IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS	**:**	**CONSOLIDATED UNDER**
LIABILITY LITIGATION (No. VI)	**:**	**MDL DOCKET NO. 875**
	:	
VARIOUS PLAINTIFFS	**:**	**Certain Cases on the**
	:	**02-MD-875 Maritime Docket**
v.	**:**	**(MARDOC), Listed on the**
	:	**Attached Case List**
VARIOUS DEFENDANTS	**:**	

REPORT AND RECOMMENDATION

ELIZABETH T. HEY, U.S.M.J. MARCH 19, 2014

Presently before the court is "Certain Shipowner Defendants' Motion Pursuant to Court's October 29, 2013 Order Concerning Plaintiffs' Evidence of Service of Process" filed on December 16, 2013, (02-MD-875 Doc. 3719) ("Mot."), the plaintiffs' January 15, 2014 response, (02-MD-875 Doc. 3923) ("Resp."), and the defendants' January 31, 2014 reply, (02-MD-875 Doc. 4017) ("Reply"). The motion concerns the propriety of the plaintiffs' attempts at original service of process and, specifically, the availability of United States Postal Service return receipts ("green cards") showing that specific plaintiffs served specific defendants. In the motion, the defendants seek dismissal from the cases asserting that the proof of service is inadequate. For the reasons set forth below, I recommend that the motion be granted in part and denied in part.

Specifically, I recommend that the motion be denied and service be deemed proper in all cases where the plaintiff has produced green card evidence showing service of process from a specific plaintiff to a defendant and in cases where the defendants have conceded service, regardless of the timing of that service. I further recommend that the motion be granted and

service be deemed improper in all cases where the plaintiffs have failed to produce such green card evidence. Due to the improper service and the lack of good cause shown by the plaintiffs, I recommend that, pursuant to Federal Rule of Civil Procedure 4(m), the affected defendants be dismissed without prejudice from those cases. The attached case list contains three sections: (1) Section A includes the cases in which I recommend the motion be denied and service be deemed proper; (2) Section B includes the cases in which I recommend the motion be granted, service be deemed improper, and the defendants dismissed; and (3) Section C contains the cases that were initially included by the defendants in their motion, but in which no ruling should be entered at this time.

I. PROCEDURAL HISTORY

On August 26, 2013, the Honorable Eduardo C. Robreno entered a decision on 565 motions to dismiss in MDL 875 cases currently pending on the maritime docket ("MARDOC").[1] Bartel v. Various Defendants, 02-MD-875, ___ F. Supp. 2d ___, 2013 WL 4516651 (E.D. Pa. Aug. 26, 2013). At issue in the instant motion is his decision to deny 147 motions to dismiss due to improper service of process. Id. at *2.

In those motions, the defendants acknowledged that they had notice of the lawsuits, but asserted that the method the plaintiffs used to effectuate service of process -- sending the complaints from plaintiffs' counsel to the defendants via certified mail, return receipt requested -- did not comply with Ohio Civil Rules 4.1(A)(1)(a) and 4.3(B)(1). Pursuant to the Ohio Civil Rules, service by certified mail, return receipt requested is valid, but only if it is sent by the clerk of court. Ohio Civ. R. 4.1(A)(1)(a). The Ohio rule was judicially modified in Piercey v. Miami Valley Ready–Mixed Pension Plan, 110 F.R.D. 294 (S.D. Ohio 1986). In Piercey, the court held

[1] The cases are a subset of the Group 1 MARDOC cases. For a more complete history of these cases, see the Bartel decision at 2013 WL 4516651, at *1-2.

that, despite the clear wording of Ohio Civil Rule 4.1, plaintiff's counsel, rather than the clerk of court, could serve process by certified mail, if counsel was able to provide specific evidence of reliability including: (1) a copy of the cover letter, if any, which accompanied the complaint; (2) an executed return of service completed by counsel; and (3) the signed green card, addressed to counsel that was sent with the documents. Id. at 296. The court also held that counsel must file an affidavit setting forth: (1) that the complaint was sent by counsel, to the defendant by certified mail, return receipt requested; (2) the date the documents were sent; and (3) that the green card was signed and mailed back to counsel. Id. The defendants asserted in their motions to dismiss that because plaintiffs could not provide all of the Piercey proofs, service should be deemed improper and they should be dismissed from the cases.

The plaintiffs argued that they had made service as directed by Judge Thomas Lambros in the Northern District of Ohio, who had overseen the cases before they were referred to MDL-875. The plaintiffs contended that according to Judge Lambros, so long as the defendants had received actual notice of the actions, service of process sent from plaintiffs' counsel to the defendant by certified mail, return receipt requested, would suffice.

In denying the motions, Judge Robreno recognized that the plaintiffs could not provide all of the Piercey proofs. Bartel, 2013 WL 4516651, at *10. However, he concluded that "under the circumstances of this case, the court holds that service of original process here satisfies Ohio law provided that plaintiffs can produce sufficient proof which verifies and confirms that through the mailing of the process papers, defendant received notice of the pending action." Id. Specifically, in that Judge Lambros had previously held on November 28, 1987 that '"the return receipt of the registered mail would serve as proof of actual notice [to defendant],'" Judge Robreno found "that a signed returned green card, evidencing receipt by defendant of the

original process papers, serves as sufficient proof of service to satisfy the verification requirements of Ohio Rule 4.3(B)(1)." Id. He then directed me to order the plaintiffs to provide all of the supportive green cards in these cases and "provide defendants an opportunity to challenge the authenticity and genuineness of any green cards produced by plaintiffs." Id. at *10 n. 23.

On October 29, 2013, I offered the parties that opportunity by ordering the plaintiffs to provide to the defendants copies of the green cards for the Group 1 MARDOC cases and by allowing the defendants, after review, to "present any challenge to the authenticity and genuineness of any green cards, by filing a motion for hearing specifically identifying the defect." (02-MD-875 Doc. 3382).[2]

In response to my October 29, 2013 order, on December 16, 2013, the defendants filed the instant motion disputing the green card evidence provided by the plaintiffs in the Group 1 cases. (02-MD-875 Doc. 3719). The plaintiffs responded on January 15, 2014, (02-MD-875 Doc. 3923), and the defendants replied on January 31, 2014, (02-MD-875 Doc. 4017).

II. THE PARTIES' CONTENTIONS

In their motion, the defendants contend generally that the information provided by the plaintiffs is insufficient to establish that they were served with a complaint in a given case. Thus, they seek dismissal. The defendants divide the cases into four categories depending on the amount of evidence supplied by the plaintiffs. In the first two groups, the plaintiffs provided copies of green cards and internal database printouts allegedly verifying that the green cards related to specific plaintiffs and defendants. In the third group of cases, the plaintiffs provided

[2] While Judge Robreno's Bartel decision concerned only certain Group 1 MARDOC cases, my order also set forth a schedule for the production of all other green cards and a similar period for comment from the defendants.

no green cards but only their database printouts which they assert establish that they had received a green card, even if they do not currently possess it. In the fourth group of cases, the defendants do not dispute that they received green cards but instead contend that service was untimely in that it was made more than 120 days from the filing of the complaint in violation of Federal Rule of Civil Procedure 4(m). I will provide greater detail as to each of the four groups before addressing the motion's legal merit.

A. Cases with a Green Card, Receipt, and Printed Information Sheet

In the first group, which consist of the majority of cases at issue, the plaintiffs have provided the following documentation: (1) a copy of a green card showing the defendant's address, the date of delivery, a hand-written "batch number" generated by the plaintiffs,[3] a postal tracking number, and the signature of the recipient; (2) a copy of the receipt for certified mail showing the defendant's address, the date, and the postal tracking number; and (3) a printout created by the plaintiffs listing the defendant, the same batch number found on the green card, and the applicable cases by the plaintiff's name and case number. An example of this type of submission is attached to the defendants' motion. (Mot., Exh. 1). The defendants assert that this information is insufficient to show that a complaint was served for the listed plaintiff, and that there is no proof that the defendants received a summons and complaint for each plaintiff since there are no cover letters.

The plaintiffs first emphasize that the defendants admitted that they received service (or in the defendants' words, "notice") in all of these cases and only disputed the method of that service. The plaintiffs also assert that they can readily tell based on the batch numbers and the postal tracking numbers listed on the green cards, which plaintiffs served which defendants by

[3] The plaintiffs assigned batch numbers and wrote them on the green cards when they served complaints for multiple plaintiffs on one defendant in a single mailing.

comparing that information to the information in their "Service of Process Status" database. The database contains, for each plaintiff, information regarding each defendant such as the purported service date of the complaint and the postal tracking number from the green card.
The plaintiffs' explain their method for tracking service which utilizes this database in an affidavit from Michele Boyle, who has supervised the serving of process at the Jaques Admiralty Law Firm since 1991. (Resp., Exh. 3).

In their reply, the defendants dispute that they have "acknowledged" service and contend that they merely found complaints for these cases in their files. They also dispute the accuracy of the plaintiffs' "Service of Process Status" database. Specifically, they assert that there is no description of Ms. Boyle's supervision, nor is there anything demonstrating some form of quality assurance or review of the database to establish that the information was accurately entered. They suggest that this is important as they allege that there are instances where the green cards and the plaintiffs' database do not correspond. They also note that Ms. Boyle has no basis for her testimony regarding pre-1991 record keeping practices at the firm. The defendants similarly contend that the declaration of Robert E. Swickle, the president of the Jaques Admiralty Law Firm -- in which he states that "the same procedures to which Ms. Boyle has attested to [*sic*] regarding service of process were in place since Judge Lambros issued **MARDOC Order No. 17, issued November 20, 1987**" -- lacks any sort of detail and, thus, weight. See (Resp., Exh. 9) (emphasis original). In sum, they contend that the plaintiffs' database information is unreliable and cannot be verified.

B. Cases with a Green Card and a Hand Written Information Sheet

The second group consists of two cases, Kintana, 11-31558 and Turner, 11-32064, in which the plaintiffs have provided copies of the green cards showing the defendant, the date of

delivery, the recipient's signature, and the postal tracking number. They are accompanied by hand-written notes listing the applicable plaintiff's name and case number. See (Mot., Exh. 2). The two green cards for these cases do not have batch numbers written on them since the complaints were served individually on the defendant. The defendants contend that they cannot verify whether the green cards apply to the identified defendants or to which cases they purport to apply, as the plaintiffs' internal notes cannot be trusted.

The plaintiffs assert that in these cases, service may be confirmed by comparing the postal tracking numbers listed on their "Service of Process Status" database printouts which they attach to their response, (Resp., Exhs. 6 & 7), with the postal tracking numbers listed on the green cards. The database printouts list the plaintiffs and case numbers and contain various columns of information including a purported service date (in the form of six numbers, i.e. "012798"), the tracking number, and the defendant.

In reply, the defendants do not dispute the dates the complaints were filed, the dates of receipt on the green cards, that the postal tracking numbers on the green cards match the numbers on the plaintiffs' database printouts, or that they filed answers to the complaints. However, they assert that the reliability of the plaintiffs' database is still in question, thus, they will not concede that service was made within 120 days of the filing of the complaint.

C. Cases with No Green Cards

In the third group, consisting of seven cases, plaintiffs have not provided green cards.[4] Instead, they have provided their "Service of Process Status" database printouts which are

[4] Originally, there were eight cases in this group. However, in their reply the defendants concede that service was made within 120 days in Dodd, 11-32883. See (Reply, at 7-8, 14). They reason that because they filed their answer within 120 days of the complaint being filed, they must have been served within that time. Given the defendants' concession, even though no

identical in form to the ones described above, as well as other forms of secondary evidence. The database printouts for these cases are attached to the defendants' motion. (Mot., Exh. 3). As described above, the printouts list the plaintiffs' names and case numbers, the purported dates of service, the postal tracking numbers, and the applicable defendants. The defendants assert that the plaintiffs' proffer does not comply with Judge Robreno's ruling in Bartel in that the plaintiffs have failed to provide a green card. They also argue that, because the plaintiffs' database may be unreliable, they are unable to determine if service was made within 120 days of the filing of the complaint, even though that information is purportedly contained in the database.

The plaintiffs argue that the evidence they have proffered is sufficient to establish service. They also assert that before February 1995, they filed the returned green cards with the court, so they do not possess the originals and may not have retained copies for their records. According to the plaintiffs, it was only after MARDOC Order No. 161, issued February 2, 1995, that they were directed to retain the green cards. They claim that they have used the same method to track service since 1987, which includes, upon receipt of a signed green card, inputting the information from the card into their "Service of Process Status" database. As a result, the plaintiffs contend that with printouts from their database, they can prove that they received a green card from a specific defendant regarding a specific plaintiff's complaint, the date of the service, and the postal tracking number. In effect, the plaintiffs assert that if the green card data was recorded in their database, then they received the green card, even though they cannot now produce that green card. The plaintiffs also assert that due to a flood in the 2000's, some green cards in their possession "may or may not have [been] destroyed." (Resp., at 8).

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green card has been produced, Dodd is included in Section A of the attached case list as I conclude that the defendants have withdrawn their motion in this case.

In reply, the defendants contend that the plaintiffs' failure to produce green cards should be dispositive and that the plaintiffs' database cannot be verified. They assert that the database printouts contain inadmissible hearsay, which cannot be used to establish a date of service or receipt of process upon a particular defendant.[5] They also argue that regardless of whether a green card may have been filed with the court or lost in a flood, the plaintiffs have not met their burden to establish proper service.

The plaintiffs have delineated case by case the evidence which they contend establishes proof of service of process, summarized below:

1. Cases Filed in Ohio

a. Tedder, 11-32827, challenged by Sinclair Refining: as proof of service, the plaintiffs proffer a "Service of Process Status" database printout which lists the plaintiff, the defendant, the purported service date (February 5, 1998), and the postal tracking number. (Resp., Exh. 13). They also attach Sinclair's answer to the complaint. The defendants agree with the filing date of the complaint, and that plaintiffs' database shows a postal tracking number assigned to Sinclair Refining and a purported service date. They likewise agree that the defendant filed an answer. However, given the lack of green card and the passage of time, they will not concede that service was made within 120 days of the filing of the complaint.

b. Sutherland, 11-33165, challenged by Sinclair Refining: as proof of service, the plaintiffs proffer a "Service of Process Status" database printout that lists the plaintiff, the defendant, the purported service date (August 21, 2000), and the postal tracking number. (Resp., Exh. 17). The defendants agree with the filing date of the complaint and that plaintiffs' database shows a postal tracking number assigned to Sinclair Refining and a purported

[5] The defendants contend that the records do not qualify for the business record exception to the hearsay rule because they were made for litigation purposes.

service date. However, given the lack of green card and the passage of time, they will not concede that service was made within 120 days of the filing of the complaint. In this particular case, no answer was filed as the suit began during a time when the court had directed the defendants not to file answers.

c. Watson, 11-33470, challenged by Sinclair Refining: as proof of service, the plaintiffs attach as Exhibit 18, the August 7, 1987 cover letter allegedly sent with service. In addition, they provide their "Service of Process Status" database printout which lists the plaintiff, the defendant, the alleged service date (February 22, 1989), and the postal tracking number. (Resp., Exh. 19). They also provide Sinclair's answer to the amended complaint. The defendants assert that there is no evidence that the cover letter was received by Sinclair Refining and note that the plaintiffs do not contend that it establishes receipt of process. Therefore, the defendants claim that the cover letter is irrelevant. Otherwise, the defendants agree with the filing date of the complaint, and that the plaintiffs' database shows a postal tracking number assigned to Sinclair Refining and a purported service date. They likewise agree that the defendant filed an answer. However, given the lack of green card and the passage of time, they will not concede that service was made within 120 days of the filing of the complaint.

d. Jacobson, 11-33888[6], challenged by Sinclair Refining: the plaintiffs proffer their "Service of Process Status" database printout which lists the plaintiff, the

[6] In their reply, the defendants assert that Jacobson should be governed by Michigan law since it was initially filed in Michigan. This argument is detailed directly below in Section II. C. 2. regarding several other such cases. However, in their reply brief to their motion for reconsideration of Bartel, the defendants acknowledge that Jacobson originally filed his action against the defendant at issue, Sinclair Refining, in Ohio as part of his first amended complaint. (02-MD-875 Doc. 3201 at 4 n. 5; see also 02-MD-875 Doc. 3184, at 2 n. 1, plaintiffs' response to the motion for reconsideration). Thus, they withdrew Jacobson from their arguments based upon Michigan law. (Id.). As such, I conclude that in this motion, the defendants erroneously included Jacobson as a case that they believed should be governed by Michigan law.

defendant, the purported service date (February 22, 1989), and the postal tracking number. (Resp., Ex. 27). They also attach Sinclair's answer to the complaint. The plaintiffs point out that since this case was filed before 1995, the court would have the original green card.[7] The defendants agree with the amended complaint filing date, and that the plaintiffs' database has a postal tracking number assigned to Sinclair Refining and a purported service date. Likewise, they do not dispute that they filed an answer. However, given the lack of green card and the passage of time, they will not concede that service was made within 120 days of the filing of the complaint.

2. Cases that Were Originally Filed in Michigan

a. Schroeder, 11-32774, challenged by Sinclair Refining
b. Hansen, 11-33520, challenged by Sinclair Refining
c. Smith, 11-33516, challenged by Atlantic Refining and Conoco Oil

The defendants initially included these three cases in their motion. However, in their reply, they recognize that in Judge Robreno's October 4, 2013 order granting in part their motion for reconsideration of Bartel, he held that these cases should be governed by Michigan law.[8] (02-MD-875 Doc. 3222). Thus, the defendants contend that any decision regarding the validity of service in these cases should be held until the court addresses the issue of service of process under Michigan law. In light of Judge Robreno's October 4, 2013 order, the defendants are correct that they should not have included these cases in their motion. While no rulings should

[7] Watson, 11-33470, also appears to have been filed before 1995. However, the plaintiffs do not raise this argument in that case.

[8] In their reply, the defendants do not to make this argument for Smith, 11-33516. However, since Judge Robreno found in his October 4, 2013 order that all three of these cases were governed by Michigan law, I must conclude that they mistakenly neglected to make this argument regarding Smith. (02-MD-875 Doc. 3222).

be made on these motions at this time, the cases are included in Section C of the attached case list so that this report and recommendation is filed on their dockets.

D. Untimely Service

The defendants assert that in eight cases they were not served within 120 days of the filing of the complaint.[9] Therefore, they contend that service is improper and they should be dismissed from the cases pursuant to Federal Rule of Civil Procedure 4(m). The plaintiffs do not dispute that the defendants must be served within 120 days, and in most of these cases claim that they did timely serve defendants via an amended complaint and have provided additional supportive evidence with their response. In a handful of cases, they acknowledge that service was late but ask that the court grant them time to cure the untimely service rather than dismiss the affected defendants. The defendants argue that given the lack of good cause shown by the plaintiffs, they should not be given an extension of time to cure the service errors. These cases can be divided into three categories.

1. Where Service Was a Few Days Late

Fernandez, 11-33169, challenged by Atlantic Richfield: the plaintiffs acknowledge that they mailed service to Atlantic Richfield on the 119th day and, based on the date stamped on the green card, the defendant received service on the 125th day. In that the complaint was mailed within 120 days, the plaintiffs ask for time to cure the defect rather than have the claim dismissed. The defendants contend that service was untimely as it is the date of receipt that is pertinent, not the mailing date. They also assert that the plaintiffs have not offered any reason why they waited until the last day to mail the summons.

[9] The defendants had initially identified nine additional cases as involving late service, but after reviewing the plaintiffs' submissions have conceded that service was timely. These cases are listed in section III. C. below.

2. Where Service Was Very Late

a. Fruge, 11-32186, challenged by Continental Steamship, where the plaintiffs acknowledge that service was made 635 days after filing the complaint.

b. Hart, 11-30417, challenged by Continental Steamship, where the plaintiffs acknowledge that service was made 690 days after filing the complaint.

c. Resendez, 11-31152, challenged by Continental Steamship, where the plaintiffs acknowledge that service was made 400 days after filing the complaint.

d. Sullivan, 11-32177, challenged by Continental Steamship, where the plaintiffs acknowledge that service was made 365 days after filing the complaint.

In these four cases, the plaintiffs recognize that they untimely served Continental Steamship explaining that they could not locate a valid service address when they filed the complaints. They request the opportunity to cure the defective service pursuant to Federal Rule of Civil Procedure 4(m). In their reply, the defendants contend that the plaintiffs have not set forth the efforts they used to locate the defendant's address. They further contend that the plaintiffs have failed to provide a reason for their failure, how the failure was addressed, or how it was cured. Thus, they assert that the plaintiffs have failed to established good cause for a reprieve, especially since they have allegedly been mailing process to Continental Steamship since at least 1987.

3. Cases Where the Service Dates Are Disputed

a. Linscomb, 11-33240, challenged by Sinclair Oil and Sinclair Refining.

The parties agree that the complaint was filed on August 4, 1993, making service due by December 2, 1993. As proof that these defendants were served on December 1, 1993, the plaintiffs rely on two Return of Service forms completed on October 17, 1994, nearly a year after

service was made. (Resp., Exhs. 44 & 45). As noted by the defendants, the green cards attached to the Return of Service forms show a service date of December 6, 1993, 125 days after the complaint was filed. The defendants argue that the Return of Service forms are unreliable since they were completed ten months after service was made. Instead, they assert that the green cards speak for themselves.

b. Martinez, 11-30485, challenged by Sinclair Oil.

The parties agree that the complaint was filed on November 17, 1994, making service due by March 17, 1995. As proof of that the defendant was served on February 27, 1995, the plaintiffs cite to the relevant green card attached to their response. (Resp., Exh. 48). The defendants correctly claim that the service date written on the green card appears to be either May 1 or 7, 1995, not February 27, 1995. The defendants acknowledge that the docket indicates that they filed their answer on March 23, 1995, which seems to support the plaintiff's position. See (Resp., Exh. 47). However, they contend that the plaintiff has not produced the actual answer and they argue that the docket must be incorrect. They note that the court did not enter the answer on the docket until January 8, 1996, nearly ten months after it was filed. They argue that this temporal anomaly calls into question the validity of the filing date on the docket.

c. Perna, 10-30028, challenged by Arco Marine.

The parties agree that the complaint was filed on March 30, 2001, making service due by July 28, 2001. The plaintiffs proffer a green card showing a service date of May 21, 2001. (Resp., Exh. 49). The defendants claim that the proffered green card lists "Arco" as the recipient, not "Arco Marine," the defendant at issue. The defendants attach the green card for Arco Marine, which shows a service date of October 1, 2001, or 186 days after the complaint was filed. (Reply, Exh. 3).

III. LEGAL ANALYSIS AND DISCUSSION

A. Cases with Green Cards

The first two groups, discussed above in Sections II. A. and B., include cases with green cards. In the first group of cases, the plaintiffs have provided: (a) a copy of a green card; (b) a copy of the receipt for certified mail; and; (c) a printout from their files listing the defendant, the batch number written on the green card, and the applicable cases by name and case number. In the second group of cases, the plaintiffs have provided: (a) copies of the green cards; (b) hand written notes listing the applicable plaintiff's name and case number; and (3) as part of their reply, "Service of Process Status" database printouts listing the plaintiff, the defendant, the service date, and the postal tracking number.

In Bartel, Judge Robreno recognized the rather unique circumstances of these cases and acknowledged that Judge Lambros' previous decision that green cards would suffice as proof of service, was the law of the cases. 2013 WL 4516651, at *10 n. 22. As a result, he held "that a signed returned green card, evidencing receipt by defendant of the original process papers, serves as sufficient proof of service to satisfy the verification requirements of Ohio Rule 4.3(B)(1)." Id. at *10. Here, the plaintiffs have provided exactly that information. Moreover, the defendants have not questioned the "authenticity and genuineness" of any of these green cards, which was the purpose of this exercise. Id. at *10 n. 23. As a result, I recommend that service in these cases be deemed proper and the defendants' motion be denied as to them.

B. Cases without Green Cards

In the third group of cases, the plaintiffs have failed to provide green cards. There are only four Ohio cases in this group: Tedder, 11-32827, Sutherland, 11-33165, Watson, 11-33470, and Jacobson, 11-33888. As proof of service in these cases, the plaintiffs have provided

printouts from their "Service of Process Status" database. In all but Sutherland, the plaintiffs have also provided the defendants' answers, purportedly evidencing that they received service. In Watson, the plaintiffs additionally provided the cover letter that was allegedly sent with service.

In these cases, the plaintiffs have failed to adhere to Ohio Civil Rule 4.1, the Piercey standard for establishing proof of service when counsel serves process by certified mail, or the standard for proof of service espoused by Judge Lambros and Judge Robreno. Instead, the plaintiffs provide only secondary evidence purporting to establish proof of service, an issue for which they bear the burden. Grand Entm't Grp., Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488 (3d Cir. 1993) (acknowledging that "the party asserting the validity of service bears the burden of proof on that issue"). I am unconvinced that the rules of service under Ohio law, which, on their face, would dictate that service was improper in every case at issue, should be eroded further so that the plaintiffs need only provide their own records to meet their burden of proof. As a result, I recommend that the service of process in these cases be deemed improper due to the plaintiffs' failure to provide adequate and reliable proof of service. The question in these four cases then becomes, what consequence to impose for the improper service? I discuss this question below in Section III. D.

C. Cases in Which the Defendants Contend They Were not Timely Served

The defendants' fourth group includes those cases where they claim that service was untimely. There is no dispute in five of these cases that the plaintiffs untimely served the defendants: Fernandez, 11-33169, Fruge, 11-32186, Hart, 11-30417, Resendez, 11-31152, and Sullivan, 11-32177. See Section II. D. 1.-2. In that it is clear that service was improper in all of these cases, I will consider the consequences in Section III. D, below.

In their reply, after review of the new materials submitted by the plaintiffs, the defendants concede that service was received within 120 days in nine cases which they had initially challenged in their motion. As a result, I conclude that the defendants have withdrawn their timeliness arguments and the motions should be denied as to these cases:

- **Artis, 11-31027, challenged by Continental Steamship**
- **Brathwaite, 11-33043, challenged by Continental Oil Co. and Conoco, Inc.**
- **Bruce, 11-32943, challenged by Conoco, Inc. and Continental Oil Co.**
- **Clements, 09-91137, challenged by Sinclair Refining**
- **Todd, 11-32764, challenged by Atlantic Refining**
- **Trahan, 11-31088, challenged by Sinclair Refining**
- **Dodd, 11-32883, challenged by Sinclair Refining**[10]
- **Loftin, 09-91201, challenged by Sinclair Refining**
- **Preston, 11-33799, challenged by Continental Oil**

Also at issue in this group are the three cases where the parties disagree as to the date of service of process: Linscomb, 11-33240, Martinez, 11-30485, and Perna, 10-30028. See Section II. D. 3. After reviewing the evidence, I conclude that service in all three of these cases was untimely and they will be addressed in Section III. D. below as to the consequences of late service.

In Linscomb, the green cards clearly show December 6, 1993 service dates. (Resp., Exhs. 44 & 45). As a result, even though the non-contemporaneous Return of Service forms show December 1, 1993 service dates, it is apparent that service in Linscomb was untimely by five days. (Id.).

In Martinez, the green card provided shows a service date of May 1 or 7, 1995, not February 27, 1995 as claimed by the plaintiffs, making service untimely. (Resp., Exh. 48). As a

[10] It appears that the plaintiffs have not produced a green card in this case. However, the defendants have conceded that they received service of process within 120 days, effectively withdrawing their motion. See supra at 7 n. 4.

result, when the answer was entered on the docket, ten months after it was filed, it is highly likely that the entry was misdated. See (Resp., Exh. 47).

Finally, in Perna, the defendants appear to be correct that according to the proper green card for "Arco Marine," rather than the green card for "Arco," service in this case was untimely made on October, 1, 2001. Compare (Resp., Exh. 49) with (Reply, Exh. 3).

D. The Consequences of Improper Service under Federal Rule of Civil Procedure 4(m)

As described above, there are two categories of cases in which I have recommended that the court find that service was improper: (1) those where the plaintiffs have not the green card requirement; and (2) those where there is a green card but service was late.

Under Federal Rule of Civil Procedure 4(m), "[i]f a defendant is not served within 120 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). However, "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Id. The Third Circuit has interpreted this rule to mean that, even without good cause, the court can, at its discretion, provide additional service time rather than dismiss the defendants. Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995). The additional time to serve process may be provided by the court nunc pro tunc so that otherwise untimely service of process may be deemed timely. See McCurdy v. Am. Bd. of Plastic Surgery, 157 F.3d 191, 196 (3d Cir. 1998).

1. Cases with No Acceptable Proof of Service

In Bartel, Judge Robreno premised his decision to deny the motions to dismiss due to improper service on the fact that the plaintiffs had provided or would provide "signed green cards evidencing receipt by the defendants of the service papers." 2013 WL 4516651, at *8. He

concluded that "[a]ssuming that plaintiffs can [ ] show [the green cards], the question becomes, is the signed 'green card' sufficient evidence of service to satisfy Ohio Law Rule 4.3(B)(1)?" Id. at *10. Judge Robreno answered this question in the affirmative. Id. As discussed above, there are four Ohio cases for which plaintiffs have been unable to produce a green card: Sutherland, 11-33165, Tedder, 11-32827, Watson, 11-33470, and Jacobson, 11-33888.

It is the plaintiffs' burden to establish proper service of process. Grand Entm't Grp. Ltd., 988 F.2d at 488. Unless the plaintiffs can show good cause for their failure to provide green cards in these cases, the court has the discretion to dismiss the affected defendants or allow the plaintiffs to properly re-serve the complaints. The plaintiffs make only two attempts to show good cause for their failure, both of which involve the timing of MARDOC Order No. 161, (02-MD-875 Doc. 2061, Exh. C), signed by Judge Lambros on February 2, 1995. In Order No. 161, Judge Lambros directed the plaintiffs to retain the returned signed green cards rather than file them with the court which had been the accepted process previously. (Id. at 2).

For cases filed before February 1995, the plaintiffs contend that after receiving a green card and adding its information into their database, they filed them with the court. Therefore, they assert that they do not, and could not, have the green cards for those cases. However, we did not require the plaintiffs to produce the original green card, only copies thereof. See (02-MD-875 Doc. 3382). Plaintiffs have provided no valid excuse for why they did not keep copies of the green cards, the only proof of service required by Judge Lambros, in their own files before submitting the original to the court. See (02-MD-875 Doc. 2061, Exh. B, p. 5 "MARDOC Order No. 17") (Judge Lambros providing that "the return receipt of the registered mail would serve as proof of actual notice").

Regarding cases filed after February 1995, when the plaintiffs were required to retain the green cards, they contend that one of their counsel's storage rooms was flooded in the 2000's and all of the records therein were destroyed. They assert that the "flood may or may not have destroyed some of the boxes where the green cards were stored." (Resp., p. 8). This excuse is completely speculative in that the plaintiffs cannot even confirm whether green cards were lost in the flood.

I conclude that neither of these reasons provides good cause for excusing the plaintiffs' failure to provide proof of service in these four cases. In that the plaintiffs would be required to re-serve the defendants decades after the cases were filed, I recommend that the affected defendants be dismissed from these cases pursuant to Federal Rule of Civil Procedure 4(m).

2. Cases Where Service Was Untimely

In eight cases, Fernandez, 11-33169, Fruge, 11-32186, Hart, 11-30417, Resendez, 11-31152, Sullivan, 11-32177, Linscomb, 11-33240, Martinez, 11-30485, and Perna, 10-30028, the evidence establishes that, while there are green cards to provide proof of service, the service was untimely. The plaintiffs attempt to provide justification for their late service in only four cases: Fruge, Hart, Resendez, and Sullivan. For these cases, the plaintiffs assert that when the complaint was filed, they did not have a viable address for Continental Steamship. As noted by the defendants, the plaintiffs do not describe what they did to procure the address or why it took so long for them to do so. Given the rather thin excuse provided by the plaintiffs, I must conclude that they have failed to establish good cause for their failure to timely serve the defendants.

Nonetheless, the defendants were eventually served, as the green cards attest. Given this proof of service, unlike the four cases described above, the plaintiffs would not be required to re-

serve the defendants. Instead, only an extension of the service deadlines nunc pro tunc would be necessary to cure the defective service. I conclude, given the unique posture of these cases, the many years that they laid dormant, and the proof of actual notice of the lawsuits, that the defendants have not been prejudiced by the late service, even where that service occurred nearly two years after the complaint was filed. As a result, for these eight cases, I recommend that, pursuant to Federal Rule of Civil Procedure 4(m), the court provide extensions of the service deadlines, nunc pro tunc, so that service is deemed timely in each case.

IV. CONCLUSION

As a result of Bartel, the defendants were given the opportunity to challenge the green card evidence provided by the plaintiffs. In response, the defendants filed the instant motion and divided their challenges into four categories of cases. The first two categories, as well as the fourth category, contain cases in which the plaintiffs have provided signed green cards and attendant documents "evidencing receipt by defendant of the original process papers." Bartel, 2013 WL 4516651, at *10. This is precisely the type of evidence that Judge Robreno envisioned when he denied the motions to dismiss due to improper service. Thus, I recommend that the defendants' motion be denied as to these cases, which are found in Section A of the attached case list. The third category of cases contains those without green cards and only secondary evidence from the plaintiffs' own database and files. These cases do not meet the proof of service standards established by Judge Lambros and accepted as the law of the case by Judge Robreno. Therefore I recommend that the motion be granted in these cases, found in Section B of the attached case list, and the affected defendants be dismissed pursuant to Federal Rule of Civil

Procedure 4(m).[11] Regarding the untimeliness of service in the fourth category of cases, given the lack of prejudice to the defendants, especially in light of the proof of the actual notice of service, I recommend that the service deadlines be extended nunc pro tunc so that service in those cases be deemed timely. These cases are also included in Section A of the case list. Finally, the three cases to which Michigan law applies are found in Section C of the case list, and the motion should not be disposed of at this time in these cases.

Therefore, I make the following:

[11] The sole exception is Dodd, 11-32883, discussed supra at 7 n.4 & 17 n.10, where even though the plaintiffs have apparently not provided a green card, based on the timing of their answer, the defendants have conceded that service was made within 120 days of the filing of the complaint. See (Reply, at 7-8, 14).

RECOMMENDATION

AND NOW, this 19th day of March 2013, it is **RESPECTFULLY RECOMMENDED** that "Certain Shipowner Defendants' Motion Pursuant to Court's October 29, 2013 Order Concerning Plaintiffs' Evidence of Service of Process" (02-MD-875, Doc. 3719) be **GRANTED in part** and **DENIED in part.** Specifically, for the reasons set forth above, I **RECOMMEND** that:

(1) regarding the cases in Section A of the attached case list, in which the plaintiffs have provided green cards establishing proof of service, or the defendants have conceded service, the motion be **DENIED** and service of process in those cases be deemed proper, regardless of whether service was originally timely;

(2) regarding the cases in Section B of the attached case list, for which the plaintiffs have failed to provide green card evidence of service, the motion be **GRANTED** and the listed defendants be dismissed from the listed cases without prejudice; and

(3) regarding the cases in Section C of the attached case list, in that they are governed by Michigan law, no decision should be made regarding the propriety of service of process until that issue is addressed by the court under Michigan law.

The parties may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. The deadline to file objections is April 2, 2014. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ELIZABETH T. HEY

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ELIZABETH T. HEY
UNITED STATES MAGISTRATE JUDGE