

Defendant Daiwa Securities SMBC Europe Limited (“Daiwa Europe”) respectfully submits this memorandum in support of its motion, pursuant to Rule 12(b)(2) and 12(b)(5) of the Federal Rules of Civil Procedure, to dismiss all claims against it in the Second Consolidated Amended Complaint (the “SAC”) (Ex. 1) for insufficient service of process and lack of personal jurisdiction.¹

FACTUAL BACKGROUND

The SAC was filed on February 23, 2009. Plaintiffs assert claims under Sections 11 and 12(a)(2) of the Securities Act on behalf of a putative class of investors against various entities, including Daiwa Europe, a corporation that is organized and existing under the laws of the United Kingdom, that allegedly underwrote portions of securities offerings of Lehman Brothers Holding Inc. (“Lehman”).

The SAC alleges that Daiwa Europe is an investment banking firm “based in London, England.” SAC ¶ 54. Daiwa Europe has no office, employees, or presence in the United States. It has no agents authorized to accept service of the SAC on its behalf in the United States. Massey Decl. ¶ 6; see Goodman Decl. ¶ 8.

On March 13, 2009, Plaintiffs attempted to serve the SAC upon Daiwa America Securities Inc. (“Daiwa America”) at Daiwa America’s offices in 32 Old Slip, New York, New York. (Ex. 2). Daiwa America is not named in the SAC.

Specifically, Plaintiffs’ process server attempted to serve a Daiwa America employee, Daiwa America Vice President and Associate General Counsel, Joshua Goodman, with a copy of the summons and SAC in the above-captioned action. Goodman Decl. ¶ 10. Mr. Goodman told

¹ All exhibits are attached to the accompanying Declaration of Breon S. Peace, dated April 27, 2009. The declarations of Roger Massey (hereinafter “Massey Decl.”) and Joshua Goodman (hereinafter “Goodman Decl.”) are also filed in support of this motion.

Plaintiffs' process server that the summons and SAC named only Daiwa Europe, and not Daiwa America, and that Daiwa Europe's office was located in London. Goodman Decl. ¶¶ 11–12. Mr. Goodman further told Plaintiffs' process server that he was not authorized to accept service of process of the summons and SAC on behalf of Daiwa Europe, and that he was not a general agent for Daiwa Europe. Id. ¶ 11. After being advised of these facts, Plaintiffs' process server then made a telephone call and after the call, he repeated the request that Mr. Goodman accept a copy of the summons and SAC. Id. ¶ 13. Mr. Goodman refused and the process server left the building. At no time did Mr. Goodman accept service of the summons and the SAC on March 13, 2009. Id. ¶ 15.

On March 13, 2009, Plaintiffs' process server submitted a sworn affidavit of service in this action (Ex. 2) stating that he personally served the summons and SAC on Daiwa Securities SMBC Europe Limited at 11:10 a.m. on March 13, 2009, at "32 Old Slip, New York, New York (Lobby)." He further swore that he delivered a true copy of each to Daiwa Europe by delivering such to "JOHN DOE [REFUSED TO GIVE HIS NAME]" personally, and further swore that the process server knew that "said individual to be MANAGING AGENT thereof" of Daiwa Europe. Id.

Daiwa America is an affiliate to Daiwa Europe, but the two corporations are separate and distinct. They have different ownership structures and share only one common corporate parent. Goodman Decl. ¶ 4; Massey Decl. ¶ 8.

To date, defendant Daiwa Europe has not been served in this action at its corporate office in London. Massey Decl. ¶ 11.

ARGUMENT

A. APPLICABLE LAW

1. Methods of Serving Foreign Defendants

Federal Rule of Civil Procedure 4 provides for acceptable methods of service of a summons and complaint in federal court. Rule 4(h), when read together with 4(f) provides that a foreign defendant, like Daiwa Europe, may be served outside the United States by:

1. any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
2. if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
 - A. as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
 - B. as the foreign authority directs in response to a letter rogatory or letter of request; or
 - C. unless prohibited by the foreign country's law, by
 - i. delivering a copy of the summons and of the complaint to the individual personally; or
 - ii. using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
3. by other means not prohibited by international agreement, as the court orders.

2. Legal Principles

Pursuant to Federal Rule of Civil Procedure 12(b)(5), a complaint may be dismissed for insufficient process. See Gateway Overseas, Inc. v. Nishat (Chunian) Ltd., No. 05 CV 4260 (GBD), 2006 WL 2015188, at *5 (S.D.N.Y. Jul. 13, 2006). "Without proper service a court has no personal jurisdiction over a defendant." Hawthorne v. Citicorp Data Sys., Inc., 219 F.R.D.

47, 49 (E.D.N.Y. 2003); see Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. DE C.V., 451 F. Supp. 2d 585, 589 (S.D.N.Y. 2006); OSRecovery, Inc. v. One Groupe Int'l, Inc., 234 F.R.D. 59, 61 (S.D.N.Y. 2005) (“[without proper service] actual notice alone will not sustain personal jurisdiction over a defendant”) (Kaplan, J.). Once a defendant raises a challenge to the sufficiency of service of process, the plaintiff bears the burden of proving its adequacy. See Weston Funding, LLC, 451 F. Supp. 2d at 589; Am. Institute of Certified Pub. Accountants v. Affinity Card, Inc., 8 F. Supp. 2d 372, 376 (S.D.N.Y. 1998). In deciding a motion to dismiss pursuant to Rule 12(b)(5), a Court must look to matters “outside the complaint to determine whether it has jurisdiction.” Mende v. Milestone Tech., Inc., 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003).

B. THE SAC SHOULD BE DISMISSED AS TO DAIWA EUROPE FOR INSUFFICIENCY OF SERVICE

Daiwa Europe is organized and existing in the United Kingdom and does not have any offices located in the United States. Massey Decl. ¶¶ 2-4; Goodman Decl. ¶ 5; see also SAC ¶ 54. In order to serve Daiwa Europe, Plaintiffs must comply with Rules 4(h) and 4(f). Namely, Plaintiffs are required to provide service upon Daiwa Europe pursuant to the Hague Convention since it is the method of service of process to be used between the United States and the United Kingdom – countries that are parties to the Convention.² To date in this case, Plaintiffs have not served Daiwa Europe in accordance with the Hague Convention.

Plaintiffs’ attempt to serve Daiwa America, a separate affiliate of Daiwa Europe with different ownership structures and corporate parents, and which was not named in the SAC, does not constitute sufficient service. Rule 4(h)(1) provides that service can be made pursuant to the law of the state where the district court is located or in which service is effected (here, New

² Both the United States and the United Kingdom ratified the Convention on February 10, 1969.

York) or by delivering a copy of the summons and complaint to “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.” N.Y. C.P.L.R. § 311(a)(1) (McKinney 2008). Here, Plaintiffs’ process server attempted to serve Mr. Goodman, an employee of Daiwa America, with the summons and SAC for Daiwa Europe at Daiwa America’s offices. Since Mr. Goodman is neither an officer, director nor an agent authorized by appointment or by law to receive such general service of process, the only basis on which he could have accepted service is that he was somehow a managing or general agent of Daiwa Europe. He is not. As Mr. Goodman advised the process server on March 13, he is not a managing agent or general agent authorized to accept the summons and SAC on behalf of Daiwa Europe. Goodman Decl. ¶ 11. Further, Mr. Goodman refused to accept the summons and the SAC. *Id.* ¶ 13. Thus, the process server’s sworn affidavit that he personally delivered the summons and SAC to “JOHN DOE” in his capacity as a “MANAGING AGENT” of Daiwa Europe is demonstrably false.

In light of Mr. Goodman’s explicit statement to the process server on March 13 that he was *not* authorized to accept service of the summons and the SAC for Daiwa Europe, which he identified as a separate company in London, there is simply no reasonable basis for any inference that Daiwa Europe authorized Mr. Goodman to “accept service of process on its behalf.” Gateway Overseas, 2006 WL 2015188, at *5 (dismissing complaint where plaintiff failed to establish that co-defendant served was agent of other defendant); Weston Funding, LLC, 451 F. Supp. 2d at 590–91 (dismissing complaint where plaintiff failed to establish that corporation served was defendant corporation’s agent for service of process); see Am. Institute of Certified Pub. Accountants, 8 F. Supp. 2d at 378 (“[U]nder the federal rules, service of process upon a non-employee who makes no representations as to authorization to receive service is not

effective.”). Accordingly, since Plaintiffs have not effected service of process upon Daiwa Europe pursuant to the Hague Convention or federal or state law, the SAC should be dismissed as to Daiwa Europe for lack of personal jurisdiction. See Gateway Overseas, 2006 WL 2015188, at *5.

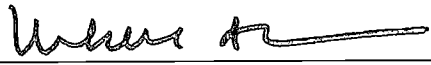
CONCLUSION

For the foregoing reasons, the claims as to Daiwa Europe should be dismissed.

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Respectfully submitted,

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