IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

THE CHASE MANHATTAN BANK, as Collateral Agent,	:	
Plaintiff,	:	
v.	:	C. A. No. 00-564-RRM (JJF)(MPT)
IRIDIUM AFRICA CORPORATION; et al.,	:	
Defendants.	:	

ORDER GRANTING DEFENDANT PACIFIC ELECTRIC WIRE & CABLE'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT

Plaintiff Chase Manhattan Bank filed this action on June 9, 2000, alleging that the defendants are members of Iridium LLC, a bankrupt Delaware limited liability company. Chase alleges that Iridium's members are liable to Chase in various amounts because Iridium has defaulted on an $800,000,000 loan extended by Chase and other financiers to Iridium. The members' liability is premised on a clause of Iridium's LLC Agreement entitled "Reserve Capital Call," which allegedly obligates Iridium members to pay certain pre-set amounts totaling $242 million upon Iridium's default as a security for Iridium's loan. Chase alleges that defendant Pacific Electric Wire & Cable Co., Ltd. ("PEWC"), a Taiwanese corporation, is a member of Iridium and is liable in the amount of its Reserve Capital Call obligation, $9,997,500, plus interest. PEWC failed to respond to Chase's complaint and on November 14, 2000, the court entered judgment in favor of plaintiff Chase Manhattan Bank and against PEWC in the amount of $10,872,999.05, plus interest. Presently before the court is PEWC's motion to set aside the default judgment

pursuant to Federal Rule of Civil Procedure 55(c).

PEWC has presented two bases on which to set aside the default judgment. First, PEWC argues that the judgment is void under Rule 60(b)(4) because this court lacks personal jurisdiction over it. PEWC notes that it is a Taiwanese corporation that conducts no business in Delaware. It argues that it transferred its interest in Iridium to a wholly-owned subsidiary, Pacific Asia Communications, Ltd., in 1997 and that it has had no further involvement with Iridium since that time. Second, PEWC argues that it did not respond to the suit because it believed the court lacked jurisdiction over it and that it had not been properly served. For these reasons, PEWC submits that it can establish excusable neglect under Rule 60(b)(1).

I. Should the court set aside the default judgment as void under Rule 60(b)(4)?

Chase alleges that PEWC is subject to the jurisdiction of this court due to its membership in Iridium. As discussed in Judge McKelvie's September 28, 2001 order denying defendant Stet-Societa Financiaria Telefonica per Azioni's motion to dismiss, Section 11.04 of the Iridium's LLC Agreement provides that parties to the agreement waive any objection to the jurisdiction of this court. The waiver only applies, however, to parties to the agreement, and thus the court found that Stet waived its jurisdictional challenge only if it was a party to the LLC Agreement. Because Stet alleged it transferred its interest in Iridium to another entity and because the evidence on this point was disputed, Judge McKelvie denied Stet's motion to dismiss and invited it to challenge jurisdiction following the completion of discovery. Relying in part on Judge McKelvie's order, Chase argues PEWC did not validly transfer its interest in Iridium and

remains bound by the waiver of Section 11.04.

Thus, evaluating whether this court can exercise personal jurisdiction over PEWC raises questions of fact relating to the validity of PEWC's transfer of its interests to Pacific Asia. PEWC argues it validly transferred its interests in Iridium to Pacific Asia at an October 15, 1997 Iridium Board of Directors meeting. While the minutes of that meeting show the Board's approval of that transfer, the Board also made the transfer contingent upon Pacific Asia's execution of a counterpart of the LLC Agreement. Chase notes, however, that no party has produced a counterpart of the LLC Agreement executed by Pacific Asia. On this basis, Chase argues that PEWC's transfer was ineffective.

On the bare factual record presented by the parties, the court is unable to resolve whether PEWC validly transferred its interest in Iridium to Pacific Asia. The Board's approval of the transfer of PEWC's interest appears to evidence the consummation of that transfer. However, PEWC has not produced a copy of the LLC Agreement executed by Pacific Asia. Because the Board's approval of the transfer was contingent upon Pacific Asia's signing of the LLC Agreement, the court is unable to determine whether PEWC effectively transferred its interests in Pacific Asia.

Chase also argues that regardless of whether PEWC withdrew as a member of Iridium and therefore waived its jurisdictional challenge, PEWC is still subject to the court's jurisdiction because: (i) it cannot transfer the Reserve Capital Call obligation under Section 6.04 of the LLC Agreement, and (ii) it executed an "Agreement of Indirect Owner" containing the same jurisdictional waiver as the LLC Agreement. Neither argument is persuasive. First, Section 6.04 does not state that those transferring their

membership in Iridium to others must remain liable for the Reserve Capital Call. Rather, it states that "no Transfer shall relieve a party hereto of its contractual obligations under this Agreement . . . unless the relief of such obligations is approved by the holders of at least 66 2/3 % of the then outstanding Class 1 interests," including Motorola. The Iridium Board minutes of October 15, 1997 indicate that PEWC's transfer of interest to Pacific Asia was approved by 66 2/3% of the Board and Motorola. Therefore, it appears that PEWC complied with that section. Furthermore, Chase's reliance on the Agreement of Indirect Owner to establish jurisdiction is also unhelpful because Chase failed to include an executed copy of that agreement, if one exists, in its appendices with this motion. Thus, the court finds that Chase has not shown a factual basis for exercising jurisdiction over PEWC other than PEWC's allegedly continued membership in Iridium.

Because the court lacks a sufficient factual record to determine whether PEWC transferred its interests to Pacific Asia, the court cannot resolve whether PEWC waived its challenge to the jurisdiction of this court. While PEWC may show at some future time that this court lacks jurisdiction over it, the court cannot grant PEWC's motion to hold the default judgment void without the development of a more complete factual record.

II. Should the court set aside the default judgment for excusable neglect under Rule 60(b)(1)?

PEWC's second argument in favor of setting aside the default judgment is that its failure to respond to Chase's summons and complaint was due to its excusable neglect. Jack T. Sun, PEWC's Chairman, stated in an affidavit that the only copy of the

summons and complaint PEWC received were copies sent by Chase's attorney and delivered to PEWC's offices in Taiwan by Federal Express. Sun stated that PEWC was aware of Chase's suit, but did not think that it had been properly served or that it was subject to jurisdiction in Delaware. PEWC submitted the affidavit of Chung-The Lee, a Taiwan attorney, stating it was his belief that Taiwanese corporations could only be served in a foreign action through the Taiwan courts and that letters received by courier were ineffective. According to Sun and an affidavit submitted by Chung-The Lee, PEWC concluded that it had not been adequately served and that it had withdrawn from Iridium in 1997.

Chase argues that PEWC's failure to respond to the complaint should not be considered excusable neglect. Chase notes that it received several letters from Steven H. Thal, a lawyer from LeBoeuf, Lamb, Greene & MacRae, L.L.P., in which Thal purported to represent PEWC and other parties. Thus, Chase charges that PEWC's failure to respond to the complaint was a strategic decision made by PEWC that it now seeks to have undone.

Eugene C. Hu, an employee of PEWC, responded to Chase's allegations by filing an affidavit explaining the circumstances surrounding Thal's purported representation of PEWC. According to Hu, he attended an Iridium Board of Directors meeting on behalf of PEWC during June 2000 to discuss Chase's suit. At that meeting, Thal briefed the Board on the suit and offered to represent PEWC and other Iridium members. Although Hu admits corresponding with Thal regarding representation, he and Sun both stated in their affidavits that PEWC never retained Thal or anyone else at LeBoeuf, Lamb because it thought service was ineffective and it was beyond the jurisdiction of the

court. PEWC argues that, on these facts, it has established its excusable neglect.

To reopen a default judgment for excusable neglect under Rule 60(b)(1), the Third Circuit has stated that a court must consider three factors. "[F]irst, whether the plaintiff will be prejudiced; second, whether the defendant has a meritorious defense; and third, whether culpable conduct of the defendant led to the default." Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 122 (3d Cir. 1983) (citing Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656 (3d Cir. 1982)).

Chase submits that it will be prejudiced should the court set aside the default judgment in three ways. First, almost one year passed between the entry of judgment and PEWC's motion. Second, Chase incurred substantial costs during that year attempting to enforce the default judgment by finding PEWC assets in the United States. Third, it notes that discovery has closed and dispositive motions have been filed. While Chase is correct to complain of the length of time before PEWC challenged the default judgment, none of these facts indicate to the court that Chase has suffered substantial prejudice. Chase has not detailed exactly what costs it incurred in attempting to enforce the judgment and, in any event, those efforts will not go entirely to waste should PEWC be found liable on the merits. Moreover, the outstanding discovery necessitated by PEWC's inclusion among the defendants is likely to be minimal. Most of the liability issues in this case turn on the actions of Iridium and not each of its members individually. Chase has already received substantial discovery from Iridium and its other members, and the inclusion of PEWC is unlikely to have substantial effect on Chase's proof of liability. Thus, the court finds that the prejudice to Chase from setting aside the default judgment is minimal.

The court also finds that PEWC has presented a potentially meritorious defense. It has shown some evidence indicating it transferred its interest in Iridium to Pacific Asia. While a substantial number of issues remain regarding the effect of that transfer and PEWC's alleged execution of an Agreement of Indirect Owner, PEWC has at least shown both that it may be beyond the jurisdiction of this court and that Pacific Asia should be the proper defendant in this action. Thus, PEWC has a potentially meritorious defense were the court to set aside the default judgment.

Finally, PEWC has shown to the court's satisfaction that it was not culpable for the default. On this point, Chase argues that because PEWC was cognizant of the action, its failure to respond to the complaint must be a deliberate trial strategy for which it must be found culpable. PEWC responds that it had a good faith belief it was no longer a member of Iridium, beyond the jurisdiction of the court, and not properly served. Therefore, PEWC submits its decision not to respond to the complaint was not culpable. The Third Circuit has stated that "culpable conduct means actions taken willfully or in bad faith." Gross, 700 F.2d at 123-24. It is thus unsurprising that Chase attempts to paint PEWC's failure to answer the complaint as evidencing a deliberate trial strategy gone awry as Chase moves closer to enforcing the default judgment against PEWC assets in the United States. The facts of this case, however, are not nearly so clear. PEWC has presented colorable arguments that it is beyond the jurisdiction of the court and was improperly served. Given these substantial unresolved questions, the court finds it understandable that a foreign corporation would consider it unnecessary to respond to the suit. See Feliciano, 691 F.2d at 656 (holding a district court's refusal to lift a default judgment occasioned by a foreign "company's reasonable

doubt about the personal jurisdiction of the American court" was an abuse of discretion); Packard Press Corp. v. Com Vu Corp., 584 F. Supp. 73, 75 (E.D. Pa. 1984) (default judgment lifted where defense counsel thought service to be improper); Lasky v. Continental Prods. Corp., 97 F.R.D. 717, 719 (E.D. Pa. 1983) (default judgment lifted when plaintiff improperly served foreign corporation). Moreover, because substantial questions of fact remain concerning whether the judgment should be void for lack of jurisdiction, the court finds that setting aside the default judgment is consistent with the principle that Rule 60(b) is to be given a "liberal construction" in order that "cases may be decided on their merits." Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245 (3d Cir. 1951).

III. Conclusion

The court will therefore grant PWEC's motion to set aside the default judgment. Chase has suggested that should this court set aside the default judgment, it should do so only upon four conditions: (1) that PEWC post a bond for its full Reserve Capital Call obligation, plus interest, (2) that PEWC pay Chase's attorneys' fees in obtaining and enforcing the default judgment, (3) that PEWC pay Chase's attorneys fees in conducting discovery of PEWC, and (4) that PEWC immediately produce all relevant documents to Chase. The court will not require PEWC to comply with these conditions. First, Chase admits that PEWC has assets over $2 billion, which is easily sufficient to meet any judgment in this case. Second, the court finds no reason to shift Chase's attorneys' fees to PEWC, given that it has not been found liable on the merits in this action. Finally, Chase is free to use the rules of Civil Procedure to request discovery of PEWC and any order of this court untethered to those rules is likely to be either superfluous or

overreaching.

For the foregoing reasons, **IT IS HEREBY ORDERED** that:

(1) Defendant Pacific Electric Wire & Cable Co., Ltd.'s motion to set aside the default judgment entered against it on November 14, 2000 (D.I. 498) is granted.

(2) Defendant Pacific Electric Wire & Cable Co., Ltd.'s motion for a stay of execution and enforcement of default judgment pending determination of motion for relief from default judgment (D.I. 503) is denied as moot.

Mary Pat Thynge
UNITED STATES MAGISTRATE JUDGE

Dated: April 5, 2002