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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MF GLOBAL HOLDINGS LTD., et al.,	:	**Case No. 11-15059 (MG)**
Debtors.[1]	:	**(Jointly Administered)**
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC, Plaintiffs,	:	
vs.	:	**Adv. Proc. No. 16-01251 (MG)**
ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY, Defendants.	:	

PLAINTIFFS' OMNIBUS OPPOSITION TO THE BERMUDA INSURERS' MOTIONS TO COMPEL ARBITRATION

[1] The debtors in the chapter 11 cases are MF Global Holdings Ltd.; MF Global Finance USA Inc.; MF Global Capital LLC; MF Global Market Services LLC; MF Global FX Clear LLC; and MF Global Holdings USA Inc. The Court entered an order of final decree closing the chapter 11 cases of MF Global Capital LLC, MF Global FX Clear LLC, and MF Global Market Services LLC on February 11, 2016.

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PRELIMINARY STATEMENT

In their motions to compel arbitration,[2] defendants Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., Starr Insurance & Reinsurance Limited (collectively, "Iron-Starr") and Allied World Assurance Company, Ltd. ("AWAC") (collectively, the "Bermuda Insurers") present this case as a straightforward application of the Federal Arbitration Act's ("FAA") presumption in favor of arbitration. This completely ignores the extreme complexity of this case at the intersection of bankruptcy and insurance law, which requires interpretation and enforcement of this Court's prior orders. Accordingly, as this Court has recognized, the dispute over whether this proceeding should be arbitrated requires a "more nuanced" analysis that goes beyond mere platitudes.[3] Yet the Bermuda Insurers have failed to grapple with, or even mention, many of the important issues that must be considered in order to resolve their motions.

First, the Bermuda Insurers wholly ignore New York Insurance Law § 1213(c), which requires them to post a bond *before* filing a motion to compel arbitration. The New York Legislature enacted § 1213(c) to protect New York residents from the obstacle of resorting to distant forums for the purpose of asserting legal rights under insurance policies issued by foreign

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[2] See Memorandum of Law in Support of Defendant Allied World Assurance Company, Ltd's Motion To Compel Arbitration (Adv. D.I. 13-1) ("AWAC Br."); Memorandum of Law in Support of the Iron-Starr Defendants' Motion To Compel or Stay in Favor of Arbitration (Adv. D.I. 20) ("Iron-Starr Br."). Citations to "Adv. D.I." refer to docket items in this Adversary Proceeding, Number 16-01251 (Bankr. S.D.N.Y.). Citations to "D.I." refer to docket items in the main bankruptcy case of MF Global Holding Ltd. ("MFGH"), Case No. 11-15059. Citations to "MDL D.I." refer to docket items in the consolidated MDL proceeding Deangelis v. Corzine, No. 11-cv-07866-VM (S.D.N.Y.) (the "MDL"). Citations to "SIPA D.I." refer to docket items in the SIPA liquidation of MF Global Inc. ("MFGI"), which was proceeding before the Bankruptcy Court as Case No. 11-02790 before it was closed on April 4, 2016. For the Court's convenience, prior orders of the Court referenced herein are annexed in chronological order to the accompanying Affidavit of Jason B. Lissy (the "Lissy Aff.").

[3] Memorandum Opinion and Order Finding That The Bermuda Insurers Violated The Barton Doctrine at 7 (Adv. D.I. 99).

unauthorized insurance companies like the Bermuda Insurers. Compelling arbitration of this dispute before the Bermuda Insurers comply with § 1213(c) would reward them for ignoring this legal mandate. Because the Bermuda Insurers failed to post a bond, as required by § 1213(c), this Court should strike their motions to compel without reaching the merits.

The Bermuda Insurers also ignore the fact that the plain language of the Plan precludes arbitration of this dispute. See Second Amended and Restated Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (D.I. 1382) (Lissy Aff., Ex. 2) (the "Plan"). In the Plan, this Court expressly retained jurisdiction to "adjudicate" any "adversary proceedings." Plan, Art. XII.e. The term "adjudicate" implies a final judgment on the merits, as opposed to a decision whether to compel arbitration. Nevertheless, unlike other insurers facing similar situations, the Bermuda Insurers failed to object to this Court's retention of jurisdiction over this proceeding. The Plan thus superseded the arbitration provisions in the Bermuda Insurers' policies, and the Bermuda Insurers are precluded from invoking arbitration here.

Next, AWAC inexplicably neglects to mention that its policy actually contains *two separate arbitration provisions*, one *mandatory* and the other *permissive*. AWAC cites only the first of these two provisions, presuming (without analysis) that all of the MFG Parties are bound by it. But as the AWAC policy's plain language makes clear, only MFGH is bound by the *mandatory* arbitration provision cited in AWAC's brief. MFGH's subsidiaries (including MFGI), their respective directors, officers, and employees (the "Individual Insureds"), and their assignees are subject to the second, *permissive* arbitration provision, which AWAC does not even acknowledge. MFGI, the Individual Insureds, and their respective assignees therefore never agreed to mandatory Bermuda arbitration of this dispute.

Finally, in yet another attempt to strip this Court of its rightful jurisdiction, the Bermuda

Insurers ignore the many ways in which arbitration of this core dispute would seriously jeopardize the objectives of the Bankruptcy Code. Because the policy of defendant Federal Insurance Company ("Federal") does not contain an arbitration provision, it is clear that the claims against Federal will be adjudicated in this Court and not in a Bermuda arbitration. Moreover, the claims against AWAC are not subject to mandatory arbitration, and must therefore stay with this Court, to the extent they are brought by MFGI, the Individual Insureds, or their assignees. There is thus no option to send all proceedings here to arbitration.

However, sending a portion of this case to arbitration, while leaving the remainder with this Court, would undermine the Bankruptcy Code's objectives by creating a morass of decentralized, duplicative proceedings, thus wasting resources and generating a significant risk of inconsistent rulings. And given this Court's unique historical involvement in the complex bankruptcy-related and insurance-related issues raised here, this Court is in a much better position than a Bermuda arbitration panel to resolve this bankruptcy dispute. Retaining jurisdiction is also the only way for this Court to ensure that its prior orders will be respected and enforced. Accordingly, this Court should exercise its discretion to retain jurisdiction over this entire dispute and deny the motions to compel arbitration.

FACTUAL BACKGROUND

The MFG Parties incorporate by reference facts alleged in the Adversary Complaint (the "Complaint") (Adv. D.I. 1), which in the interest of brevity are not fully repeated herein.

I. The Dissenting E&O Policies

For the May 31, 2011 to May 31, 2012 policy period, Plaintiff MFGH purchased a professional liability insurance program consisting of seventeen Errors and Omissions ("E&O") insurance policies, with combined policy limits totaling $157.5 million (the "E&O Tower"). The excess E&O insurance policies sold to MFGH by Defendants AWAC, Iron-Starr, and Federal

(collectively, the "Dissenting E&O Policies") occupy the top three coverage "layers" of the E&O Tower and provide $25 million in combined policy limits. See Complaint ¶¶ 23-25.

The Dissenting E&O Policies are considered "follow form" excess insurance policies as, with certain exceptions, they incorporate and adopt the terms and conditions of the E&O Tower's first-layer captive policy sold to MFGH by MFG Assurance Company Limited (the "Followed MFGA Policy") (Policy No. 1-18002-00-11).[4] Per the terms of the Followed MFGA Policy, the Dissenting E&O Policies cover MFGH and its subsidiaries, including MFGI and the Individual Insureds, for any actual or alleged acts, errors, and omissions while performing or failing to perform services provided by MFGH and MFGI (collectively, "MF Global").

Only two of the three Dissenting E&O Policies in this dispute contain arbitration provisions. While the AWAC Dissenting E&O Policy and Iron-Star Dissenting E&O Policy each contain a Bermuda arbitration provision, see Complaint Ex. B, Section IX; Ex. C, Section G., the Federal Dissenting E&O Policy does not have an arbitration provision at all, see id. Ex. D. The Iron-Starr Dissenting E&O Policy's Bermuda arbitration provision does not identify the insureds to whom the provision applies, stating generally that "any dispute arising out of or in connection with this Policy shall be referred to and fully and finally resolved solely by Arbitration held in Hamilton, Bermuda." Id. Ex. C, Section G. By contrast, the AWAC Dissenting E&O Policy's arbitration provision expressly differentiates between the arbitration rights and obligations of various insureds under the Policy. See infra Part III of Argument.

II. The Confirmed Bankruptcy Plan

On April 5, 2013, this Court confirmed the liquidation Plan for MFGH and its debtor

[4] Copies of the AWAC Dissenting E&O Policy (Policy No. C007357/005) (Ex. B), Iron-Starr Dissenting E&O Policy (Policy No. ISF0000508) (Ex. C), Federal Dissenting E&O Policy (Policy No. 8208-3220) (Ex. D), and Followed MFGA Policy (Policy No. 1-18002-00-11) (Ex. E) are attached to the Adversary Complaint (Adv. D.I. 1).

subsidiaries. See Complaint ¶¶ 19, 21. In the Plan, this Court expressly retained broad jurisdiction to "adjudicate" any "adversary proceedings" "that may be pending on the Effective Date or brought thereafter." Plan, Art. XII.e.

III. The Disputed Insurance Claims

As set forth in the Complaint, see Complaint ¶¶ 6-8, 49-52, 56-61, 92-94, the MFG Parties seek insurance coverage under the Dissenting E&O Policies for distinct losses resulting from various underlying claims asserted by MF Global's commodity futures customers (the "Customer Claims"): (1) customer net equity claims asserted directly against MFGI (SIPA Bankruptcy Claim No. 000005523) (the "MFGI Direct Claim") and MFGH (MFGH Claim No. 2093; see D.I. 1911, ¶ 3 (Lissy Aff., Ex. 5)) (the "MFGH Direct Claim"), paid through the advancement of MFGI general estate funds, with MFGH's approval, pursuant to the Court's NES Approval Order (SIPA D.I. 7208) (Lissy Aff., Ex. 4); and (2) the Customer Claims in the MDL Class Action asserted against the Individual Insureds, which were assigned and subrogated to MFGI until the amount of the net equity advances were repaid in full, and subsequently resolved through the MDL Settlement Agreement (D.I. 2271-2) (Lissy Aff., Ex. 7), which included the assignment of the Individual Insureds' rights under the Dissenting E&O Policies for the Dissenting Insurers' failure to fund the "Defendants' Financial Obligation" therein (the "Individual Insureds' Assigned Claims").

Per the various assignments of insurance rights this Court authorized, (1) the MFGH Direct Claim is held by MFGH; (2) the MFGI Direct Claim is held by MF Global Assigned Assets LLC ("MFGAA"), see SAA Approval Approval Order at 6 (SIPA D.I. 8855) (Lissy Aff., Ex. 6); and (3) the Individual Insureds' Assigned Claims are held by MFGAA, MFGH as Plan Administrator, and the Litigation Trustee of the MF Global Litigation Trust, see MDL Settlement Agreement ¶ 1(c)(i-ii), Ex. A ¶ 6.

IV. The Adversary Complaint

The Complaint requests declaratory judgment that, among other things, "the limits of the Dissenting E&O Policies are currently due and owing to MFGAA as the assignee and designee of all coverage claims and rights of recovery of MFGI and the Individual Insureds." Complaint ¶ 106. The Complaint also seeks relief for breach of contract, including the implied covenant of good faith and fair dealing. Id. ¶¶ 107-119.

SUMMARY OF ARGUMENT

For multiple, independent reasons, this Court should strike or deny the Bermuda Insurers' motions to compel arbitration. First, because the Bermuda Insurers failed to post a bond *before* filing their motions to compel arbitration, as required by New York Insurance Law § 1213(c), the Court should strike their pleadings and enter default judgment against them. Second, the Bermuda Insurers are precluded from invoking arbitration because the arbitration provisions in their insurance policies were superseded by the confirmed Plan, which expressly retained this Court's jurisdiction to "adjudicate" any "adversary proceedings," and which the Bermuda Insurers failed to challenge. Third, the terms of AWAC's policy do not impose an arbitration requirement on MFGI, the Individual Insureds, or their assignees, none of whom agreed to mandatory Bermuda arbitration. Finally, the motions to compel arbitration should be denied because arbitration of parts of this core bankruptcy proceeding would seriously jeopardize the objectives of the Bankruptcy Code, including centralized dispute resolution, the avoidance of piecemeal litigation, and the power of a bankruptcy court to enforce its own orders.

If, however, the Court sends any portion of this case to arbitration, it should stay the arbitration pending resolution of the retained claims before this Court in order to ensure consistent results, avoid collateral estoppel, and preserve judicial and estate resources.

ARGUMENT

I. The Court Should Require The Bermuda Insurers To Comply With New York Insurance Law § 1213(c) Before Ruling On The Motions To Compel

As explained in Plaintiffs' Motion To Require The Bermuda Insurers' Compliance With New York Insurance Law § 1213(c) (Adv. D.I. 118), the Bermuda Insurers were required to post a $60 million bond *before* filing their pleadings, including the motions to compel arbitration, id. at 1, 7-8. The Bermuda Insurers failed to do so, and therefore, consistent with New York case law, this Court should strike the Bermuda Insurers' pleadings and enter default judgment against them. Id. at 1, 8-9, 12-15. This remedy is necessary to prevent the Bermuda Insurers from continuing their extensive and costly motion practice while they avoid posting a bond before filing a formal answer, and to ensure that funds will be available to the MFG Parties should they prevail on their claims against the Bermuda Insurers. See, e.g., id. at 3-4, 14-15 (citing Lissy Aff., Ex. A & Ex. B. (Nov. 8, 2016 Letters from Sedgwick Chudley on behalf of the Bermuda Insurers to the MFG Parties, warning the MFG Parties that "the Supreme Court of Bermuda would not enforce any U.S. judgment against a Bermuda entity")). Ruling on the motions to compel before the Bermuda Insurers post a bond would condone and reward their unlawful activities. Moreover, the Bermuda Insurers are not prejudiced by this proposed sequence: Even if the Court ultimately grants the Bermuda Insurers' motions to compel arbitration, the bond must stay in place until all claims are fully resolved to ensure that the MFG Parties do not have to seek enforcement of any future award in far-flung jurisdictions. Id. at 15-16.

II. The Confirmed Plan Of Liquidation Requires The Bankruptcy Court To Adjudicate This Dispute And Precludes The Bermuda Insurers From Invoking Arbitration

In the confirmed Plan, this Court expressly retained jurisdiction to "adjudicate" any "adversary proceedings" "that may be pending on the Effective Date or brought thereafter."

Plan, Art. XII.e. Because the Bermuda Insurers failed to object to this provision, the arbitration provisions in their policies were superseded by the terms of the Plan, and the Bermuda Insurers are precluded from invoking arbitration. Consistent with the Plan, this Court should retain jurisdiction to "adjudicate" this entire dispute.

Courts confronting similar facts have held that arbitration provisions are superseded when a confirmed plan expressly retains the bankruptcy court's jurisdiction to "adjudicate" adversary proceedings. For example, under the confirmed plan in Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 754 (7th Cir. 2002), "the bankruptcy court expressly retained jurisdiction for the purpose of '[a]djudication of any pending adversary proceeding, or other controversy or dispute.'" Ernst & Young moved to compel arbitration based on a preexisting agreement between the parties that any "'controversy or claim arising out of or relating to the services covered'" be resolved through arbitration. Id. The bankruptcy court denied this motion, and the district court affirmed. Id. at 755.

The Seventh Circuit affirmed the denial of the motion to compel. Id. at 758. Because "[a] confirmed plan of reorganization is in effect a contract between the parties and the terms of the plan describe their rights and obligations," id. at 755, the court concluded, "Ernst & Young's right to arbitrate is superseded by the terms of the confirmed plan," id. at 756. The court rejected Ernst & Young's argument that "the focus of [its] analysis should be on the words 'retains jurisdiction' and that the bankruptcy court can satisfy its obligation to retain jurisdiction over the pending adversary proceeding by simply hearing arguments on the motion to compel arbitration . . . ." Id. at 755. The court explained that while "the terms of the plan could have called for the bankruptcy court to retain jurisdiction over a dispute while its merits are arbitrated, the terms of this plan specifically called for the bankruptcy court to retain jurisdiction *to*

adjudicate such disputes." Id. at 756 (citing BARRON'S LAW DICTIONARY 11 (Ed. 1996) ("adjudication" "implies a final judgment . . . as opposed to a proceeding in which the merits of the cause of action were not reached")). Finally, the court noted that Ernst & Young could have protected its right to arbitrate by objecting to the plan and requesting that it expressly assume the arbitration provisions. Id.

Similarly, in In re All American Semiconductor, Inc., the bankruptcy court held that a liquidating plan providing that all litigation was subject to the exclusive jurisdiction of the court precluded a party from asserting contractual arbitration rights. No. 07-12963-BKC-LMI, 2010 WL 2854153, at *9 (Bankr. S.D. Fla. July 20, 2010). Because "[a] chapter 11 plan is a contract that binds both debtors and creditors," the court explained, "'all prior obligations and rights of the parties are extinguished and replaced by the plan.'" Id. at *5 (citation omitted). Accordingly, the court held, the "arbitration provisions for litigation arising with respect to" a preexisting agreement to arbitrate "may be waived, including by virtue of being superseded by the provisions of a confirmed plan to which no objection is raised." Id. at *9. Unlike in Ernst & Young, no adversary proceeding was pending at the time of confirmation. Id. at *8. However, the court noted that the party seeking arbitration "knew the Liquidating Trust was going to be filing several lawsuits . . ., and due to its involvement in" the subject of the litigation, the party "had to know it was a potential target." Id. Under such circumstances, the court concluded, the "jurisdiction provisions of a confirmed plan will be binding on a creditor and supersede or modify the provisions of any contract between the creditor and the debtor, including arbitration . . . provisions." Id.

Under these principles, the Bermuda Insurers are barred from invoking the arbitration

provisions, which were superseded by the Plan.[5] *First*, the terms of the Plan clearly preclude arbitration of this dispute. The Plan provides that this Court "shall retain such jurisdiction . . . to" "*[a]djudicate*, decide or resolve any motions, *adversary proceedings*, contested or litigated matters and any other matters . . . that may be *pending on the Effective Date or brought thereafter*." Plan, Art. XII.e (emphases added).[6] Moreover, this Court retained exclusive jurisdiction over "all matters . . . set forth in Article XII of the Plan." Confirmation Order ¶ 89 (D.I. 1288) (Lissy Aff., Ex. 1). As Ernst & Young held, the term "adjudicate" requires a final judgment on the merits, as opposed to a decision on a motion to compel arbitration. 304 F.3d at 756.[7] The Plan thus "superseded" the arbitration provisions in the Bermuda Insurers' policies. Id.; see also U.S. Brass Corp. v. Travelers Ins. Grp., Inc., 301 F.3d 296, 307 (5th Cir. 2002) (because the "reorganization plan functions as a contract in its own right, obligations created by the plan potentially constrain the Appellants' ability to submit the . . . claims to arbitration.").

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[5] Any arguments to the contrary are barred by *res judicata*, as the Bermuda Insurers did not object to the Plan and the time to appeal has run. See, e.g., Travelers Indem. Co. v. Bailey, 557 U.S. 137, 152 (2009) ("[O]nce the [bankruptcy court's orders] became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the parties and those in privity with them." (citations omitted)); see also United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 275 (2010) (although "the Bankruptcy Court's failure to find undue hardship before confirming Espinosa's plan was a legal error," "the order remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal").

[6] The Plan also retains the Bankruptcy Court's jurisdiction to "[r]esolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation or enforcement of this Plan or any contract, instrument, release or other agreement or document that is entered into or delivered pursuant to this Plan or any Entity's rights arising from or obligations incurred in connection with this Plan or such documents." Plan, Art. XII.g.

[7] See also Applied Energetics, Inc. v. NewOak Capital Mkts., LLC, 645 F.3d 522, 525-26 (2d Cir. 2011) (agreement that any dispute between the parties "shall be adjudicated" "is a clear and unmistakable reference to judicial action" and thus "'specifically precludes' arbitration" and "displaces" an arbitration clause); Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (citing Webster's Third New International Dictionary for the proposition that "adjudicate" means "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised").

Second, the Bermuda Insurers are bound by the terms of the Plan. Section XI.B of the Plan provides that the "provisions of this Plan shall bind any Holder of a Claim against, or Interest in, the Debtors and their respective successors and assigns, whether or not the Claim or Interest of such Holder is Impaired under this Plan and whether or not such Holder has accepted this Plan." Plan, Art. XI.B; see also 11 U.S.C. § 1141(a). This provision binds the Bermuda Insurers to the Plan, as the insurers are "Holder[s] of a Claim" in the MFGH bankruptcy. For example, the underlying E&O Policy requires the MFG Parties to "defend and contest any claim made against them." Followed MFGA Policy 5.9. If the MFG Parties violate this provision (or any other provision of the policy), the Bermuda Insurers can sue for breach of contract. The Bermuda Insurers thus hold contingent, unliquidated claims against the MFG Parties. In re Grove, 100 B.R. 417, 420-21 (Bankr. C.D. Ill. 1989) ("Any claim by [the insurer] against the Debtors was a pre-petition contingent claim, subject to being liquidated if the Debtors breached the terms of the insurance policy by failing to defend.").[8] Furthermore, the improper Bermuda proceedings initiated by the Bermuda Insurers for alleged breaches of their policies sought "indemnity costs" against the MFG Parties.[9] Because such "judicial demands for costs and attorneys' fees [are] 'claims,'" In re Matter of Southmark Corp., 88 F.3d 311, 317 (5th Cir. 1996),

[8] See also, e.g., In re R.H. Macy & Co., 67 Fed. App'x 30, 31-32 (2d Cir. 2003) ("Under the Bankruptcy Code, '[i]t is well-established that a claim is . . . allowable . . . in a bankruptcy proceeding even if it is a cause of action that has not yet accrued,'" and "in the context of contract actions, . . . contingent claims encompass 'obligations that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created.'" (citations omitted)).

[9] AWAC Skeleton Argument ¶ 34 (Nov. 7, 2016) (Ex. D-3 to MFG Parties' Dec. 27, 2016 Letter to Court); Iron-Starr Skeleton Argument ¶ 34 (Nov. 7, 2016) (Ex. E-3 to MFG Parties' Dec. 27 Letter to Court); Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order at 6-7 (Adv. D.I. 76).

the Bermuda Insurers are "Holder[s] of a Claim" and are thus bound by the Plan.[10]

Finally, the Bermuda Insurers are precluded from invoking arbitration because, despite having had notice of the Plan, they failed to object to the Plan's retention of this Court's jurisdiction to adjudicate this proceeding. See Ernst & Young, 304 F.3d at 756; All American, 2010 WL 2854153, at *8-9. The Bermuda Insurers were clearly aware of the MF Global bankruptcy proceedings. The Plan itself expressly included all insurance policies as property of the estate. Plan, Art. 1.A.134 (defining property of the estate). All causes of action against all insurers were also specifically preserved. Plan, Art. VIII.C. Furthermore, prior to the petition date, the underlying litigation against the Individual Insureds had already begun, and MFGA had already started advancing defense costs to MFGH on behalf of the Individual Insureds. Disclosure Statement at 39 (D.I. 1111-1). This prepetition litigation (not to mention the claims brought during the bankruptcy proceeding) alleged billions of dollars in damages—amounts well in excess of the E&O Policies. Accordingly, as in All American, the Bermuda Insurers "had to know" they were "potential target[s]." 2010 WL 2854153, at *8. Moreover, the Bermuda Insurers undoubtedly received notice of the Plan and Confirmation Order.[11]

Nevertheless, neither of the Bermuda Insurers objected to the provisions of the Plan precluding the arbitration provisions. By contrast, the insurers in In re Residential Capital, LLC,

[10] Even assuming *arguendo* that the Bermuda Insurers do not hold claims, they are still bound by the Plan as "parties in interest" because they "have a financial or legal stake in the outcome" of the reorganization. In re Old Carco LLC, 500 B.R. 683, 691 (Bankr. S.D.N.Y. 2013); see In re 785 Partners LLC, 470 B.R. 126, 136-37 (Bankr. S.D.N.Y. 2012) ("The confirmation of a plan of reorganization binds all creditors and parties in interest."); In re JC's East, Inc., No. 95 CIV. 1870 (MGC), 1995 WL 555765, at *2 (S.D.N.Y. Sept. 19, 1995) (same); In re Johns-Manville Corp., 97 B.R. 174, 180 n.9 (Bankr. S.D.N.Y. 1989) (same).

[11] See, e.g., D.I. 1260 (affidavit of service of Plan solicitation package); D.I. 1472 (notice of confirmation); D.I. 1008 (notice of proposed disclosure statement); D.I. 1116 (notice of deadline for filing administrative claims); D.I. 697 (schedule of potentially executory contracts listing the Bermuda Insurers).

No. 12-12020 (MG), 2016 WL 6155925 (Bankr. S.D.N.Y. Oct. 21, 2016)—which, according to the Bermuda Insurers, involved "facts that cannot be readily differentiated from" the facts here, AWAC Br. at 1; see also id. at 9 ("the facts are nearly indistinguishable"); Iron-Starr Br. at 9 ("strikingly similar circumstances")—objected to the proposed plan's exclusive retention of jurisdiction by the bankruptcy court, explicitly citing Ernst & Young. See Objection and Memorandum of Law in Opposition to Confirmation of Joint Chapter 11 Plan, In re Residential Capital, LLC, No. 12-12020 (MG), 2013 WL 6709253, ¶ 26, (Bankr. S.D.N.Y. Oct. 21, 2013) (Docket No. 5413) ("Here, by attempting to provide for *exclusive* jurisdiction in the Bankruptcy Court over matters which are within the ambit of the arbitration provisions of the Policies, the Plan proponents are attempting to modify the contractual rights of the Certain GM Insurers."). This objection was successful: In response, the debtors modified the plan to specifically include language providing that "nothing contained in this Plan . . . shall in any way operate to, or have the effect of, impairing, altering, supplementing, changing, expanding, decreasing, or modifying the rights under the [objectors' policies]." Confirmed Plan, In re Residential Capital, LLC, No. 12-12020 (MG), at Art. VII.K.2(b) (Docket No. 6065-1) (Lissy Aff., Ex. 9). Because the Bermuda Insurers sat on their rights and failed to object to the Plan here, it does not contain a similar provision. The Plan thus superseded the arbitration provisions, which the Bermuda Insurers are accordingly barred from invoking.

III. The AWAC Policy Does Not Impose A Mandatory Arbitration Requirement On MFGI, The Individual Insureds, Or Their Assignees

The "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). While the FAA generally favors arbitration, it "does not require the parties to arbitrate when they have not agreed to do so." Volt Info. Scis. v. Bd. of

Trs., 489 U.S. 468, 478 (1989). Arbitration remains a "matter of consent," where courts should "not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002); see also Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002) ("Arbitration agreements are no exception to the requirement of manifestation of assent."). Moreover, "while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." Applied Energetics, 645 F.3d at 526.

Here, the plain language of the AWAC policy's arbitration provision requires only the policy's singular "**Named Insured**" and those "deriving rights through or asserting rights on behalf of the **Named Insured**" to arbitrate disputed claims. See Complaint Ex. B, at 7 (hereinafter, "AWAC Policy"). Although "**Named Insured**" is not defined, the agreement as a whole makes clear that it refers to MFGH alone, and that MFGH is the only entity bound by the mandatory arbitration provision. As such, the Policy does not impose a mandatory arbitration requirement on MFGI, the Individual Insureds, or their respective assignees.

A. The AWAC Policy's Arbitration Provision Does Not Prohibit MFGI And The Individual Insureds From Pursuing Coverage In The Bankruptcy Court

The AWAC Policy's mandatory arbitration provision does not bind MFGI and the Individual Insureds; rather, they are subject to a separate, permissive arbitration provision within the Policy. The AWAC Policy's Section IX, entitled "Arbitration," is effectively divided into two parts. The first part, covering the first page of the section, see AWAC Policy at 7, addresses only matters relating to the singular "**Named Insured**." The first paragraph on that page states:

> [a]ny and all disputes arising under or relating to this policy, . . . whether between the **Insurer** and the **Named Insured** or any person or entity deriving rights through or asserting rights on behalf of the **Named Insured**, shall be finally and fully determined in Hamilton, Bermuda . . . by a Board composed of three

arbitrators . . . .

Id. Given this mandatory arbitration provision, it is not surprising that the rest of the page addresses steps for obtaining and enforcing the arbitration award. The page sets forth the rules for selecting arbitrators (paragraph 2), the timing for the Arbitration Board to hold a hearing and render its decision (paragraphs 3 and 4), the allocation of expenses and costs associated with the arbitration (paragraph 5), the finality of awards by the Arbitration Board and the lack of a right to appeal (paragraph 6), and the enforceability of the awards (paragraph 7).

The second part of Section IX is located in the final paragraph on the next page of the Policy, *see* AWAC Policy at 8, and only in that paragraph does any reference to the plural "**Named Insureds**" appear. Addressing matters unrelated to a potential arbitration proceeding between AWAC and the "**Named Insured**," this final paragraph sets forth the rights and obligations of AWAC and the "**Named Insureds**" with respect to potential third-party claims. Specifically, it provides that AWAC shall not be impleaded or joined as a party to any litigation against the **Named Insureds** to determine the **Named Insureds**' liability to third parties (sentence one). Similarly, in the event that the **Named Insureds**' other insurance companies commence an indemnification or contribution proceeding inconsistent with the terms of the Policy, the final paragraph provides that the **Named Insureds** shall take reasonable steps to obtain dismissal of such proceeding (sentence two). The **Named Insureds** are also obligated to voluntarily reduce their insurance recovery judgments against such other insurance companies by the amount by which those insurance companies seek indemnification or contribution from AWAC (sentence three).

Finally, the concluding sentence (sentence four) of the final paragraph, which focuses exclusively on the "**Named Insureds,**" in contrast to the rest of Section IX, which focuses on the rights and obligations of the "**Named Insured,**" contains a *permissive* arbitration provision.

Unlike the "**Named Insured**," who must arbitrate "[a]ny and all disputes arising under or relating to" the AWAC Policy, id. at 7:

> [t]he **Named Insureds** *shall be entitled to assert claims* against the **Insurer** for coverage under this policy . . . in an arbitration between the **Insurer** and the **Named Insureds** pursuant to this clause.

Id. at 8 (emphasis added). Thus, the plain language of Section IX's two different arbitration provisions is clear: Whereas part one of Section IX applies to the singular "**Named Insured**" and requires arbitration, see id. at 7, part two of Section IX applies to the plural "**Named Insureds**" and makes arbitration optional, see id. at 8.

Courts routinely construe "shall be entitled to assert claims" provisions as permissive. See, e.g., Heyco, Inc. v. Heyman, 636 F. Supp. 1545, 1547-48 (S.D.N.Y. 1986) (a contractual provision stating that a party "shall . . . be entitled" to seek relief in New Jersey state court was permissive, not mandatory; "under the clause at issue here, New Jersey courts are empowered to adjudicate this litigation, but the parties have not agreed that New Jersey is the exclusive forum. The clause merely allows plaintiff the option of another forum in which to sue").[12] The AWAC Policy's arbitration provision thus takes a *mandatory* approach toward the "**Named Insured**" and a *permissive* approach toward "**Named Insureds**," which "shall be entitled"—that is, have the option—to pursue coverage through Bermuda arbitration.

Although the AWAC Policy's preamble expressly defines the bolded term "**Insurer**" as AWAC, see AWAC Policy at 3, the Policy does not define the bolded terms "**Named Insured**" and "**Named Insureds**." Nevertheless, the Policy as a whole, including the arbitration provision,

[12] See also, e.g., Dasher v. Bruno, 5 Ill. App. 2d 500, 504 (Ill. App. Ct. 1955) ("The words . . . 'shall be entitled to,' are words not of limitation or imposition, but are words of right, privilege and power implying a choice." (citations omitted)); Norton v. State, 104 Wash. 248, 254-55 (Wash. 1918) (the word "entitle," as used in the phrase "shall without prejudice be entitled," "means the granting of a privilege or right to be exercised at the option of the party for whose benefit the word is used, and upon which no limitation can be arbitrarily imposed").

makes clear that the term "**Named Insured**" means MFGH only, whereas the term "**Named Insureds**" also includes both MFGI and the Individual Insureds. AWAC entirely ignores these different meanings, instead merely reciting the mandatory arbitration provision from the first part of Section IX, see AWAC Br. at 12 (citing AWAC Policy at 7), which—as explained above—applies only to the "**Named Insured**" (*i.e.*, MFGH).

Rules of contract construction require giving different meaning to the terms "**Named Insured**" and "**Named Insureds**." "Sophisticated lawyers . . . must be presumed to know how to use parallel construction and identical wording to impart identical meaning when they intend to do so, and how to use different words and construction to establish distinctions in meaning." Int'l Fidelity Ins. Co. v. Cty. of Rockland, 98 F. Supp. 2d 400, 412 (S.D.N.Y. 2000). Accordingly, "different words of a contract" must "be construed in a fashion that gives them separate meanings, so that no word is superfluous." In re Motors Liquidation Co., 447 B.R. 142, 147 (Bankr. S.D.N.Y. 2011).[13]

[13] See also Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 221–22 (N.Y. App. Ct. 2002) ("In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'" (internal citations omitted)); L & D Serv. Station, Inc. v. Utica First Ins. Co., 103 A.D.3d 782, 783 (N.Y. Sup. Ct. 2013) ("An insurance contract should not be read so that some provisions are rendered meaningless." (internal citation omitted)); Bretton v. Mut. of Omaha Ins. Co., 110 A.D.2d 46, 49–50 (N.Y. Sup. Ct. 1985) ("In interpreting insurance policies, '[e]very clause or word . . . is deemed to have some meaning.' Furthermore, a policy's terms should not be assumed to be superfluous or to have been idly inserted." (internal citations omitted)).

Notwithstanding AWAC's suggestion that its "arbitration agreement is governed by Bermuda law," AWAC Br. at 3, the AWAC Policy requires that New York law govern resolution of the motion to compel. The Policy provides that it "shall be construed and enforced in accordance with the internal laws of the State of New York (with the exception of the *procedural law* required by [the arbitration provision], which shall be construed and enforced in accordance with the laws of Bermuda)." AWAC Policy at 8 (emphasis added). "[P]rocedural law" refers to the internal workings of the Arbitration Board, and does not encompass the question at issue here—namely, which parties agreed to arbitrate. Indeed, consistent with this clear meaning, AWAC briefed its motion exclusively under United States and New York law.

Applying these rules of construction, it is clear that the term "**Named Insured**" means MFGH only. New York courts generally construe the term "named insured" to "refer only to the person specifically designated upon the face of the contract." See, e.g., Moran v. Moran, 346 N.Y.S.2d 424, 427 (N.Y. Dist. Ct. 1973); Standard Sur. & Cas. Co. of N.Y. v. Md. Cas. Co., 100 N.Y.S.2d 79, 84 (N.Y. Sup. Ct. 1950) (same). Here, MFGH alone is listed as the "Named Corporation" within the AWAC Policy's introductory Declarations pages, and MFGH alone is named in the Policy's endorsement headers as the entity to which the Policy was issued. AWAC Policy at 1, 9-12. This is not surprising, as professional liability insurance is typically procured by corporations, not individuals like the Individual Insureds, whose names (Jon Corzine, Bradley Abelow, Henri Steenkamp, David Dunne, Vinay Mahajan, and Edith O'Brien) do not appear in the policy. In addition, Section VIII of the AWAC Policy, entitled "Cancellation Clause," expressly links the defined term "**Named Insured**" to MFGH alone by providing that AWAC may cancel the Policy by mailing written notice "to the **Named Insured**, by registered, certified, or other first class mail, *at the **Named Insured**'s address set forth in the Declarations*." Id. at 6 (emphasis added). The *only* insured listed in the AWAC Policy's Declarations is "MF Global Holdings Ltd." Id. at 1.

Tellingly, *AWAC itself* has repeatedly acknowledged that the term "**Named Insured**"—as used in the policy it drafted—means MFGH. See AWAC Br. at 2 ("MFGH is the '**Named Insured**' under the Allied World Excess Policy."); AWAC Skeleton Argument ¶ 22 (Nov. 7, 2016) (Ex. D-3 to MFG Parties' Dec. 27 Letter to Court) ("MFGH, in its pre-Chapter 11 guise, was the Named Insured under the Policy."); First Affidavit of Jan E. Haylett ¶ 9 (Nov. 7, 2016) (Ex. D-2 to MFG Parties' Dec. 27 Letter to Court) ("MFGH, is the 'Named Insured' under the

Policy . . . .").[14] The Iron-Starr parties have embraced this position as well.[15]

Given that MFGH alone is the "**Named Insured**," the only reasonable interpretation of the AWAC Policy that gives separate meaning to each term, see Motors Liquidation, 447 B.R. at 147, is that the term "**Named Insureds**" collectively refers to MFGH, MFGI, and the Individual Insureds. The AWAC policy confirms this interpretation by unequivocally and repeatedly distinguishing between the singular "**Named Insured**" and the plural "**Named Insureds**" in setting forth the general terms and conditions of coverage. MFGH, as the acknowledged "**Named Insured**," must defend underlying claims, AWAC Policy at 5, has the exclusive right to cancel the Policy, see id. at 6, and is subject to the Policy's "prior notice" exclusion, see id. at 11. In contrast, MFGI and the Individual Insureds—in addition to MFGH—as "**Named Insureds**," must pay additional premiums when modifying the terms of the underlying insurance, see id. at 5, may report claims and circumstances that could give rise to claims, see id., must provide full cooperation and information to AWAC while it conducts a claim investigation, see id. at 5-6, may request an extended reporting period for claims made after the policy period, see id. at 6, and have agreed to certain choice-of-law principles, see id. at 8.

Accordingly, per the plain terms of the arbitration section, and consistent with the rest of the Policy, only the "**Named Insured**"—MFGH—is bound by the mandatory arbitration provision, whereas MFGI and the Individual Insureds are not. Nor can MFGI and the Individual Insureds be compelled to arbitrate based on the "deriving rights" provision: Neither MFGI nor

[14] Given that the FAA's presumption in favor of arbitration does not apply to an ambiguity regarding which persons or entities are bound by an arbitration provision, extrinsic evidence may properly be considered in the event that the Court determines that the AWAC Policy's arbitration provision is ambiguous. See Applied Energetics, 645 F.3d at 526; see also Banos v. Rhea, 25 N.Y.3d 266, 276 (N.Y. 2015) (extrinsic evidence may be considered where a contract is ambiguous); Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (N.Y. 2002) (same).

[15] See, e.g., Iron-Starr Br. at 2 ("MFGH is the 'Named Insured' under the Excess E&O Policy.").

the Individual Insureds derive their rights through MFGH; rather, they enjoy independent and direct rights under the AWAC Policy, as this Court previously recognized. See, e.g., In re MF Global Holdings Ltd., 469 B.R. 177, 183 (Bankr. S.D.N.Y. 2012) (the D&O and E&O policies at issue "potentially provide *direct coverage* for the Debtors and the Individual Insureds" and "expressly provide insurance for the Individual Insureds") (emphasis added).[16]

This carve-out of certain entities from a mandatory arbitration provision is both commonplace and routinely allowed by courts. The parties to a contract "are generally free to structure their arbitration agreements as they see fit," and there is no legal requirement that all insureds receive the same treatment under an insurance contract's arbitration provision. Volt, 489 U.S. at 479; see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010) ("[W]e have held that parties . . . may specify *with whom* they choose to arbitrate their disputes." (citations omitted)); Oxbow Calcining USA Inc. v. Am. Indus. Partners, 96 A.D.3d 646, 648-49 (N.Y. App. Div. 2012) ("[P]arties may structure arbitration agreements to limit . . . '*with whom* they choose to arbitrate their disputes.'" (citation omitted)).

For example, in Ogden Power Dev.-Cayman, Inc. v. PMR Ltd., No. 14-CV-8169 (PKC), 2015 WL 2414581 (S.D.N.Y. May 21, 2015), a shareholders' agreement regarding a construction project in the Philippines contained an arbitration provision applying to disputes arising "among

[16] Other courts have also recognized that additional insureds possess rights independent of the named insured. See, e.g., 233 E. 17th St., LLC v. L.G.B. Dev., Inc., 78 A.D.3d 930, 931 (N.Y. App. Div. 2010) ("Each individual additional insured must be treated as if it had a separate policy of its own with the insurer."); Jefferson Ins. Co. v. Travelers Indem. Co., 243 A.D.2d 273, 273 (N.Y. App. Div. 1997) ("[A]s an additional insured, A-Drive was entitled to coverage independent of the coverage provided to Continental."); Circle Bus. Credit, Inc. v. Lumberman's Mut. Cas. Co., 205 A.D.2d 728, 729 (N.Y. App. Div. 1994) (finding that "an additional insured . . . possessed an independent right to recovery," and "was not merely a loss payee who was subject to any defenses which could be asserted against the named insured"); Greaves v. Pub. Serv. Mut. Ins. Co., 4 A.D.2d 609, 612 (N.Y. App. Div. 1957) ("Greaves was entitled in his own right to coverage as an additional insured.").

the Shareholders." Id. at *3. The shareholders' agreement defined "Shareholders" to include specific companies, but to exclude one signatory that was seeking to avoid arbitration. Id. at *4. The court held that, because the parties chose to draft the arbitration provision to apply only to specifically identified "Shareholders," the non-shareholder entity was not required to arbitrate its dispute under the contract. Id. at *8 ("[A]ccording to the plain language of the [Shareholder] Agreement, [a non-shareholder entity] is not subject to the arbitration provision.").

The court in Ogden also rejected the argument that equitable estoppel required the non-shareholder entity to arbitrate because it received a direct benefit from a contract containing an arbitration provision. Rather, the court honored the plain language of the shareholder agreement, which gave the non-shareholder entity a right to recover contractual benefits outside the scope of the arbitration provision. Id. at *9 ("Here, it is clear from the plain language of the [Shareholder] Agreement that the parties intended [the non-shareholder entity] to both receive certain benefits from the contract and at the same time be exempt from the arbitration provision.").

As in Ogden, equitable estoppel does not apply here. This is not a case where "a signatory-plaintiff brings an action against a nonsignatory-defendant asserting claims dependent on a contract that includes an arbitration agreement that the defendant did not sign." Janvey v. Alguire, 847 F.3d 231, 242 (5th Cir. 2017). Nor is this a case—like American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (cited at AWAC Br. at 13; Iron-Starr Br. at 16)—where a nonsignatory is seeking to knowingly exploit an agreement containing an arbitration provision while avoiding arbitration on the basis that it did not sign the contract, see Janvey, 847 F.3d at 242-43.[17] In short, the MFG Parties are not seeking to "cancel

[17] In the Bermuda Insurers' other case regarding estoppel, Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995) (cited at AWAC Br. at 13; Iron-Starr Br. at 16), the court actually *refused* to compel arbitration based on an estoppel theory because the party

out" the Bermuda Insurers' contractual rights. See Iron-Starr Br. at 16. Instead, like Ogden, this is a case where the parties expressly agreed that certain parties—MFGI and the Individual Insureds—would receive contractual benefits without being compelled to arbitrate disputes in Bermuda. Because MFGI and the Individual Insureds are not the "**Named Insured**" under the arbitration provision, they are not required to arbitrate their claims against AWAC.

B. MFGAA and MFGH, As Assignees Of MFGI And The Individual Insureds, Are Not Prohibited From Pursuing Coverage In The Bankruptcy Court

As the assignee of MFGI's and the Individual Insureds' rights of recovery under the AWAC Policy, MFGAA "stands in the shoes" of MFGI and the Individual Insureds, and therefore possesses the same right to pursue coverage in this Court in lieu of Bermuda arbitration proceedings. It is well settled that an assignee "stands in the shoes of its assignor, and takes neither more *nor less* than the assignor had." 785 Partners, 470 B.R. at 133 (emphasis added).[18] AWAC and Iron-Starr recognize this principle, *see* AWAC Br. at 13-14; Iron-Starr Br. at 15-16, but reach the wrong conclusion based on the incorrect assumption that AWAC's policy requires MFGI and the Individual Insureds to arbitrate their claims. Applying assignment law to the correct starting point, it is clear that MFGAA, as MFGI's and the Individual Insureds' assignee, takes all of their rights, including their right to litigate in this court rather than arbitrate in Bermuda.

Moreover, to the extent that MFGH pursues coverage in its capacity as an assignee of the

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seeking to avoid arbitration never indicated "a willingness to arbitrate." Id. at 779. The court reasoned that "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." Id. The Bermuda Insurers' own case thus demonstrates exactly why MFGI's and the Individual Insureds' claims are not subject to mandatory arbitration.

[18] See also, e.g., Septembertide Pub., B.V. v. Stein & Day, Inc., 884 F.2d 675, 682 (2d Cir. 1989) (same); O'Brien v. Argo Partners, Inc., 736 F. Supp. 2d 528, 535 (E.D.N.Y. 2010) (same).

Individual Insureds' rights under the AWAC Policy, it too is not required to prosecute the Individual Insureds' Assigned Claims through Bermuda arbitration proceedings. A party required to arbitrate its own, direct disputes under a contract nevertheless is not required to arbitrate assigned rights under the contract if the assignor itself is not subject to the contract's arbitration provision. See, e.g., Caribbean S.S. Co., S.A. v. Sonmez Denizcilik Ve Ticaret A.S., 598 F.2d 1264, 1266-67 (2d Cir. 1979) ("One cannot make an arbitrable claim out of a non-arbitrable one by assigning it to a person having a broad 'any dispute' arbitration contract with the party against whom the claims lies . . . .").[19] Any other result would inappropriately allow an assignment to "change the very nature of the rights assigned." GMAC Commercial Credit LLC v. Springs Indus., Inc., 171 F. Supp. 2d 209, 216 (S.D.N.Y. 2001). Like MFGAA, MFGH possesses the right to pursue coverage in this Court instead of in a Bermuda arbitration to the extent that it is acting in its capacity as assignee of the Individual Insureds' rights.[20]

IV. The Bermuda Insurers' Motions To Compel Arbitration Should Be Denied Because Arbitration Of Parts Of This Core Proceeding Would Seriously Jeopardize The Objectives Of The Bankruptcy Code

As courts in this Circuit have repeatedly recognized, they have a Congressionally conferred power to enjoin arbitration in the bankruptcy setting. While the Bermuda Insurers

[19] See also Janvey, 847 F.3d at 242 ("Because the Receiver brings his claims on behalf of the Bank and the Bank has not consented to arbitration, the motions to compel arbitration fail."); CardioNet, Inc. v. Cigna Health Corp., 751 F.3d 165, 178 (3d Cir. 2014) ("[T]he right to pursue . . . claims in court, rather than through mandatory arbitration . . . does not dissipate simply because the claim is brought by assignees who have promised to arbitrate certain *direct* claims they might bring against the defendant. . . . Just as the burden of arbitration must travel with a claim, so too, must the right to litigate." (citation omitted)).

[20] By contrast, in Residential Capital, there was no doubt that the parties agreed to arbitrate the proceeding. See 2016 WL 6155925, at *7 (cited at AWAC Br. at 1, 2, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 21; Iron-Starr Br. at 9, 12, 13, 15, 17, 21, 25). "The applicable agreements . . . contain[ed] a broad provision to send disputes about the policies to arbitration," "these arbitration provisions cover[ed] the Plaintiffs' dispute," "[t]he Plaintiffs [did] not dispute" that the parties agreed to arbitrate, and "their motion papers [did] not address this prong at all." Id.

focus on the FAA's establishment of a federal policy favoring arbitration agreements, see, e.g., AWAC Br. at 9-11; Iron-Starr Br. at 10-12, they neglect the bankruptcy interests which are paramount here. "Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command," including the Bankruptcy Code. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).[21] "That is true even where arbitration is sought subject to an international arbitration agreement." U.S. Lines, 197 F.3d at 639. "Disputes that involve both the Bankruptcy Code and the Arbitration Act often present conflicts of 'near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach toward dispute resolution.'" MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006). "In resolving these conflicts, courts distinguish between claims over which bankruptcy judges have discretion to refuse arbitration and those that they must send directly to arbitration." Id.

Courts in this Circuit employ a "two-part test for determining when a Bankruptcy Court has the discretion to decline to compel arbitration": (1) "whether the proceeding is considered a core or non-core bankruptcy proceeding," and (2) "whether the arbitration 'would seriously jeopardize the objectives of the bankruptcy code such that there is an inherent conflict between arbitration and the code.'" Lehman Bros., 2015 WL 5729645, at *3.[22] "Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters, which implicate 'more pressing bankruptcy concerns.'" Hill, 436 F.3d at 108 (citing U.S. Lines, 197

[21] See also In re U.S. Lines, Inc., 197 F.3d 631, 639 (2d Cir. 1999) (same); In re Lehman Bros. Holdings, Inc., No. 14 Civ. 7643(ER), 2015 WL 5729645, at *5 (S.D.N.Y. Sept. 30, 2015) (same); In re S.W. Bach & Co., 425 B.R. 78, 88-89 (Bankr. S.D.N.Y. 2010) (Glenn, J.) (same); In re Bethlehem Steel Corp., 390 B.R. 784, 793 (Bankr. S.D.N.Y. 2008) (Glenn, J.) (same).

[22] Courts have also used a four-part test, which the Bermuda Insurers acknowledge is "essentially the same" as the two-part test. AWAC Br. at 12 n.5; Iron-Starr Br. at 13 n.7 (same).

F.3d at 640). Applying this standard, courts routinely deny the enforcement of arbitration proceedings, including international proceedings, when the factual circumstances dictate that compelling arbitration would undermine the efficiencies and purposes of the Bankruptcy Code. See, e.g., Lehman Bros., 2015 WL 5729645, at *14.[23]

Both prongs of the two-part test are satisfied here. *First*, this dispute is a core proceeding because it requires interpretation and enforcement of this Court's prior orders and involves critical assets of the bankruptcy estate. *Second*, arbitration of any portion of this case would seriously jeopardize the objectives of the Bankruptcy Code. It is clear that the claims against Federal are not subject to Bermuda arbitration given the lack of an arbitration provision in Federal's policy. Moreover, the claims against AWAC are not eligible for Bermuda arbitration to the extent they are brought by MFGI, the Individual Insureds, or their assignees. See supra Part III. Thus, sending some parts of this dispute to a Bermuda arbitration, while proceeding with other parts in this Court, would upend the Bankruptcy Code's goals, including centralizing dispute resolution, avoiding inconsistent results, and upholding the power of bankruptcy courts to enforce their own orders. The claims against Federal, AWAC, and Iron-Starr are wholly dependent on each other and factually and legally inseparable, and—when compared to this Court—a Bermuda arbitration panel is at a severe comparative disadvantage in analyzing the interplay of bankruptcy and insurance issues, this Court's prior rulings, and the complex factual circumstances. The only way for this Court to ensure appropriate, consistent results is to retain jurisdiction over the entire dispute. Moreover, as the history of this case demonstrates, retaining jurisdiction over this proceeding is necessary to ensure that the Court's previous orders will be

[23] In re Hostess Brands, Inc., No. 12-22052-rdd, 2013 WL 82914, at *5-6 (Bankr. S.D.N.Y. Jan. 7, 2013); Bethlehem Steel, 390 B.R. at 794-95; see also In re White Mountain Mining Co., 403 F.3d 164, 170 (4th Cir. 2005).

respected and enforced. This is a textbook case for the Court's exercise of its discretion to retain the entire case with Federal, AWAC, and Iron-Starr as defendants, and to deny AWAC's and Iron-Starr's motions to compel arbitration.

A. This Dispute Is A Core Bankruptcy Proceeding, Requiring Interpretation And Enforcement Of Prior Bankruptcy Court Orders And Disbursement Of Critical Assets Of The Bankruptcy Estate

"The Bankruptcy Code divides claims in bankruptcy proceedings into two principal categories: 'core' and 'noncore.'" U.S. Lines, 197 F.3d at 636 (citing 28 U.S.C. § 157). "'Bankruptcy judges have the authority to "hear and determine all . . . core proceedings arising under title 11 . . . and may enter appropriate orders and judgments."'" Id. (citations omitted). "With respect to non-core claims, unless the parties otherwise agree, the bankruptcy court can only recommend findings of fact and conclusions of law to the district court." Id. "[C]ore proceedings" "should be given a broad interpretation that is 'close to or congruent with constitutional limits' as set forth in *Marathon*,[24] and . . . *Marathon* is to be construed narrowly." Id. at 637 (citations omitted).

"[U]nder *Marathon*, whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization." Id. Contrary to the claims of the Bermuda Insurers, see AWAC Br. at 19; Iron-Starr Br. at 21, the former inquiry is not dispositive, and proceedings can be core even when they are based on pre-petition contracts, see, e.g., U.S. Lines, 197 F.3d at 638

[24] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), "struck down provisions of the 1978 Bankruptcy Act that vested authority in Article I bankruptcy courts to hear cases that, absent the parties' consent, constitutionally could only be heard by Article III courts—so-called 'non-core proceedings.'" U.S. Lines, 197 F.3d at 636. In response, Congress enacted 28 U.S.C. § 157, which classifies matters as either "core proceedings" or "non-core proceedings," and provides a non-exclusive list of the proceedings that are "core." In re Orion Pictures Corp., 4 F.3d 1095, 1100-01 (2d Cir. 1993).

(finding proceedings to be core notwithstanding the fact "that the Trust's claim are upon pre-petition contracts"); see also In re Petrie Retail, Inc., 304 F.3d 223, 229 (2d Cir. 2002) (finding proceedings core where contract at issue was executed pre-petition). For its part, "[t]he latter inquiry hinges on the 'nature of the proceeding.'" U.S. Lines, 197 F.3d at 637 (citation omitted). "Proceedings can be core by virtue of their nature if either (1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings, . . . or (2) the proceedings directly affect a core bankruptcy function . . . ." Id. (citations omitted). Applying this test, courts have concluded that "[d]isputes involving major insurance contracts do often have a significant effect on core functions of the bankruptcy court, permitting the bankruptcy court to exercise jurisdiction." In re DPH Holdings Corp., 437 B.R. 88, 96 (Bankr. S.D.N.Y. 2010); see also U.S. Lines, 197 F.3d at 638 ("[R]esolving disputes relating to major insurance contracts are bound to have a significant impact on the administration of the estate.").

Likewise, here, the proceeding is core because it "directly affect[s]" the "core bankruptcy function[s]," U.S. Lines, 197 F.3d at 637, of (1) interpreting and enforcing prior Bankruptcy Court orders; and (2) disbursing critical assets of the bankruptcy estate.[25]

1. *This Proceeding Is Core Because Its Resolution Requires Interpretation And Enforcement Of This Court's Prior Orders*

A core function of bankruptcy courts is the interpretation and enforcement of their prior orders. That core function is directly implicated here because the interpretation and enforcement of this Court's prior orders will determine the MFG Parties' claims.

"[T]he Bankruptcy Court plainly ha[s] jurisdiction to interpret and enforce its own prior orders," Travelers Indem., 557 U.S. at 151, and the Second Circuit has made clear that core

[25] This proceeding is also core based on, as explained above, this Court's retention of jurisdiction to adjudicate adversary proceedings regarding the debtors' insurance policies. See supra Part II.

jurisdiction exists where a proceeding is heavily reliant on the interpretation and enforcement of prior orders of the bankruptcy court. For example, in In re Petrie Retail, Inc., 304 F.3d 223 (2d Cir. 2002), the Second Circuit considered a dispute in which the bankruptcy court had previously entered a sale order approving an asset purchase agreement and the sale of a debtor's assets. Id. at 226. Under the sale order, which the bankruptcy court incorporated into the terms of an order confirming a plan of reorganization, the purchaser of the assets was excluded from certain liabilities related to a lease agreement, and "those holding excluded liabilities were 'enjoined from asserting or prosecuting any Claim or cause of action' against [the purchaser] related to the excluded liabilities." Id. Notwithstanding the sale order, a creditor sent a letter to the purchaser seeking payment for an excluded liability. Id. at 227. In response, the purchaser filed a motion in the bankruptcy court for an order in aid of consummation of the reorganization plan, which the bankruptcy court granted. Id. On appeal to the Second Circuit, the creditor argued "that the bankruptcy court did not have subject matter jurisdiction over the contract dispute raised in [the purchaser's] motion." Id. at 228.

The Second Circuit disagreed, concluding that "the impact of [the purchaser's] motion on other core bankruptcy functions renders it core." Id. at 229. The court emphasized that "the dispute was uniquely affected by and 'inextricably linked to the bankruptcy court's Sale Order.'" Id. at 230 (citation omitted). Because the purchaser's motion "sought enforcement of a pre-existing injunction issued" by the bankruptcy court, and because the dispute "involved interpretation of the bankruptcy court's orders," the Second Circuit held it was a core proceeding over which the bankruptcy court appropriately exercised subject matter jurisdiction. Id.[26]

[26] See also id. at 231 ("The combination of factors in this case leads us to conclude that the plan consummation motion was a core proceeding because it was not independent of the reorganization. Specifically, the plan consummation motion uniquely affected and was uniquely

Similarly, in In re Millenium Seacarriers, Inc., 458 F.3d 92 (2d Cir. 2006), the Second Circuit held that a proceeding is core where it amounts to a request for the interpretation and enforcement of prior bankruptcy court orders. In a dispute over which of two contracts for the carriage of goods by ship was assumed and assigned pursuant to a bankruptcy court sale order, one party brought an adversary proceeding in the bankruptcy court (the "Jamaica Adversary Action"), while the other party commenced an arbitration in London pursuant to the terms of an arbitration provision. Id. at 94. The bankruptcy court assumed jurisdiction over the Jamaica Adversary Action and enjoined the parties from pursuing the London arbitration. Id. On appeal, the party seeking arbitration argued that the bankruptcy court erred in assuming subject matter jurisdiction over the action and in imposing the anti-suit injunction. Id. at 95.

As in Petrie Retail, the Second Circuit rejected this argument, holding that the Jamaica Adversary Action was core because it sought enforcement of a prior bankruptcy court sale order:

> "[O]rders approving the sale of property" constitute core proceedings, 28 U.S.C. § 157(b)(2)(N), and the Jamaica Adversary Action, which turns on the terms of the Sale Order, *amounts to a request that the bankruptcy court enforce that order*. We therefore deem the Jamaica Adversary Action a core proceeding and conclude that the bankruptcy court's initial decision to exercise jurisdiction over that action was not error.

Id. at 95 (emphasis added). Simply put, in this Circuit (and others), where the proceeding seeks enforcement of the bankruptcy court's prior order, it is deemed a core proceeding.[27]

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affected by core bankruptcy functions because the dispute . . . was based on rights established in the sale order [and] the plan consummation motion sought enforcement of a pre-existing injunction issued in the bankruptcy court's sale order . . . .").

[27] See also, e.g., In re Allegheny Health Educ. & Research Found., 383 F.3d 169, 176 (3d Cir. 2004) ("[W]e hold that the bankruptcy court correctly determined that the suit was a core proceeding because it required the court to interpret and give effect to its previous sale orders."); In re Williams, 256 B.R. 885, 892 (B.A.P. 8th Cir. 2001) ("[T]he enforcement of orders resulting from core proceedings are themselves considered core proceedings."); In re Matter of Nat'l Gypsum Co., 118 F.3d 1056, 1063 (5th Cir. 1997) ("Courts have held that actions to enforce the discharge injunction are core proceedings because they call on a bankruptcy court to construe

The Bermuda Insurers ignore these authorities entirely. Recognizing that the interpretation of this Court's prior orders means that this proceeding is core, the Bermuda Insurers seek to evade this conclusion by claiming—contrary to all evidence—that this dispute "has nothing to do with . . . the Court's prior orders." Iron-Starr Br. at 23; see AWAC Br. at 20. But, as detailed in the Adversary Complaint, "resolution of this action is inextricably intertwined with the numerous settlements and orders entered by the Court throughout the MF Global Cases," over which this Court has expressly retained jurisdiction. Complaint ¶¶ 19, 22, 55-56, 62, 92, 100. In this action, the MFG Parties seek a "judicial declaration of their rights and interests in, and the obligations of the Dissenting E&O Insurers under the Dissenting E&O Policies" with respect to the losses incurred in connection with the underlying Customer Claims. Id. at ¶ 105. The determination of whether the Dissenting E&O Policies cover the underlying Customer Claims will unavoidably implicate this Court's related prior orders, requiring their interpretation, application, and enforcement.[28]

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and enforce its own orders."); In re Anderson, 553 B.R. 221, 228-29 (S.D.N.Y. 2016) (debtor's claim "is properly characterized as a core issue" because it seeks enforcement of the discharge injunction; "[t]he discharge is clearly a right created by federal bankruptcy law, and an enforcement proceeding concerning that discharge therefore arises under the Bankruptcy Code").

[28] Because the MFG Parties' Complaint affirmatively seeks a judicial declaration enforcing this Court's prior orders, the Bermuda Insurers' argument regarding "potential coverage defenses" is inapposite. AWAC Br. at 20; Iron-Starr Br. at 23. Unlike in four of the five cases cited by the Bermuda Insurers, here the "substantive action" itself—and not merely potential coverage defenses—"require[s] the construction of . . . past orders of this Court." Hoffman v. First Nat'l Bank of Akron (In re Hoffman), 99 B.R. 929, 931-32 (N.D. Iowa 1989); see also K V Oil & Gas, Inc. v. Centre Equities, Inc., No. 2:09-cv-00188, 2009 U.S. Dist. LEXIS 76734, at *12 (S.D.W. Va. Aug. 27, 2009); In re Agway Gen. Agency, Inc. v. Burkeholder (In re Agway, Inc.), No. 02-65872, 2006 Bankr. LEXIS 4552, at *8 (Bankr. N.D.N.Y. Mar. 6, 2006); Kmart Creditor Trust v. Conaway (In re Kmart Corp.), 307 B.R. 586, 595 (Bankr. E.D. Mich. 2004). This case is more akin to the other case cited by the Bermuda Insurers, Medlin v. Johnson (In re Meabon), No. 3:13-cv-317-RJC, 2014 WL 1309093 (W.D.N.C. Mar. 28, 2014), in which the court deemed a proceeding to be core, even though "no specific section of the bankruptcy code was cited by the Plaintiff (Appellee) in his complaint," because "the facts alleged demonstrate[d] that relief turned in large measure on a substantial question of bankruptcy law." Id. at *2.

a. *The MFG Parties' Request For Declaratory Judgment Seeks Enforcement Of This Court's Prior Determinations That The Underlying Customer Claims Are Not "Uninsurable" As A Matter Of New York Law And Public Policy*

Any ruling on the MFG Parties' request for declaratory judgment will inevitably require a determination as to whether this Court's prior orders conclusively establish that the underlying Customer Claims were not (as the Bermuda Insurers contend) "uninsurable" as a matter of New York law and public policy. *First*, resolution of this proceeding will require a determination of whether the Court's 9019 Order approving the MDL Settlement Agreement (D.I. 2282) (Lissy Aff., Ex. 8) and its NES Approval Order (SIPA D.I. 7208) (Lissy Aff., Ex. 4) establish that the underlying Customer Claims are not "uninsurable." The Dissenting E&O Policies expressly define covered "Loss" to include "restitution orders of a compensatory nature." Complaint ¶ 34, Ex. E at 7-8. As a result, the Dissenting E&O Policies' "matters uninsurable" exclusion cannot be read to exclude coverage for "restitution orders of a compensatory nature" without rendering the Policy's express grant of coverage for such losses illusory.[29] The adjudication of the "matters uninsurable" exclusion will therefore require a determination of whether the 9019 Order and NES Approval Order, pursuant to which MFGI's and the Individual Insureds' payments in connection with the underlying Customer Claims were made, constitute "restitution orders of a compensatory nature." If so, this Court's prior orders would definitively establish that the underlying Customer Claims are not "uninsurable."

[29] See, e.g., Wright v. Evanston Ins. Co., 788 N.Y.S.2d 416, 417 (N.Y. App. Div. 2005) (rejecting "interpretation advanced by [insurance company]" that would "render the coverage illusory, a result which the public policy of this state cannot abide") (citing Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co., 34 N.Y.2d 356, 362 (N.Y. 1974); Nationwide Mut. Ins. Co. v. Davis, 600 N.Y.S.2d 482, 483 (N.Y. App. Div. 1993)). Such a construction would also violate the well-settled principles of New York insurance policy interpretation that exclusions are to be afforded a "strict and narrow construction" and must be stated in "clear and unmistakable language." Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 311 (N.Y. 1984); see also, e.g., J.P. Morgan Secs. Inc. v. Vigilant Ins. Co., 2 N.Y.S.3d 415, 419 (N.Y. App. Div. 2015) (same).

Second, the Court's NES Approval Order and its SAA Approval Order (SIPA D.I. 8855) (Lissy Aff., Ex. 6), pursuant to which the Customer Claims against the Individual Insureds and MFGI's Direct Claim were transferred for substantial consideration, are also directly implicated in assessing whether the Customer Claims and MFGI's Direct Claim are "uninsurable" as a matter of New York law and public policy. See Complaint ¶ 62; SIPA D.I. 8854, at 15-16. For example, the SAA Approval Order expressly found that the Sale and Assumption Agreement was "reasonable and appropriate to maximize the value of MFGI's and the Chapter 11 Debtors' estates." SAA Approval Order ¶ 4; see also id. ¶ 6 ("The Plan Administrator has given adequate, fair, reasonable and substantial consideration . . . ."). If the claims assigned pursuant to the NES Approval Order and the SAA Approval Order were uninsurable, and thus valueless, they could not have constituted such "reasonable" and "fair" consideration.

Third, the MFG Parties believe that the Court's 9019 Order precludes any argument that the underlying Customer Claims were "uninsurable" by prohibiting the Bermuda Insurers from challenging the "Reasonableness of Settlement," 9019 Order ¶ 7, which means that:

> (a) the Settlement[30] is reasonable; (b) the amounts paid towards the Settlement and comprising Defendants' Financial Obligation are reasonable; and (c) the amounts paid under the D&O Funding Agreement, E&O Funding Agreement, and Federal Funding Agreement are reasonable and that, in addition to amounts previously paid, such amounts ***constitute proper, full, fair, and complete exhaustion with respect to those policies in accordance with, and pursuant to, their terms and conditions***.

MDL Settlement Agreement, at Def. ¶ (ccccc) (emphasis added). The "policies" referenced in

[30] "Settlement" is defined as "the settlement and related terms between the Parties as set forth in this Agreement and related agreements, including without limitation the Funding Agreements." MDL Settlement Agreement, at Def. ¶ (zzzzz). Accordingly, "Settlement" as referenced in the "Reasonableness of Settlement" definition encompasses the MDL Settlement Agreement and all related agreements, including the assignment of rights to the MFG Plaintiffs made pursuant to the Assignment Agreement. Id. at Ex. A.

this definition include the Followed MFGA Policy, whose terms the Dissenting E&O Policies themselves follow. The Followed MFGA Policy expressly excludes coverage for "matters uninsurable under [New York] law." Complaint Ex. E at 10. Thus, this Court's determination that the underlying Customer Claims addressed by the MDL Settlement Agreement "proper[ly]" and "fair[ly]" exhausted the contributing E&O Policies (including the Followed MFGA Policy) "in accordance with, and pursuant to, their terms and conditions" (including the terms excluding coverage for "uninsurable matters"), means that this Court's 9019 Order established that the underlying Customer Claims are not "uninsurable" as a matter of New York law and public policy. Simply put, claims that are "uninsurable" as a matter of New York law could not have "proper[ly] and "fair[ly]" exhausted the contributing E&O Policies "in accordance with" "terms and conditions" expressly excluding coverage for "uninsurable" matters.

The Bermuda Insurers believe that this Court's prior orders do not preclude them from arguing here that the underlying Customer Claims are "uninsurable" as a matter of New York law and public policy.[31] In fact, the Bermuda Insurers maintain that the underlying Customer Claims constitute claims for "disgorgement and/or restitution" that are "uninsurable."[32]

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[31] The Bermuda Insurers acknowledge that the 9019 Order prohibits them from contesting the "Reasonableness of Settlement," see Adv. D.I. 28, at 8; Adv. D.I. 32, at 10, but they disagree as to the scope of the prohibition. By a letter dated January 10, 2017, see Adv. D.I. 69, Ex. B, the MFG Parties have requested that the Bermuda Insurers clarify their representations made to this Court at the January 4, 2017 hearing that they "will not challenge the reasonableness of the Global settlement that was entered and approved by the bankruptcy court and district court," Jan 4 Hr'g Tr. 65:5-12. To date, the Bermuda Insurers have not responded.

[32] See, e.g., Iron-Starr MOL in Opposition to Application of the Bar Order and Barton Doctrine at 4 n.4 (Adv. D.I. 64) (stating that the "Iron-Starr Defendants are not precluded from asserting that [their] own Excess E&O Policy precludes coverage, *by contesting insurability under the Excess E&O Policy* . . . ." (emphasis added)); AWAC MOL in Opposition to Application of the Bar Order and Barton Doctrine at 2 n.3 (Adv. D.I. 62) (disputing that the Court's 9019 Order precludes Allied World from "contesting insurability under its own Policy"); First Affidavit of Jan E. Haylett ¶ 14 (Ex. D-2 to MFG Parties' Dec. 27 Letter) (stating that "[t]he reasons for Allied World's refusal to provide cover under the Policy include . . . that the Policy precludes

Given the disagreement over whether this Court's prior orders preclude any argument that the underlying Customer Claims are "uninsurable" as a matter of New York law and public policy, the outcome of this proceeding will depend on the interpretation of prior bankruptcy court orders and thus, this proceeding is core.

b. *Adjudication Of The Policies' Criminal Or Fraudulent Acts Exclusion Will Require Interpretation And Enforcement Of The Court's Prior Orders*

This proceeding will also require analysis of whether the Dissenting E&O Policies' criminal or fraudulent acts exclusion applies, in turn requiring interpretation of this Court's prior orders. The criminal or fraudulent acts exclusion, a provision contained in the Followed MFGA Policy and incorporated by the Dissenting E&O Policies, generally excludes coverage for any claim arising out of criminal or fraudulent conduct on the part of the insured. Complaint ¶ 45, Ex. E, at 12 (Section 3.12). The very terms of this exclusion necessitate interpretation of this Court's prior orders. The criminal or fraudulent acts exclusion provides that it "shall only apply to the *insured* against whom it is expressly stated or held ***by a final adjudication in the underlying claim*** that the subject conduct ***did in fact occur***." Id. (emphases added). Accordingly, resolution of whether the criminal or fraudulent acts exclusion applies will require a determination of whether any of this Court's prior orders constitute "a final adjudication in the underlying claim" that any alleged wrongful conduct "did in fact occur."

Based on prior correspondence, the MFG Parties expect the Bermuda Insurers to improperly cite the CFTC Consent Order, see SIPA D.I. 7034-1 (Lissy Aff., Ex. 3), authorized by this Court, as "a final adjudication" of wrongful conduct giving rise to the criminal or

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coverage for *uninsurable matters*" (emphasis added)); First Affidavit of Lawrence P. Engrissei ¶ 13 (Ex. E-2 to MFG Parties' Dec. 27 Letter) (stating that "the reasons for Iron-Starr's refusal to provide cover under the Policy include . . . that the Policy precludes coverage for *uninsurable matters*" (emphasis added)).

fraudulent acts exclusion—even though the Order states that it "shall not be used, admissible or given preclusive effect in any other proceeding, and nothing in this Consent Order shall be construed to confer any rights on any third parties or inure to the benefit of any third parties," id. ¶ 10.[33] Indeed, prior to tendering their full policy limits, the contributing E&O Insurers had themselves attempted to improperly rely upon the CFTC Consent Order as part of their initial claim denial. See, e.g., MFGA Letter (July 25, 2014) at 2, 5 (Ex. G to Complaint) (seeking to rely upon "MFGI's purported admission in the CFTC Order"). Because adjudication of the Policies' criminal or fraudulent acts exclusion will require interpretation of the CFTC Consent Order, this is a core proceeding.

This Court's oversight is particularly necessary given that an arbitral panel is not bound by the Rules of Evidence or other protections against improper use of the CFTC Consent Order. Indeed, nothing would prevent the Bermuda Insurers from improperly and inaccurately arguing before an arbitral panel that the reports of the SIPA Trustee (SIPA D.I. 1865) and the Chapter 11 Trustee (D.I. 1279) also constitute final adjudications that an underlying fact "did in fact occur."

In addition, the MFG Parties submit that the criminal or fraudulent acts exclusion, like the "matters uninsurable" exclusion, is precluded by the 9019 Order's prohibition against challenging the "Reasonableness of Settlement." This Court's 9019 Order held that the underlying Customer Claims "proper[ly]" and "fair[ly]" exhausted the contributing E&O Policies (including the Followed MFGA Policy) "in accordance with, and pursuant to, their terms," MDL

[33] Although it is clear that the CFTC Consent Order is irrelevant to the criminal or fraudulent acts exclusion, the Bermuda Insurers do take liberties with this Court's orders absent Court oversight. See, e.g., Memorandum Opinion and Order Holding the Bermuda Insurers in Contempt at 21 (Adv. D.I. 67) ("Despite the Bermuda Insurers' numerous proclamations to the contrary, the evidentiary record is clear that the Bermuda Insurers have flouted the proscriptions of the TRO. If the Bermuda Insurers actually intended to comply with the TRO, they would not have asked the Bermuda Court to order the Plaintiffs to dismiss this adversary proceeding.").

Settlement Agreement, at Def. ¶ (ccccc), including the terms of the criminal or fraudulent acts exclusion. As such, the Court's 9019 Order conclusively determined that the criminal or fraudulent acts exclusion does not apply. Again, here, the Bermuda Insurers appear to disagree with the MFG Parties' interpretation of the 9019 Order. See, e.g., AWAC MOL in Opposition to Application of the Bar Order and Barton Doctrine at 2 n.3 (Adv. D.I. 62) (reserving the right to assert *any* coverage defense "available in law, equity, or under the terms of its Policy"); Iron-Starr MOL in Opposition to Application of the Bar Order and Barton Doctrine at 4 n.4 (Adv. D.I. 64) (same). Resolving this dispute will thus require interpretation of this Court's prior order.

c. *Adjudication Of The "Insured vs. Insured" Exclusion Will Directly Implicate This Court's Prior Orders*

The MFG Parties' request for declaratory judgment also seeks enforcement of this Court's prior determinations that the underlying Customer Claims are not precluded by the Policies' "Insured vs. Insured" exclusion. *First*, the MFG Parties seek confirmation that this Court's NES Approval Order and its SAA Approval Order—which expressly *preserved* and assigned the existing Customer Claims against the Individual Insureds—did not transform those Customer Claims into claims excluded from coverage by the "Insured vs. Insured" exclusion. See SAA Approval Order ¶ 7 ("The assignment . . . is not intended to, and does not, alter or in any way impair the enforceability of and full receipt of benefits in connection with the Assigned Rights."). *Second*, the MFG Parties seek declaratory judgment that the NES Approval Order authorized payment from the MFGI general estate of the Customer Claims against MFGI and MFGH, thus precluding any misreading of that Order as triggering the "Insured vs. Insured" exclusion with respect to those Customer Claims. *Third*, any challenge to the validity of the assignments would require interpretation of the Plan's provisions creating and empowering the Plan Administrator and the Litigation Trust. Plan, Art. IV.C; Art. IX-2. Specifically, analysis of

the various transfers of assets from MFGI to MFGH or any of its affiliates (such as MFGAA) would hinge on the scope of authority vested in the Plan Administrator by the Plan. Plan, Art. IV.C.xv; Art. XIII.G (empowering Plan Administrator to transfer assets and form new entities). *Finally*, the MFG Parties believe that the "Insured vs. Insured" exclusion is precluded by the 9019 Order's bar on challenging the "Reasonableness of Settlement." Because the underlying Customer Claims "proper[ly]" and "fair[ly]" exhausted the contributing E&O Policies (including the Followed MFGA Policy) "in accordance with, and pursuant to, their terms and conditions," they cannot have been subject to the Policies' "Insured vs. Insured" exclusion.

The Bermuda Insurers, by contrast, have broadly asserted that the Dissenting E&O Policies do not cover underlying Customer Claims on the basis of the "Insured vs. Insured" exclusion.[34] In addition, the Bermuda Insurers appear to challenge the validity of the assignments authorized by the NES Approval Order, SAA Approval Order, and 9019 Order.[35] The interpretation of this Court's prior orders will thus be essential to resolving this case.

In sum, this proceeding will require the interpretation and enforcement of numerous prior orders of this Court, including the CFTC Consent Order, the NES Approval Order, the SAA Approval Order, and the 9019 Order. Because this proceeding "directly affect[s]" the "core bankruptcy function" of interpreting and enforcing prior bankruptcy court orders, it is a core proceeding. U.S. Lines, 197 F.3d at 637.

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[34] *See* First Affidavit of Jan E. Haylett ¶ 14 (Ex. D-2 to MFG Parties' Dec. 27 Letter) (stating that the "reasons for" AWAC's and Iron-Starr's "refusal to provide cover under the Policy include . . . that the Policy precludes coverage for . . . claims that constitute 'Insured vs. Insured' claims"); First Affidavit of Lawrence P. Engrissei ¶ 13 (Ex. E-2 to MFG Parties' Dec. 27 Letter) (same).

[35] See Memorandum in Support of Defendant Allied World Assurance Company, Ltd's Appeal as of Right, and in the Alternative, Motion for Leave to Appeal the Bankruptcy Court's Barton Order at 15, In re MF Global Holdings Ltd., No. 17-00953 (RWS) (S.D.N.Y. Mar. 22, 2017) (referring to MFGAA as "the ***putative assignee*** of the insureds' interests under the insurance policies" (emphasis added)).

2. *The Importance Of The Dissenting Insurers' Limits To The Bankruptcy Estate Establishes That This Is A Core Proceeding*

Courts evaluating core status in the insurance context also consider the importance of the disputed insurance coverage in relation to the bankruptcy estate. In U.S. Lines, for example, the Second Circuit concluded that the proceedings were core due to the impact that the insurance contracts at issue had on other core bankruptcy functions. 197 F.3d at 638. The Second Circuit emphasized that those insurance contracts "may well be . . . the most important asset[s] of [the] estate," as they represented "the only potential source of cash available" to a certain group of creditors. Id. (citations and internal quotation marks omitted). "As such," the court determined, "resolving disputes relating to major insurance contracts are bound to have a significant impact on the administration of the estate." Id. Similarly, in In re County Seat Stores, Inc., No. 01-CIV-2966 (JGK), 2002 WL 141875 (S.D.N.Y. Jan. 31, 2002), the court held that an insurance coverage action was core because it threatened to directly affect a core bankruptcy function. Id. at *6. The court highlighted the fact that "[t]he insurance proceeds available to pay any liability . . . in the Underlying Action, up to $25 million, *may also be the most important asset of the estate*." Id. (emphasis added). Accordingly, the court reasoned, it would "be difficult for the Trustee to decide questions relating to the distribution of assets among creditors without a decision in the Coverage Action." Id.[36]

Here, as in U.S. Lines and County Seat Stores, the amounts owed by the Dissenting Insurers in connection with their wrongful denials are "[c]hief among the remaining potential

[36] See also Norkin v. DLA Piper Rudnick Gray Cary, LLP, No. 05-CIV-9137 (DLC), 2006 WL 839079, at *4 (S.D.N.Y. Mar. 31, 2006) (proceeding deemed core based, in part, on the "importance of the recovery to [the] estate"); In re Winimo Realty Corp., 270 B.R. 108, 118 (S.D.N.Y. 2001) (proceeding was core where it involved "the single biggest asset of the bankruptcy estate that remains to be liquidated").

sources of recovery" for the MF Global bankruptcy estates.[37] This was true when the Dissenting Insurers improperly refused to tender their combined $25 million in policy limits under the Dissenting E&O Policies in settlement of the underlying Customer Claims. Complaint ¶¶ 95-96. It is all the more true today given the at least $40 million in additional consequential and other damages that have been caused by the Dissenting E&O Insurers' breaches of the Dissenting E&O Policies' implied covenant of good faith and fair dealing. Id. ¶¶ 116-118. The importance of recovering the Dissenting Insurers' limits for the bankruptcy estate, which still has a shortfall in the hundreds of millions of dollars for the amounts advanced to the Customer Class, demonstrates that this proceeding is core.

B. Arbitration Of Parts Of This Dispute Would Seriously Jeopardize The Objectives Of The Bankruptcy Code, Including Centralized Dispute Resolution, The Avoidance Of Piecemeal Litigation, And The Power Of A Bankruptcy Court To Enforce Its Own Orders

Whether or not the court finds this proceeding to be core, the second prong of the "two-part test for determining when a Bankruptcy Court has the discretion to decline to compel arbitration" is "whether the arbitration 'would seriously jeopardize the objectives of the bankruptcy code such that there is an inherent conflict between arbitration and the code.'" Lehman Bros., 2015 WL 5729645, at *3; see also, e.g., In re Harrelson, 537 B.R. 16, 25 (Bankr. M.D. Ala. 2015) ("[C]ircumstances occasionally warrant a refusal to compel arbitration even as to non-core claims.").[38] Such inherent conflicts are common, as "[d]isputes that involve both the

[37] Mem. Op. and Order Granting Motions to Approve SAA Agreement at 5 (SIPA D.I. 8854); see also 9019 Motion for Approval of MDL Settlement ¶ 5 (D.I. 2271) (identifying proceeds under E&O Policies as "among the most significant remaining assets" of the MF Global bankruptcy estates); Complaint ¶ 19 (noting that the Dissenting E&O Policies constitute "one of the final remaining substantial assets of the Debtors' estates").

[38] Achievable, Inc. v. Hamm, No. 2:11-cv-678-MEF, 2012 WL 1392950, at *6 (M.D. Ala. Apr. 23, 2012) ("Although classified as a non-core proceeding, the unique set of facts presented in this case, when considered in the aggregate, compel the Court to the conclusion that

Bankruptcy Code and the Arbitration Act often present conflicts of 'near polar extremes.'" Hill, 436 F.3d at 108. "To make a determination that an inherent conflict exists, a court must engage in 'a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy.'" Anderson, 553 B.R. at 229 (citing Hill, 436 F.3d at 108). "'If a severe conflict is found, then the court can properly conclude that . . . Congress intended to override the [FAA's] general policy favoring the enforcement of arbitration agreements.'" Anderson, 553 B.R. at 230 (citing Hill, 436 F.3d at 108).

"A court may find that an 'inherent conflict' exists where arbitration would" undermine "'the goal of centralized resolution of purely bankruptcy issues'" or "'the need to protect creditors and reorganizing debtors from piecemeal litigation.'" Anderson, 553 B.R. at 230 (citing Hill, 436 F.3d at 108); see also U.S. Lines, 197 F.3d at 640 ("[O]ne of the core purposes of bankruptcy . . . is to 'allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.'"). In Bethlehem Steel, for example, this Court denied four motions to compel arbitration, finding "a 'severe conflict' between policies underlying arbitration agreements and the conduct of this bankruptcy proceeding." 390 B.R. at 795. Emphasizing the Bankruptcy Code's "'inexorable pull towards centralization,'" this Court determined that—because the various adversary proceedings at issue arose from common facts—"[u]niformity in the application of the law to the facts in these federal statutory claims is furthered by federal court

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arbitration of this dispute would seriously disturb the objectives of the Chapter 7 bankruptcy."); Hooks v. Acceptance Loan Co., No. 2:10-CV-999-WKW, 2011 WL 2746238, at *3 (M.D. Ala. July 14, 2011) (explaining that "the core/non-core distinction is not dispositive"); In re Hicks, 285 B.R. 317, 322-24 (Bankr. W.D. Okla. 2002) (refusing to compel arbitration of non-core claims); cf. U.S. Lines, 197 F.3d at 640 ("[N]on-core proceedings . . . are *unlikely* to present a conflict sufficient to override by implication the presumption in favor of arbitration." (emphasis added)).

litigation and not arbitration." Id. at 793-95 (citing U.S. Lines, 197 F.3d at 640). This Court warned against piecemeal litigation, reasoning that "'certain fact situations may be expected to bring about fairly consistent results.'" Id. at 795 (citation omitted).

Similarly, the district court in Anderson held that "the Bankruptcy Court had discretion to refuse to compel arbitration" because arbitration "would necessarily jeopardize the objectives of the Bankruptcy Code," including "the uniform application of bankruptcy law, which has been recognized consistently in courts throughout this district." 553 B.R. at 230, 234-35. In Anderson, "a number of debtors assert[ed] claims under virtually identical agreements with one creditor—Credit One." Id. at 234. "Given that each individual claim would be subject to separate arbitration," the court reasoned, allowing arbitration "could create wildly inconsistent results," especially "in light of the broad discretion arbitrators have in deciding whether or not to apply collateral estoppel offensively." Id. (citation omitted). Accordingly, the court held, "multiple violations of a discharge injunction by one creditor are more efficiently and uniformly decided by federal litigation." Id. at 235.

As these cases make clear, the Bankruptcy Code's preference for centralized dispute resolution also preserves judicial and party resources and avoids unnecessary delays. Thus, courts regularly refuse to compel arbitration where doing so would result in similar claims being concurrently litigated in both the bankruptcy court and in arbitration, particularly where dealing with multiple proceedings would be burdensome for the parties and witnesses. See, e.g., In re Koper, 516 B.R. 707, 721-22 (Bankr. E.D.N.Y. 2014) (refusing to compel arbitration because "there are two other adversary proceedings pending before this Court involving a common set of facts and law and the same parties which may be impacted").[39]

[39] See also Koper, 516 B.R. at 722 ("[T]his Court will need to conduct a trial or evidentiary

Here, regardless of whether the Court deems the proceedings core or non-core, allowing any part of this proceeding to be arbitrated in Bermuda "'would seriously jeopardize the objectives of the bankruptcy code,'" Lehman Bros., 2015 WL 5729645, at *3, including cost-effective centralized dispute resolution, consistent results, and the power of a bankruptcy court to enforce its own orders. This Court should therefore deny the motions to compel arbitration.

First, there is no option to send all proceedings to a single arbitration. Because Federal's policy lacks an arbitration provision, the claims against Federal must proceed before this Court. And because the claims against AWAC do not fall under the AWAC arbitration provision to the extent they are brought on behalf of MFGI, the Individual Insureds, or their respective assignees, see supra Part III, those claims must proceed in this Court as well. Thus, if the rest of the case was sent to arbitration, this Court would adjudicate the MFGI Direct Claim and the Individual Insureds' Assigned Claims against AWAC (the lowest remaining excess layer of the E&O insurance program) and all of the claims against Federal (the highest remaining excess layer); meanwhile, one Bermuda arbitration panel would adjudicate the MFGH Direct Claim against AWAC and yet another Bermuda arbitration panel would decide all claims against Iron-Starr (the intermediate excess layer). See Complaint ¶¶ 2, 3 n.6, Ex. A. These decentralized, duplicative proceedings would create a significant risk of inconsistent rulings, which can and should be avoided by this Court's retention of jurisdiction over the entire dispute.

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hearing on the very same facts considered by the arbitrator . . .. [to determine] dischargeability. Therefore, not only would there be a waste of judicial resources, but this would also be burdensome on the Debtor and witnesses where litigation is occurring in multiple forums. The Bankruptcy Code's purpose of centralizing all litigation in one forum would be defeated."); White Mountain Mining, 403 F.3d at 170 ("[T]he London arbitration was inconsistent with the purpose of the bankruptcy laws to centralize disputes about a chapter 11 debtor's legal obligations so that reorganization can proceed efficiently."); Nat'l Gypsum, 118 F.3d at 1069 n.21 (because "efficient resolution of claims . . . [is an] integral purpos[e] of the Bankruptcy Code," "efficiency concerns" such as "substantial arbitration costs [and] severe delays" can "present a genuine conflict between the Federal Arbitration Act and the Code").

Second, allowing arbitration would mean that both this Court and the Bermuda arbitration panels could seek to simultaneously interpret this Court's prior orders, construe the same insurance contract provisions, and decide the same disputed issues, thereby increasing inefficiency, delay, and litigation costs. Because the MFG Parties assert the same claims against each of the Dissenting Insurers, and the Dissenting Insurers themselves assert the same defenses against the MFG Plaintiffs,[40] fragmentation of this dispute into separate bankruptcy court and Bermuda arbitral proceedings would cause unnecessary duplication at each stage of this litigation, from fact discovery through trial. For instance, the MFG Parties would be required to present their own witnesses for repeated examination by the Dissenting Insurers on the very same topics. This duplication would be exacerbated by the confidentiality restrictions of Bermuda arbitration, which limit the use in other proceedings of documents and testimony obtained in Bermuda arbitral proceedings. See, e.g., ACE Bermuda Ins. Ltd. v. Ford Motor Co., [2016] SC (Bda) 1 Civ (6 Jan. 2016), ¶ 25. And this duplication would be especially wasteful given the exorbitant costs associated with multiple foreign arbitral panels comprised of Queen's Counsel Barristers and requiring experts to provide testimony on New York law.

Third, the need for centralization here is particularly strong due to this Court's unique historical involvement in the complex bankruptcy-related and insurance-related issues raised in this case. The case law is clear that inherent conflicts between the FAA and the Bankruptcy Code are more likely to arise in large, complex proceedings. See U.S. Lines, 197 F.3d at 641 ("[t]he need for a centralized proceeding is further augmented by the complex factual scenario, involving multiple claims, policies and insurers"); Lehman Bros., 2015 WL 5729645, at *9 (both size and complexity "are relevant to the determination of whether a conflict exists"). Arbitration

[40] Compare, e.g., First Affidavit of Jan E. Haylett ¶ 14 (Ex. D-2 to MFG Parties' Dec. 27 Letter), with First Affidavit of Lawrence P. Engrissei ¶ 13 (Ex. E-2 to MFG Parties' Dec. 27 Letter).

of claims related to complex bankruptcy proceedings jeopardizes the objectives of the Bankruptcy Code because the arbitrators typically lack the necessary experience. See, e.g., Bethlehem Steel, 390 B.R. at 795 (refusing to "'subject these matters to arbitration, before individuals and tribunals with little or no experience in bankruptcy law or practice, and with little or no concern for the rights and interests of the body of creditors'" (citation omitted)).[41]

This is an extraordinarily complex proceeding that this Court alone is equipped to adjudicate. Compared to this Court, which has a deep familiarity with this case, a Bermuda arbitration panel is at a major disadvantage in analyzing the interplay among bankruptcy issues, insurance issues, this Court's prior rulings, and the complex factual circumstances. The claims brought by the MFG Parties in this proceeding include the MFGI Direct Claim and Individual Insureds' Assigned Claims, which were acquired pursuant to orders of the Bankruptcy Court. See SAA Approval Order (order approving Sale and Assumption Agreement); 9019 Order (order approving MDL Settlement Agreement). These assigned claims and orders substantially complicate this proceeding. Indeed, the Bermuda Insurers have themselves been confused about this set of facts—incorrectly asserting that MFGH "never had or no longer has any cognizable interest or rights to the [Dissenting] E&O Policy" and that MFGAA was "assigned all rights to the [Dissenting] E&O Policy." Adv. D.I. 36, at 5; see also Adv. D.I. 37, at 16 n.21 ("Because the coverage claims were never property of the MFGH estate and a third-party, non-debtor (i.e., MFGAA) currently holds any and all title to the Allied World Policy . . . .")). As the MFG

[41] See also Lehman Bros., 2015 WL 5729645, at *14 (affirming denial of motion to compel arbitration based, in part, on the fact that the bankruptcy court "has spent seven years presiding over this liquidation and appreciates the impact these determinations likely will have on the complex proceedings and numerous creditors involved"); Koper, 516 B.R. at 721 ("[A]llowing an arbitrator to decide issues of liability and amount of damages would . . . leav[e] the bankruptcy court with the role of ratifying a decision made by someone who may or may not have any expertise in bankruptcy . . . .").

Parties explained, these assertions ignore that the MDL Settlement Agreement conveyed to the MFG Plaintiffs,[42] and not merely to MFGAA, all rights of the Individual Insureds against the Defendants. MDL Settlement Agreement, Ex. A (assigning Individual Insureds' rights in the Dissenting E&O Polices to the MFG Plaintiffs). That these factual nuances were lost on the Bermuda Insurers, upon whom notice of this Court's approval of the MDL Settlement Agreement was contemporaneously provided, demonstrates the significant potential for confusion if these same facts must be introduced to others less familiar with the history of this bankruptcy.

Understanding, and thus being able to efficiently evaluate, the various claims asserted by the MFG Parties requires an intimate knowledge of the prior proceedings. Indeed, each set of claims asserted by the MFG Parties touches upon different aspects of the SIPA, chapter 11, and MDL proceedings. Moreover, the facts leading to the MF Global bankruptcy proceedings are themselves incredibly complex. The "catastrophic collapse" of MF Global led to "vast litigation" that the district court overseeing the MDL litigation compared to a "'massive train wreck' that caused injuries to thousands of unknowing and unsuspecting victims." In re MF Global Holdings Ltd. Inv. Litig., 998 F. Supp. 2d 157, 166 (S.D.N.Y. 2014). The complaint filed by the Customer Class was comprised of "695 paragraphs, filling 218 pages." In re MF Global Holdings Ltd. Sec. Litig., 982 F. Supp. 2d 277, 289 (S.D.N.Y. 2013).[43] In contrast to arbitrators confronting these facts for the first time, this Court has first-hand and thorough knowledge of the facts undergirding this dispute. Given the voluminous record generated in this case, as well as

[42] The term "MFG Plaintiffs" is defined in the MDL Settlement Agreement as MFGH, MFGAA, and the Litigation Trustee.

[43] The Chapter 11 Trustee and the SIPA Trustee also published hundreds of pages of reports detailing the complex facts surrounding the failure of MF Global and the actions of the Individual Insureds. See Report of the Trustee's Investigation and Recommendations (SIPA D.I. 1865) (275 pages); Report of Investigation of Louis J. Freeh, Chapter 11 Trustee of MF Global Holdings, Ltd. (D.I. 1279) (174 pages).

the complex procedural history involving three separate proceedings, this Court is in a much better position than Bermuda arbitrators to adjudicate this dispute.

Fourth, arbitration would inherently conflict with the Bankruptcy Code's goal of upholding a bankruptcy court's power to apply its prior orders. In Anderson, for example, the Court refused to compel arbitration because it "would necessarily jeopardize the objectives of the Bankruptcy Code" by asking an arbitrator to "interpret and enforce . . . an affirmative order of the bankruptcy court." 553 B.R. at 230, 233 (distinguishing Hill, 436 F.3d at 110, which involved interpretation and enforcement of a *statute*).[44] In reaching this conclusion, the court emphasized that "a main objective of the Bankruptcy Code is the 'undisputed power of a bankruptcy court to enforce its own orders,'" id. at 233 (citing Hill, 436 F.3d at 108-09), and that "courts in the Second Circuit consistently recognize the unique power of a bankruptcy court to interpret its own orders," id.[45]

As explained above, see supra Part IV.A.1, interpretation and enforcement of this Court's prior orders will determine the outcome of the MFG Parties' claims. Given this Court's long history with this case, a Bermuda arbitration panel is at a major comparative disadvantage in

[44] See also, e.g., PRL USA Holdings, Inc. v. U.S. Polo Ass'n, No. 14–CV–764 (RJS), 2015 WL 1442487, at *6 (S.D.N.Y. Mar. 27, 2015) (refusing to compel arbitration of contempt issue because "the FAA may not be construed to divest courts of their traditional powers to police their own orders," and because "hold[ing] otherwise would improperly permit an arbitrator to decide whether and how to enforce a federal injunction"); Hooks, 2011 WL 2746238, at *5 (denying motions to compel arbitration because arbitration "would inherently conflict with the Bankruptcy Code, undermining the bankruptcy court's authority to enforce its orders").

[45] Citing Deep v. Copyright Creditors, 122 Fed. App'x 530, 533 (2d Cir. 2004) (in turn citing In re Casse, 198 F.3d 327, 333 (2d Cir. 1999) ("The bankruptcy court [is] in the best position to interpret its own orders.")); In re Texaco Inc., 182 B.R. 937, 947 (Bankr. S.D.N.Y. 1995) ("A bankruptcy court is undoubtedly the best qualified to interpret and enforce its own orders including those providing for discharge and injunction . . . ."); PRL USA Holdings, 2015 WL 1442487, at *6 ("Federal courts, and federal courts alone, possess 'the inherent authority to enforce their judgments.'").

analyzing the relationship between this Court's prior rulings and the complex factual, bankruptcy, and insurance issues at play here. To ensure that its previous orders are respected and properly enforced, this Court should retain jurisdiction over this entire dispute.

This result is neither unfair nor inequitable. AWAC and Iron-Starr wrote policies in a tower where most of the other policies had no arbitration provision. As such, they were clearly on notice that efficiency interests might override the few arbitration provisions in the tower.

V. If The Court Sends Any Portion Of This Case To Arbitration, It Should Stay The Arbitration Pending Resolution Of The Retained Claims Before This Court

In the alternative, if the Court ultimately decides to transfer any portion of this proceeding to arbitration, it should—at the very least—exercise its discretion to stay arbitration until the retained claims are adjudicated by this Court. If, for example, the Court concludes that the claims against AWAC are not subject to arbitration to the extent they are brought by MFGI, the Individual Insureds, or their assignees, see supra Part III, the Court is required to retain those claims—even if it (incorrectly) determines that arbitration of the other claims would not seriously jeopardize the objectives of the Bankruptcy Code. And regardless of the Court's resolution of the issues raised in Parts II and III, the MFG Parties' claims against Federal must remain in this Court because Federal's policy lacks an arbitration provision. Because this Court must decide at least part of this proceeding, it should stay any arbitration in order to ensure consistent results, avoid collateral estoppel, and preserve judicial and estate resources.

This Court has the power to stay arbitration with the Bermuda Insurers under "[S]ection 105 of the Bankruptcy Code," which "authorizes the court to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11],' including enjoining proceedings in other forums against non-debtors." S.W. Bach, 425 B.R. at 98 (Glenn, J.) (citing 11 U.S.C. § 105(a); McHale v. Alvarez (In re The 1031 Tax Grp., LLC), 397

B.R. 670, 674 (Bankr. S.D.N.Y. 2008) (Glenn, J.)). The court may "enjoin proceedings" in another forum "when it is satisfied that such a proceeding would defeat or impair its jurisdiction with respect to a case before it." S.W. Bach, 425 B.R. at 99 (quoting Alvarez, 397 B.R. at 684); see also Residential Capital, 2016 WL 6155925, at *11. A court should consider "whether the suits would . . . result in inconsistent judgments" and "expose the debtor to risks of collateral estoppel or *res judicata*." S.W. Bach, 425 B.R. at 99 (quoting Alvarez, 397 B.R. at 684); see also Residential Capital, 2016 WL 6155925, at *11. Applying this standard, bankruptcy courts regularly exercise their authority to stay arbitration proceedings pending resolution of the proceedings before the court. See, e.g., S.W. Bach, 425 B.R. at 102, 104 (staying arbitration pending outcome of the court's adjudication of a fraudulent conveyance claim).[46]

Here, assuming that this Court sends any portion of this proceeding to arbitration (and it should not, see supra Parts II-IV), the Court should exercise its authority to stay the arbitration pending resolution of the retained proceedings. *First*, staying arbitration would help prevent "inconsistent judgments." See S.W. Bach, 425 B.R. at 99 (quoting Alvarez, 397 B.R. at 684); id. at 104 ("[I]nconsistent judgments detrimental to the Debtor could result if the Arbitration Panel is permitted to decide the amount owed to the Trustee or any alleged Transfer of the Accounts before this Court decides [the issues before it]."). Allowing one or more arbitral proceedings to go forward before this Court adjudicates the rest of the case would create a strong likelihood of inconsistent approaches to coverage under the terms of the very same underlying primary policy. See Residential Capital, 2016 WL 6155925, at *12 ("[T]here is no mechanism to prevent

[46] See also Residential Capital, 2016 WL 6155925, at *1, 11-13 (staying arbitration "while the plaintiffs pursue their claims against other defendants on other related insurance policies"); Allstate Ins. Co. v. Elzanaty, 929 F. Supp. 2d 199, 220-22 (E.D.N.Y. 2013) (staying arbitration due to risk of "inconsistent rulings," and noting that "a large number of New York State courts have stayed arbitrations under precisely the same facts as in the present case").

inconsistent judgments (a) among the arbitration panels, or (b) between the arbitration panels and a decision rendered in this Court on coverage for the underlying policies."). A stay is particularly appropriate here because "determinations on certain defenses contained in the policies—such as reasonableness—[may] arguably be inconsistent with prior orders of the bankruptcy court in this case." Id. at *12.

Second, this Court should stay arbitration to avoid exposing the MFG Parties "to risks of collateral estoppel or *res judicata*." S.W. Bach, 425 B.R. at 99 (quoting Alvarez, 397 B.R. at 684). If even one of the potential arbitrations were concluded before this Court ruled on the underlying policies, the MFG Parties could be collaterally estopped from litigating certain issues before this Court, even if this Court were inclined to rule differently. See, e.g., Residential Capital, 2016 WL 6155925, at *11 ("Collateral estoppel 'can be predicated on arbitration proceedings.' 'An arbitration decision may effect collateral estoppel in a later litigation . . . if the proponent can show with clarity and certainty that the same issues were resolved.'" (citations omitted)); S.W. Bach, 425 B.R. at 100 (explaining that "courts . . . are split whether, and when, an arbitration proceeding forms the predicate for collateral estoppel"). A collateral estoppel ruling would functionally deprive this Court of its jurisdiction to rule on important issues regarding the underlying policies. Accordingly, "[t]he possibility of . . . exposing the Plaintiffs to the risks of collateral estoppel or *res judicata* weigh in favor of staying the arbitration proceedings." Residential Capital, 2016 WL 6155925, at *12.

Finally, "[a]dditional concerns such as cost and efficiency also weigh in favor of staying the arbitration proceedings." Id. at *13. The arbitrations would substantially burden and distract the MFG Parties by diverting necessary manpower and funds away from administering the estate. Staying the initiation of any international arbitrations until the resolution of the

proceedings in this Court is thus both common-sense and consistent with the Court's duty to efficiently administer resolution of the bankruptcy proceedings. Given the extremely high costs of overseas arbitrations, and the fact that the Dissenting Insurers are advancing nearly identical coverage defenses, staying the arbitration is the most prudent course of action.

CONCLUSION

For the foregoing reasons, the MFG Parties respectfully request that this Court strike or deny the Bermuda Insurers' motions to compel arbitration.

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New York, New York

Respectfully submitted,

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