States," raising the problem that "foreign parties will not necessarily be found in *any* district. Requiring parties to satisfy Section 12 might amount to requiring them to do the impossible." 146 F.R.D. at 67 (emphasis in original). She noted in a footnote to the last sentence that § 12 was an "anachronism" "because it cannot account for the internationalization of arbitration law subsequent to its enactment." *Id*. at 67 n.3. "In these circumstances, Section 12 cannot be taken as the proper standard for service of process. Recourse ***19** must be had to the Federal Rules of Civil Procedure." *Id*. at 67. The "proper fallback provision for service of process is Fed.R.Civ.P. 4," in particular what is now Fed. R. Civ. P. Rule 4(f), governing "service to be effected upon [a] party in a foreign country." *Id*. at 68 (brackets in original).

However, in *InterCarbon*, the petitioner's attorney served the respondent's attorney by regular mail, which was not sufficient under any Rule 4 provision. *Id*. at 67-68. Nevertheless, Judge Lowe held that the defective service did not justify dismissal of the proceeding. She articulated several reasons for that conclusion. First, in cases involving foreign respondents, petitioner's compliance with FAA § 12 might be impossible. *Id*. at 67. Second, defects in service of process may be "excused where considerations of fairness so require, at least in cases that arise pursuant to arbitration proceedings." *Id*. at 68. Third, jurisdiction over the arbitration was clear in light of the parties' agreement to arbitrate in New York. *Id*. at 71. Fourth, notice was provided "sufficient to apprise the opposing party of the action being taken." *Id*. Fifth, respondent "suffered no significant prejudice" from InterCarbon's failure to make proper service - in particular, even though the petition "was not served properly within the three months," respondent had failed to connect the improper service "with any delay or lack of notice." *Id*. As a result, "fairness requires rejection ***20** of [respondent's] attempt to use defective service of process to avoid a full review in this case." *Id*. at 72.

Many later decisions have relied on *InterCarbon* in denying dismissal motions even though the petitioner did not make proper service of vacatur papers under FAA § 12 (and similarly for petitions for confirmation under § 9, which has the same operative service language) - in cases where the respondents were foreign. Those decisions are described in the Argument section below. As Hague Convention service on foreign parties has become the prevalent standard, decisions applying *InterCarbon* have also

recognized that Hague Convention service cannot be completed within three months, so the flexibility envisioned in *InterCarbon* is even more justified. The *Canada Life v. Converium* (D.N.J. 2007) and *Republic of Argentina v. BG Group* (D.D.C. 2010) decisions, discussed below, provide the clearest recent discussions with respect to timeliness of service.

In the present case, the district court's dismissal order did not mention the challenges of making timely foreign service and did not cite or discuss *InterCarbon* and its progeny. The district court relied only on cases strictly construing the three-month requirement for service on *domestic* respondents (Order at 9, JA-197), which are clearly different situations. The steps taken by Milberg here - notice to HWB Investors' counsel on May 6, and subsequent Hague Convention service in ***21** accordance with the district court's orders for service - satisfied all the *InterCarbon* criteria for precluding dismissal. Although *InterCarbon* is not binding on this Court, it provides a sound consensus basis for concluding dismissal was not warranted here.

ARGUMENT

A. This Court provides *de novo* review of the district court's order of dismissal

Dismissals under Fed. R. Civ. P. Rules 12(b)(1) and (6) are reviewed *de novo* on appeal, and the pleading's allegations are accepted as true if they are plausible. *Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72, 78 (2d Cir. 2015). The *de novo* standard applies to appellate review of a district court's decision on a motion to vacate an FAA arbitration award. *Webster v. Kearney Inc.*, 507 F.3d 568, 571 (7th Cir. 2007).

B. The district court erred in dismissing for lack of diversity jurisdiction, since Milberg pleaded that its partners were citizens of a state of the United States at all relevant times, which includes the time when the proceeding was commenced; and its supporting declaration competently further particularized that allegation

For its vacatur petition and motion, Milberg invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(a)(2), on the basis that, at the time the proceeding was commenced, Milberg's partners were citizens of states of the United ***22** States and HWB Investors were citizens of Germany or Luxembourg. The petition alleges:

> Petitioner is a New York limited liability partnership with two or more partners. At all times relevant to this Petition, all of Petitioner's partners are, or were, citizens of a state of the United States.

Petition ¶ 1 (allegations of the foreign citizenship of each Respondent follow), JA-116-119. The wording about Milberg's status was intended to show diversity, and also to allege that Milberg had at least two partners at all relevant times, in view of HWB Investors' contention in its pre-motion letter that an LLP with only one partner was a "nullity" and could not be a proper plaintiff (at any time).

Milberg LLP had been a large firm with dozens of partners for many years, throughout its appearance in the Argentine bond litigation starting in 2009, as well as when the arbitration with HWB Investors was commenced in August 2017. In January 2018 many of its partners organized a new firm (Milberg Tadler Phillips Grossman LLP), and only a few cases, including the bond cases and the arbitration, remained with Milberg LLP, which was reduced to only two partners. *See* Spencer Dec. ¶ 4, JA-186. When the vacatur proceeding was commenced by Milberg LLP in May 2019, the two partners of Milberg LLP were Ariana Tadler, a citizen of New York, and Glenn Phillips, a citizen of Washington. *Id*. (In June 2019, Ms. Tadler departed and another U.S. citizen became the second Milberg LLP partner. *Id*.)

***23** Milberg submits that its petition alleged, and its of counsel's declaration provided competent support for, the facts that the two partners of Milberg at the time the vacatur proceeding was commenced were citizens of New York and Washington - in the United States. It was uncontroverted that all HWB Investors were foreign citizens or subjects. That made for complete diversity between petitioners and respondents (regardless of which states were the domiciles of the Milberg partners). HWB Investors and its counsel never actually made any claim to the contrary - they had focused on their one-partner "nullity" contention, which they then did not pursue in their motion to dismiss. Their motion to dismiss did not suggest that any Milberg partner was not a citizen of a state of the United States.

As noted above, the operative petition's allegation is: "At all times relevant to this Petition, all of Petitioner's partners are, or were, citizens of a state of the United States." Milberg used both tenses because the partnership membership changed over time; but the allegation stated at *all* relevant times. The second amended petition included reference to partners' citizenship in the past tense ("were") (as well as the present tense) because on the date the second amended petition was filed, the relevant citizenship was as to partners as of the time the proceeding was commenced several months earlier, and there was a partnership change over that period. The allegation cannot plausibly be construed to leave open the possibility that Milberg ***24** had or took on a non-U.S.-citizen partner, or that a Milberg partner lost U.S. citizenship, during the relevant period, including as of the time when the action was commenced. The Spencer Declaration further confirmed the two partners' names and specific state citizenships at the time the vacatur proceeding was commenced.

The district court's suggestion that the pleading and declaration required the court to draw undue "inferences" to ascertain the partners' citizenships, or that complexities of the definition of domicile ("each partner's physical presence in a state and an intent to make the state a home," Order at 5 n.2, 6, JA-193-194) might negate diversity, are not reasonable concerns. Given that the HWB Investors were all foreign, the only issue was whether the Milberg partners were all citizens of U.S. states, which was never challenged (nor could it have been, in good faith). There are no case precedents requiring that a pleading of diversity must address or exclude every possible way that state citizenship might be called into question for any given person, particularly where (as here) the party attacking diversity has not presented any factual basis for doubting that diversity exists. Nor is there any precedent for failing to infer that "at all times relevant to this Petition," averred in an allegation of diversity jurisdiction, includes "at the commencement of the action." There is no other reasonable interpretation of the language.

***25** The district court recognized the rule that jurisdictional allegations in a pleading may be supplemented by affidavit or otherwise. Order at 6, JA-194. But the district court excluded consideration of the Spencer Declaration on the ground that it was assertedly "not based on personal knowledge," citing *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986). The district court characterized the Spencer Declaration as an "attorney's affidavit" that "contain[ed] no information to indicate a basis in personal knowledge for the affiant's conclusory statement." Order at 6-7, JA-194-195.

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 - the context in which the *Kamen* court was skeptical about conclusory statements by AT&T's in-house counsel that the entire company did not receive any federal grants (which was relevant to whether AT&T was subject to the smoke-free-environment requirements of the federal Rehabilitation Act).

Spencer made the declaration in his capacity as a knowledgeable representative of Milberg. As quoted above, the declaration stated that it was based on Spencer's long-time experience at Milberg as a partner and then of counsel, and that he remained close with the other senior lawyers at the firm. His assertions were not "conclusory" - rather, they were based on extensive and intimate knowledge of ***26** his professional home and colleagues. Moreover, the *Kamen* court observed there were good reasons to believe AT&T's in-house attorney affidavits were not only conclusory but also were false or mistaken, 791 F.2d at 1012-13; as previously noted, no one has offered any reason here to believe the Milberg partners were not citizens of a state when the vacatur petition was filed, or at any other time.

The district court made a point of noting that a Rule 12(b)(1) motion "cannot be converted into a Rule 56 motion," but then proceeded to enforce the Rule 56(c)(4) requirement that a declaration "must be made on personal knowledge" anyway, again relying on *Kamen*. Order at 6-7, JA-194-95. *Kamen* was not a jurisdiction pleading decision, and we know of no precedent for a dismissal on jurisdictional grounds where a declaration based on the same type of knowledge about the citizenship of fellow firm lawyers as the one offered here was deemed incompetent.

Finally, if the district court believed there was real doubt about the citizenship of the Milberg partners at the time the proceeding was commenced, or that greater evidentiary certainty was required, the fair step would have been to allow further amendment of the petition, or to require further evidence, or to hold a hearing. Here, the district court ordered dismissal without a hearing or argument.

This Court's more recent guidance on assessing the facts underlying alleged diversity jurisdiction indicate that the district court's approach was too hasty and ***27** constricted. In *Van Buskirk v. United Group of Companies*, 935 F.3d 49, 55-56 (2d Cir. 2019), this Court (noting 28 U.S.C. § 1653) held that pleading amendments "will be freely permitted where necessary to avoid dismissal on purely technical grounds," and "[u]nless the record clearly indicates that the complaint could not be saved by any truthful amendment ... we generally afford an opportunity for amendment" - even "on appeal."

In the present context, the further steps of amendment or submission of additional evidence should have been unnecessary and unjustified, in the absence of any fact-based suggestion by HWB Investors that diversity was indeed lacking. But the district court should have undertaken additional steps if the court's concern was serious. That principle was recognized long ago. *See* *Baer v. United Services Automobile Ass'n*, 503 F.2d 393, 397 (2d Cir. 1974) (even a pleading that is jurisdictionally defective - not the case here - "can be regarded as satisfactorily amended if the record as a whole establishes the existence of the required diversity of citizenship between the parties"). Further evidence would confirm the already-pled requisite diversity of citizenship.

***28 C. The district court erred in dismissing for untimely service of the vacatur notice of motion under FAA § 12**

1. Background of the law governing arbitration proceedings and vacatur motions

The fee dispute between Milberg and HWB Investors was arbitrated because the retainer agreements (including the fee provisions) included arbitration clauses, as described above. Milberg commenced the vacatur proceeding, challenging the arbitration outcome on fees, under the FAA in the Southern District based on diversity jurisdiction. The governing FAA provision here is § 12, which provides:

> 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.

9 U.S.C. § 12. This section appeared in the original 1925 arbitration statute (Feb. 12, 1925, ch. 213, §§ 6, 12, 43 Stat. 884, 885) and was repeated in the Federal Arbitration Act as codified in 1947, 61 Stat. 672.

***29** Section 12 has attracted its share of litigation over the years concerning the interpretation and application of the three-month service period, even apart from the foreign-respondent issue. Whether the period is subject to "customary" principles of equitable tolling and normal time-calculation rules on the one hand, or "strictly construed," "absolute," and "not subject to extension" on the other hand, has been controversial. *Compare* *Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d 1152, 1156-58 (9th Cir. 2016) (three-month period was not enforced when arbitrator's status as imposter lawyer was discovered more than three years after award was issued; § 12 satisfies criteria for recognizing equitable tolling); *Pfannenstiel v. Merrill Lynch*, 477 F.3d 1155, 1158 (10th Cir. 2007) (equitable tolling recognized for FAA § 12 service period, but plaintiff did not qualify); *Global Gold Mining LLC v. Caldera Resources, Inc.*, 941 F. Supp. 2d 374, 384 (S.D.N.Y. 2013) (three-month period can be extended by court order or party agreement) with *Dalal v. Goldman Sachs & Co.*, 541 F. Supp. 2d 72, 76 (D.D.C. 2008), *aff'd*, 575 F.3d 725 (D.C. Cir. 2009) (strict deadline); *Anglim v. The Vertical Group*, 2017 WL 543245, 16 Civ. 3269 (KPF) (S.D.N.Y. Feb. 10, 2017) at *7 (three-month period is absolute and not subject to extension; service in three months and one day was too late).

***30** However, none of those cases involved foreign respondents or the statutory gap.

Judge Torres accepted and applied the "strict construction" view on interpreting the § 12 three-month service period. She did not refer to the many precedents that examined that issue separately with respect to service on foreign respondents and that denied dismissal motions in that context. Nor did she take into account her own orders, entered without objection from HWB Investors, directing service on those respondents well after the three-month period had expired.

2. FAA § 12, enacted long before the advent of international arbitrations, fails to address how a notice of motion for vacatur is to be served on foreign respondents, and thus courts have uniformly followed the seminal S.D.N.Y. *InterCarbon* case in denying dismissal motions and indicating that Hague Convention and other types of Fed. R. Civ. P. Rule 4(f) service will be considered timely

As quoted earlier, FAA § 12 states that a notice of motion for vacatur of an arbitration award must be served on the adverse party or his attorney within three months after the award is filed or delivered, and then specifies rules for service on adverse parties within the U.S. but is silent about service on foreign adverse parties. In the present case, HWB Investors are the adverse parties, but they are residents of Luxembourg and Germany, so they fall through the statutory gap with respect to service.

***31** As noted in *InterCarbon*, foreign respondents are not amenable to service within any U.S. judicial district as delineated in the second and third sentences of FAA § 12. As a practical matter, that leaves Hague Convention service as the only reliable way to make service on most foreign respondents, and Hague Convention service invariably takes more than three months to accomplish.

As noted above, the problem of accomplishing service of a vacatur motion or petition under § 12 on a foreign respondent first received extensive analysis in the seminal *InterCarbon* decision of Judge Lowe, in 1993, which was widely followed thereafter.

In *InterCarbon*, both parties were foreign, but had agreed to arbitrate any dispute in New York, and both had New York attorneys. InterCarbon lost the arbitration and petitioned in the Southern District to vacate the award. Its attorney mailed notice of the vacatur petition to respondent Caltraport's attorney in New York. 146 F.R.D. at 66 & n.1.

The court observed that § 12 "provides no method of service for foreign parties not resident in any district of the United States" and that the "problem is that foreign parties will not necessarily be found in *any* district. Requiring parties to satisfy Section 12 might amount to requiring them to do the impossible." 146 F.R.D. 64, 67 (emphasis in original). The court noted in a footnote to the last sentence that ***32** § 12 was an "anachronism" in part "because it cannot account for the internationalization

of arbitration law subsequent to its enactment" in 1947. *Id*. at 67 n.3. The court continued, "In these circumstances, Section 12 cannot be taken as the proper standard for service of process. Recourse must be had to the Federal Rules of Civil Procedure," and concluded, "the proper fallback provision for service of process is Fed.R.Civ.P. 4." *Id*. at 67. However, InterCarbon's attorneys had attempted service of their notice of petition to vacate only by mailing it to Caltraport's counsel, *id*. at 66, and the court found that such mail service did not satisfy Rule 4. *Id*. at 67-68.

Judge Lowe went on to hold that defects in service may "nevertheless be excused where considerations of fairness so require, at least in cases that arise pursuant to arbitration proceedings," citing *Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos*, 553 F.2d 842, 844-45 (2d Cir. 1977), and *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363, 364 (2d Cir. 1964).[4] 146 F.R.D. at 68. Judge Lowe concluded that those precedents "establish ***33** that imperfect service of process in an arbitration case may not be fatal where jurisdiction over the arbitration is clear and where notice is sufficient to apprise the opposing party of the action being taken," and moreover InterCarbon's "improper service" had not caused "any delay or lack of notice." *Id*. at 71. She noted the Second Circuit's position that there "must be compliance" with service rules; "[i]n the context of arbitration, however, this Circuit has enforced service rules more liberally." *Id., citing Merrill Lynch, Victory Transport*. "[F]airness requires rejection of Caltraport's attempt to use defective service of process to avoid a full review in this case." *Id*. at 72.

There have been many cases following *InterCarbon*, particularly as international arbitrations have become more prevalent. Some of the noteworthy decisions are the following.

In 2001, Judge Sweet in the Southern District was presented with a similar issue in *Possehl, Inc. v. Shanghai Hia Xing Shipping*, No. 00 Civ. 5157, 2001 WL 214234 (S.D.N.Y. Mar. 1, 2001). An arbitration award had been entered against Possehl, which moved to vacate the award under FAA § 12. Respondent Shanghai, ***34** a foreign company, claimed that Possehl's service of its notice of motion to vacate on Shanghai's counsel by mail was insufficient, but the court held that § 12 "is designed to ensure that a defendant is properly notified," and found that service by mail on counsel sufficed. *Id*. at *4. This case did not cite *InterCarbon* but reached a similar conclusion.

In 2007, Chief Judge Brown of the District of New Jersey extensively analyzed and adopted *InterCarbon's* analysis in *Canada Life Assurance Co. v. Converium Ruchversicherung (Deutschland) AG*, Civ. No. 06-3800, 2007 WL 1726565 (D.N.J. June 13, 2007). Canada Life had commenced the underlying arbitration concerning reinsurance coverage, but an adverse award was issued on May 12, 2006, and Canada Life sought vacatur under FAA § 12 by *filing* its vacatur action in the District of New Jersey on August 11, 2006. 2007 WL 1726565 at *1-2. Both parties were outside the United States. Canada Life contended that its service of its vacatur papers on Converium's attorney in the arbitration in December 2006, some six months after the arbitration award was delivered, satisfied § 12. *Id*. at *3. The court held that "[e]ven though Canada Life's process and service of process were defective, dismissal of this action is not warranted for several reasons, including that Converium "did receive actual notice of this action as evidenced by the November 9, 2006 entry of appearance by its local counsel on its behalf," ***35** *id*. at *6 - almost six months after the arbitration award was delivered. The court denied the motion to dismiss, following *InterCarbon*. *Id*.

In *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 120-21 n.10 (D.D.C. 2010),[5] Judge Walton extensively discussed FAA § 12 service on a foreign respondent, focusing on *InterCarbon*. He noted that Hague Convention service within three months after delivery of an arbitration award would be "virtually impossible" because the process "takes significantly longer than 90 days to arrange for service of process," and that "strict enforcement" of the three-month limitation period "would effectively bar any petition to vacate an arbitral award" involving foreign respondents. He avoided this "quandary" by considering the vacatur motion in his case on its merits and concluding vacatur was not warranted, thus mooting the service issue.

In *Power Electric Distribution, Inc. v. Hengdian Group Linix Motor Co.*, Civil No. 13-199, 2015 WL 880642 (D. Minn. Mar. 2, 2015), the court denied a motion to dismiss despite Power Electric's defective service of its motion under FAA § 9 to confirm the arbitration award it obtained against the foreign respondent (§ 9 uses the ***36** same language about service as § 12). The court cited numerous cases following *InterCarbon* and concluded that Power Electric's email and mail service of the motion to confirm papers on a Linix manager and Linix's arbitration attorney provided sufficient notice, even though Hague Convention service (which requires translation of the papers being served) could have been pursued but was not. *Id. at* *7. The court cited numerous cases following *InterCarbon*, found that Linix had received actual notice, and denied its dismissal motion. *Id*. at *6-7, 10.

In the present case, on May 9, 2019, three days after the proceeding was commenced and Wilk Auslander had received the email attaching Milberg's petition and motion papers, Judge Torres ordered Milberg to "serve a copy of the amended petition" (which augmented the pleading of the parties' citizenship information per her order) "pursuant to N.Y.C.P.L.R. § 311" by May 16. JA-100. On May 14, Milberg's counsel made a letter motion for an "extension of time to serve Respondents," noting that HWB Investors' counsel in the arbitration below had just emailed that they were "not authorized to accept service." JA-102. Accordingly, Milberg sought an extension to allow Hague Convention service, or alternatively for an order that its service on Wilk Auslander be deemed effective.[6] *Id*. HWB Investors ***37** did not object. On May 15, the court denied the request that service on Wilk Auslander be deemed sufficient "at this stage," but adjourned the schedule and allowed Milberg to file a proposed order for a schedule including Hague Convention service, to be followed by summary judgment briefing. *See* JA-105. On May 22, the court ordered Hague Convention service to be effectuated by October 1. *See* JA-113. Milberg started the process of making service under the Hague Convention in mid-May, and the translated affidavits of service were filed in mid-September, *see* ECF 22-31, 33 (docket entries), JA-6-8, so the entire process took four months - which of course does not count the time it took to prepare the vacatur petition and motion papers themselves following issuance of the award.

The proceedings in this very case thus demonstrate that it would be essentially "impossible" for a petitioner seeking vacatur, once an adverse arbitration award is issued, to draft a petition and motion papers, commence the proceeding, translate the relevant documents, *and then* effectuate Hague Convention service on foreign respondents - all within three months. As discussed above, those considerations ***38** underlie courts' flexibility in assessing sufficiency of § 12 service on foreign respondents; they also explain why court orders granting extensions of time to effect FAA § 12 service beyond the three-month limit have been deemed effective. *See, e.g., Canada Life Assurance Co.*, 2007 WL 1726565 at *6 (service was untimely and defective; dismissal denied; petitioner directed to effect proper service on foreign respondent); *Global Gold Mining LLC v. Caldera Resources, Inc.*, 941 F. Supp. 2d 374, 384 (S.D.N.Y. 2013) (court grants service extensions beyond FAA § 12 three-month timeframe; dismissal denied).

The district court's dismissal order cited the following cases for strictly enforcing the three-month service deadline: *Anglim v. Vertical Group*, 16 Civ. 3269, 2017 WL 543245, at *7 (S.D.N.Y. Feb. 10, 2017); *Barclays Capital Inc. v. Hache*, 16 Civ. 315, 2016 WL 3884706, at *2 (S.D.N.Y. July 12, 2016); *Triomphe Partners, Inc. v. Realogy Corp.*, 10 Civ. 8248, 2011 WL 3586161 (S.D.N.Y. Aug. 15, 2011); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984); and *Waveform Telemedia, Inc. v. Panorama Weather N. Am.*, 06 Civ. 5270, 2007 WL 678731, at *5 (S.D.N.Y. 2007). Order at 8-9, JA-196-97. But none of those decisions involved foreign respondents, and thus they did not confront the issue here: that service on the foreign respondents within three months was not possible.

In probably the most recent FAA § 12 service decision from the Southern ***39** District, *Dalla-Longa v. Magnetar Capital LLC*, 19 Civ. 11246, 2020 WL 4504901 (S.D.N.Y. Aug. 4, 2020), Judge Schofield dismissed vacatur proceedings brought by petitioner, who got an adverse result in his domestic employment termination arbitration. She strictly rejected several theories of proper service advanced by petitioner to justify his email service on respondent's counsel on the three-month service date. However, at the end of the decision, she noted that petitioner had also argued the defects in his service should be excused on fairness grounds, citing *InterCarbon*. Judge Schofield found *InterCarbon* distinguishable because its holding was based on the

gap in § 12 for service on a foreign respondent, while the respondent in *Dalla-Longa* was domestic. The implication is that the court would have applied *InterCarbon*, or at least seriously considered doing so, if the respondent had been foreign.

Of the dozen or more cases we have found involving issues of service under FAA §§ 9 or 12 on foreign respondents, virtually all cite *InterCarbon* and all have declined to dismiss despite service and/or timeliness defects - except one: *Argentine Republic v. National Grid PLC*, 637 F.3d 365 (D.C. Cir. 2011) (per curiam). In that case, Argentina had lost an arbitration against National Grid (a U.K. company) and filed for vacatur in federal court under FAA § 12. Its counsel saw the three-month service deadline approaching and moved three days beforehand to extend time to ***40** serve the § 12 notice, contending it would be "impossible" to complete Hague Convention service in time. *See id.* at 367. The district court denied the motion to extend time and then dismissed the vacatur proceeding as untimely. The D.C. Circuit affirmed, holding that Fed. R. Civ. P. Rule 6(b), which allows orders extending time, did not apply to time periods defined by statute, and in any event the § 12 deadline was "strict." *Id.* at 368. The D.C. Circuit decision did not address petitioner's "impossibility" contention and did not cite any of the *InterCarbon* precedents. The two-page *per curiam* decision does not provide any meaningful analysis. The court seemed disposed to view the impossibility of the petitioner's making timely service of vacatur papers on foreign respondents under FAA § 12 as a feature, not a bug - an attitude this Court should eschew.

*41 CONCLUSION

There is no arguable question that Milberg and HWB Investors are of completely diverse citizenships for purposes of 28 U.S.C. § 1332(a)(2) subject matter jurisdiction.

FAA § 12 presents a party petitioning to vacate an adverse arbitration award, rendered in the U.S. but where the winning party is foreign, with a conundrum: there is no way to for the petitioner to reliably arrange to serve the foreign party within three months so as to avoid a procedural cloud based on allegedly defective or untimely service. This is in part due to the fact that the FAA service provisions, first enacted in 1925, did not foresee that arbitrations might include foreign parties. Therefore the statute has a gap when it comes to serving foreign respondents.

InterCarbon addressed that problem by granting leeway to the petitioner to serve under the foreign service provisions of Fed. R. Civ. P. Rule 4(f). Later decisions have recognized that this leeway is needed for both the manner and the timing of service - particularly because Hague Convention service invariably takes longer than three months.

InterCarbon's approach has been widely followed by other district courts, but has not been accepted or rejected by any court of appeals. The present case squarely raises the issue for this Court.

***42** Milberg satisfies all the *InterCarbon* criteria here. There is clear jurisdiction over the arbitration, which all parties agreed was to be held in New York. After the arbitration award was issued and Milberg filed its vacatur petition, the HWB Investor respondents received prompt notice through their attorney that Milberg was challenging the award. Respondents cannot credibly claim any prejudice from the service situation or any delay. Milberg complied with every order of the district court regarding service, and Hague Convention service was made on respondents accordingly. There is no reason that the merits of the vacatur petition should be insulated from district court review.

Milberg respectfully requests reversal of the order dismissing its vacatur motion and proceeding.

Dated: New York, New York

September 22, 2020

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Footnotes

1 *In the Matter of the Arbitration Between InterCarbon Bermuda, Ltd. and Caltex Trading and Transport Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993) ("*InterCarbon*").

2 Judge Griesa awarded contingency fees of 30% plus reimbursement of expenses to other plaintiffs' counsel in several class actions covering the same types of bondholders. Class counsel had not been able to obtain *pari passu* injunctions for their class members. *Id*. ¶ 41, A-128.

3 Milberg had transferred most of its practice and lawyers to a new firm, but the Argentina cases stayed with the original firm, Milberg LLP.

4 In *Lecopulos*, this Court held that by agreeing to arbitrate in New York, a party must be deemed to have consented to the jurisdiction of the court that could compel an arbitration proceeding in New York. 553 F.2d at 844.
In *Victory Transport*, petitioner moved to compel arbitration under FAA § 4, which provided *inter alia* that service of the application "shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought." 336 F.2d at 356-57 & n.3. Petitioner obtained an *ex parte* order from the district court and served its application by registered mail sent to the respondent in Madrid. *Id*. The Second Circuit approved that service on the ground that respondent had agreed to arbitrate in New York and thus had consented to jurisdiction there, the court had ordered service by registered mail, and the "sole function of process" was "to notify the [respondent] that proceedings had commenced." *Id*. at 363-64.

5 *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010), *vacated on other grounds*, 665 F.3d 1363 (D.C. Cir. 2012 (arbitrators lacked authority), *rev'd*, 572 U.S. 25,134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) (deciding scope of arbitrators' authority and standard of review of arbitrators' decisions on threshold issues), *vacated and aff'd*, 555 F. App'x 2 (D.C. Cir. 2014).

6 The district court's dismissal order faulted Milberg for not seeking an extension of the § 12 deadline. Order at 9 n.4, JA-197. Milberg's counsel's letter of May 14 did ask for an "extension of time to serve Respondents." JA-102-104 (first and last paragraphs of letter). Since the district court had already entered an order and schedule for service by that time (*i.e.*, JA-100) - which was after the three-month period had passed - the district court was acting consistent with the *InterCarbon* approach. The district court's later reliance in its dismissal order on cases applying strict § 12 deadlines

and no equitable tolling, Order at 9, JA-197, was inconsistent with its multiple earlier orders that Milberg should effect service under the Hague Convention (JA-100, 105, 110, 113) - all entered after the "strict deadline" had already passed.

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