UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

NEW SKIES SATELLITES B.V.,	)	
	)	Case No. 1:15-cv-27
Petitioner,	)	
	)	Judge Travis R. McDonough
v.	)	
	)	Magistrate Judge Susan K. Lee
GOSPEL MINISTRIES INTERNATIONAL,	)	
	)	
Respondent.	)	

ORDER

Before the Court is Gospel Ministries International's ("GMI") motion to dismiss. (Doc. 6.) Also before the Court is New Skies Satellites B.V.'s ("New Skies") motion for scheduling conference. (Doc. 23.) For the reasons stated hereafter, GMI's motion to dismiss will be **DENIED** and New Skies Satellites B.V.'s motion for scheduling conference will be **DENIED**.

I. BACKGROUND

New Skies is a Dutch corporation incorporated under the laws of the Netherlands. (Doc. 1-2, at 1, Doc. 7, at 1.) GMI is a Tennessee limited liability corporation headquartered in McDonald, Tennessee. (Doc. 1-2, at 1; Doc. 7, at 1.) In 2010, New Skies and GMI entered into a Master Services Agreement, under which GMI agreed to pay New Skies for international satellite services. (Doc. 1-2, at 1; Doc. 1-3; Doc. 7, at 1; Doc. 7-1.) When GMI failed to make payments under the Master Services Agreement, New Skies submitted a request for arbitration to the Netherlands Arbitration Institute pursuant to the Master Services Agreement's arbitration

provision. (Doc. 1-1, at 1, Doc. 1-3, Doc. 7-1, at 4.) The Master Services Agreement specifically provides:

> (g) *Governing Law/Jurisdiction/Venue*. This MSA and each Service Order shall be governed by and interpreted according to the Laws of The Netherlands, without regard to the conflicts of laws provisions thereof. Any dispute or disagreement arising between Customer and SES NEW SKIES in connection with this MSA or any Service Order, which is not settled within thirty (30) days (or such longer period as may be mutually agreed upon by the Parties) from the date that either Party notifies the other in writing that such dispute or disagreement exists, at the request of either Party, shall be finally settled in accordance with the Arbitration Rules of The Netherlands Arbitration Institute (Nederlandse Arbitrage Instituut). The arbitral tribunal shall be composed of one arbitrator. The place of arbitration shall be The Hague, The Netherlands. The arbitral procedure shall be conducted in the English language. The arbitration agreement evidenced hereby, including its validity and its interpretation is exclusively governed by the laws of The Netherlands.

(Doc. 7-1, at 4.)

In November 2013, the Netherlands Arbitration Institute entered a final arbitration award in favor of New Skies. (Doc. 1-3.) New Skies initiated this action on February 6, 2015, by filing a "Petition to Confirm Foreign Arbitration Award" (Doc. 1), and a "Memorandum in Support of Petition to Confirm Foreign Arbitration Award" (Doc. 1-2). In its Petition, New Skies seeks to confirm the final award entered by the Netherlands Arbitration Institute pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq*., and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "Convention" or "New York Convention").

On April 23, 2015, GMI moved to dismiss New Skies' petition pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[1] (Doc. 6.) New Skies responded

[1] New Skies initiated this action by filing a "Petition to Confirm Foreign Arbitration Award" (Doc. 1) and a "Memorandum in Support of Petition to Confirm Foreign Arbitration Award" (Doc. 1-2). New Skies did not, however, file a complaint. Because GMI has moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court will construe New Skies'

(Doc. 9), and GMI replied (Doc. 10). GMI's motion to dismiss is now ripe for the Court's review.

II. STANDARD OF LAW

According to Rule 8 of the Federal Rules of Civil Procedure, a plaintiff's complaint must contain "a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1). Though the statement need not contain detailed factual allegations, it must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

A defendant may obtain dismissal of a claim that fails to satisfy Rule 8 by filing a motion pursuant to Rule 12(b)(6). On a Rule 12(b)(6) motion, the Court considers not whether the plaintiff will ultimately prevail, but whether the facts permit the court to infer "more than the mere possibility of misconduct." *Id*. at 679. For purposes of this determination, the Court construes the complaint in the light most favorable to the plaintiff and assumes the veracity of all well-pleaded factual allegations in the complaint. *Thurman v. Pfizer, Inc.*, 484 F.3d 855, 859 (6th Cir. 2007). This assumption of veracity, however, does not extend to bare assertions of legal conclusions, *Iqbal*, 556 U.S. at 679, nor is the Court "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). After sorting the factual allegations from the legal conclusions, the Court next considers whether the factual allegations, if true, would support a claim entitling the plaintiff to relief. *Thurman*, 484 F.3d at 859. This factual matter must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility "is not akin to a

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petition and its memorandum in support as its "Complaint" for the purposes of ruling on GMI's motion to dismiss.

'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

"A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) involves either a facial attack or a factual attack." *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 810 (6th Cir. 2015). A facial attack "is a challenge to the sufficiency of the pleading," and, on such a motion, "the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *U.S. v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). "A factual attack, on the other hand, is not a challenge the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *Id*. "On such a motion, no presumptive truthfulness applies to the factual allegations, . . . and the court is free to weigh evidence and satisfy itself as to the existence of its power to hear the case." *Id*. (internal citations omitted).

III. ANALYSIS

A. GMI's Motion to Dismiss

GMI has moved to dismiss this action arguing that the Court does not have subject matter jurisdiction or, alternatively, that New Skies fails to state a claim for relief because the FAA mandates that a court can confirm an arbitration award only if "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration," 9 U.S.C. § 9, and the parties' Master Services Agreement contains no such provision. New Skies has opposed GMI's motion to dismiss, arguing that 9 U.S.C. § 9 does not apply to

foreign arbitration awards sought to be confirmed under the New York Convention pursuant to 9 U.S.C. §§ 201 *et seq*.

The FAA, enacted in 1925, aimed to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 435 (2d Cir. 2004) (internal quotations omitted). "In 1958, twenty-six of the forty-five nations participating in the United Nations Conference on Commercial Arbitration adopted the [New York Convention]." *Id.* "Though the United States did not accede to the Convention in 1958, Congress implemented [it] twelve years later by enacting Chapter 2 of the Convention, now codified at 9 U.S.C. §§ 201–208." *Id*. The New York Convention "was drafted with the goal of encouraging 'the recognition and enforcement of international arbitration awards and agreements," and "applies to an agreement when the award was made in a country different than the country where enforcement is being sought." *Venture Global Eng'g, LLC v. Satyam Computer Serv., Ltd.*, 233 F. App'x 517, 522 (6th Cir. 2007) (internal citations omitted); *Phoenix Aktiengesellschaft*, 391 F.3d at 435 ("The Convention's purpose was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.").

"Pursuant to 9 U.S.C. § 208, the pre-Convention provisions of the FAA—that is, the provisions of Chapter 1, 9 U.S.C. §§ 1–16—continue to apply to the enforcement of foreign arbitral awards except to the extent that Chapter 1 conflicts with the Convention or Chapter 2." *Phoenix Aktiengesellschaft*, 391 F.3d at 435. "Jurisdiction over the enforcement of awards that fall under the [New York] Convention is granted by 9 U.S.C. § 207," which provides that "[w]ithin three years after an arbitral award falling under the Convention is made, any party to

the arbitration may apply to any court having jurisdiction under this chapter for the award as against any other party to the arbitration." 9 U.S.C. § 207; *Venture Global*, 233 F. App'x at 522. The award confirmation provision of Chapter 1 of the FAA, however, is more restrictive in that it requires prior consent to confirmation by both parties:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award

9 U.S.C. § 9.

In this case, the question before the Court is whether the consent-to-confirmation requirement found in 9 U.S.C. § 9 is applicable to foreign arbitration awards sought to be confirmed under the New York Convention pursuant to 9 U.S.C. § 207. If it is, then New Skies' petition must be dismissed as the parties' Master Services Agreement does not contain a consent-to-confirmation clause. Conversely, if the Court finds that 9 U.S.C. § 9 conflicts with, and is preempted by, the requirements of the New York Convention and 9 U.S.C. §§ 201 *et seq*., the parties' failure to include a consent-to-confirmation provision in their Master Services Agreement is of no consequence, and New Skies can continue to seek confirmation of its foreign arbitration award in this Court.

In answering this question, the Court finds instructive the reasoning set forth by the United States Court of Appeals for the Second Circuit in *Phoenix Aktiengesellschaft v. Ecoplas, Inc*. Presented with the same question at issue here, the Second Circuit held that 9 U.S.C. § 207 preempts 9 U.S.C. § 9 and its consent-to-confirmation requirement as it relates to confirmation of arbitration awards under the New York Convention. *Phoenix Aktiengesellschaft*, 391 F.3d at 435. The Second Circuit reasoned that "[s]ection 207 does not in any way condition confirmation on express or implicit consent" and "[b]ecause the plain language of § 207

authorizes confirmation of arbitration awards in cases where § 9's consent requirement expressly forbids such confirmation, we hold that the two provisions conflict." *Id*.; *see also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 588–89, n. 12 (5th Cir. 1997).

The Court hereby adopts the reasoning set forth by the Second Circuit in *Phoenix Aktiengesellschaft* and finds that the consent-to-confirmation requirement in 9 U.S.C. § 9 conflicts with 9 U.S.C. § 207 and is inapplicable to the extent New Skies seeks confirmation of its foreign arbitration award pursuant to the New York Convention and 9 U.S.C. §§ 201 *et seq*. The Court therefore has subject matter jurisdiction over this action,[2] and New Skies has stated a claim upon which relief can be granted. Accordingly, GMI's motion to dismiss will be **DENIED**.

B. New Skies' Motion for Scheduling Conference

On March 17, 2016, New Skies filed a motion requesting a scheduling conference to determine the status of GMI's motion to dismiss and the applicability of the scheduling order previously entered by the Honorable Harry S. Mattice before this case was reassigned to the undersigned. (Doc. 23.) Because this Order disposes of GMI's motion to dismiss, a scheduling conference is not necessary to ascertain the status of GMI's motion to dismiss. Additionally, because the deadlines set forth in the previously entered scheduling order (Doc. 20), will remain operative, the Court finds it unnecessary to convene a scheduling conference to discuss the applicability of the Court's September 25, 2015 scheduling order going forward. Accordingly, New Skies' motion for scheduling conference will be **DENIED**.

[2] GMI's motion to dismiss does not specify whether it is making a facial or factual attack on subject matter jurisdiction under Rule 12(b)(1). Nonetheless, regardless of whether GMI's motion is construed as a facial attack or a factual attack, the Court finds that it has subject matter jurisdiction over this action.

IV. CONCLUSION

For the reasons stated herein, GMI's motion to dismiss (Doc. 6), is **DENIED**, and New Skies' motion for a scheduling conference (Doc. 23), is **DENIED.**

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE