UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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

BERMUDA INSURERS' JOINT OPPOSITION TO PLAINTIFFS' MOTION TO REQUIRE THE BERMUDA INSURERS' COMPLIANCE WITH NEW YORK INSURANCE LAW § 1213(C)

[1] The debtors in the chapter 11 cases (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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Defendants Allied World Assurance Company, Ltd ("Allied World"), Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd. and Starr Insurance & Reinsurance Limited (collectively, "Iron-Starr" and collectively with Allied World, the "Bermuda Insurers"), respectfully submit this memorandum of law in opposition to Plaintiffs' Motion to Require the Bermuda Insurers' Compliance with New York Insurance Law § 1213(c) (Adv. Dkt. 118).

PRELIMINARY STATEMENT

The question of whether a motion to compel arbitration is a "pleading" under Insurance Law Section 1213 is one that New York State courts have not considered. The New York Court of Appeals has set out the test for making this decision and, applying that test, this Court must "predict how the New York Court of Appeals would resolve [this] state law question". ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 166 (2d Cir. 2007) (citation omitted). This inquiry is to be driven by legislative purpose, and on that score, it is clear that the purpose of the statute is to secure eventual New York judgments. Accordingly, motions and other filings that contest the merits of the dispute are recognized as "pleadings" under the Insurance Law, while motions that seek to litigate the dispute elsewhere or contest the Court's authority over the defendant do not trigger the bond requirement. The Bermuda Insurers' filings in this Court, rather than disputing the merits of the contract claims, explain why the parties' mandatory arbitration clauses mean that this dispute belongs in Hamilton, Bermuda and not New York. Additionally, for Section 1213 to apply, a foreign insurer must mail a policy to New York, and Plaintiffs do not seriously contest that neither Bermuda Insurer has done so. (See Part I.)

Should this Court grant the motion to compel arbitration, it properly can avoid deciding these state-law questions. Procedural questions like these are reserved for the

arbitrators, and accordingly, the Court's role when a motion to compel arbitration is pending is solely to determine whether to grant arbitration. The Bermuda Insurers' arbitration agreements specifically empower arbitrators to order a prejudgment security, and courts in the Second Circuit have noted arbitrators' power to decide whether and how much of a bond should issue. Plaintiffs' own authority offered in support of having this Court decide the issue referred the question of how much of a bond should issue to the arbitrators. (See Part II.)

Were this Court to go where no New York State court has gone and require the Bermuda Insurers to post a bond as a condition of successfully moving for arbitration, such an interpretation of Insurance Law Section 1213 would conflict with, and thus be preempted by, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38 (the "New York Convention" or "Convention"). That treaty, which the United States and Bermuda have both joined, forecloses the use of prejudgment attachments that seek to restrict, rather than further, agreements to arbitrate. (See Part III.) Finally, even if the Court holds that Plaintiffs are entitled to a bond at this stage, the Court should significantly reduce the bond amount they request. (See Part IV.)

ARGUMENT

I. A MOTION TO COMPEL ARBITRATION DOES NOT TRIGGER THE NEW YORK INSURANCE LAW BOND REQUIREMENT.

New York Insurance Law Section 1213(c) requires that foreign insurers not authorized to do business in New York deposit a security sufficient to cover a final judgment before filing "any pleading in any proceeding against it". 1213(c)(1)(A). The Bermuda Insurers' research has not uncovered, and Plaintiffs have not cited, a single instance where a New York

State court applied the Section 1213 bond requirement to a motion to compel arbitration. This is for good reason.

A motion to compel arbitration is not a pleading under New York Insurance Law Section 1213(c) because it does not seek to contest the merits of the suit in this forum. Non-merits based motions that challenge either the court's power to adjudicate (e.g., subject matter jurisdiction or personal jurisdiction) or that argue the dispute must be heard in a different forum (e.g., forum non conveniens or motions to compel arbitration) are not "pleading[s]" under Section 1213 because they fall outside "the Legislature's objectives in enacting the statute". Levin v. Intercont'l Cas. Ins. Co., 742 N.E.2d 109, 111 (N.Y. 2000).

A. Motions That Do Not Contest the Merits of a Lawsuit in the Forum Do Not Qualify as Pleadings under the New York Court of Appeals' Interpretation of Section 1213(c).

The plain language of CPLR Section 3011 defines complaints, answers and counterclaims as the "kinds of pleadings" available in New York courts. See N.Y. CPLR 3011 (McKinney) (listing a complaint, an answer, a cross-claim, a counterclaim, interpleader pleadings, third party pleading, a reply to counterclaim and a reply to a reply). Looking solely at CPLR 3011, one district court concluded that because this definition did not "include[] a motion for summary judgment", such a motion did not trigger the bond requirement under Section 1213(c). Allstate Ins. Co. v. Administratia Asigurarilor De Stat, 948 F. Supp. 285, 295 (S.D.N.Y. 1996). The New York Court of Appeals, in Levin, took issue with what it considered to have been Allstate's overly textual approach. Levin, 742 N.E.2d at 111. It decided that to exempt a filing merely because it is not on the list in CPLR 3011 "would impede section 1213's objectives". Id. Levin concluded that the New York Legislature had not intended to exclude all

motions from Section 1213's reach. Id. The New York Court of Appeals was clear, however, that it was not opening the floodgates. Instead, Levin set out a specific test for future courts to follow, which provides that whether "any particular motion to dismiss . . . falls within the category of a 'pleading' [under Section 1213] must be determined in accordance with the Legislature's objectives in enacting the statute". Id.

Under the purposive approach that the New York Court of Appeals prescribed in Levin, a motion that seeks to deny a court grounds to reach the merits of a suit, "eliminat[ing] any possibility that the plaintiff will obtain a judgment against the defendant", is not a "pleading" that triggers the Section 1213 bond requirement. TIG Ins. Co. v. Water St. Ins. Co., 98-CV-224, 1999 U.S. Dist. Lexis 22938, at *8-9 (E.D.N.Y. Feb. 26, 1999) (granting motion to compel arbitration and denying motion to require security), R&R adopted, 1999 U.S. Dist. Lexis 22937 (E.D.N.Y. Mar. 19, 1999). "[T]he purpose of the law is to prevent New York insurers from having to 'resort to far-flung forums for satisfaction of their judgments' against foreign insurers". Id. at *9 (emphasis added) (citation omitted). Put differently, the security satisfies a judgment "if the insurer defends and is unsuccessful", or, if the insurer does not defend, "the New York plaintiff will be able to sue on the judgment procured here". Arnold Chait, Ltd. v. La Metropolitana, Compania Nacional de Seguros, S.A., 207 N.Y.S.2d 22, 24 (N.Y. Sup. Ct. 1960) (emphases added). A "possible judgment" in New York is therefore "a prerequisite to the requirement of a pre-answer security". TIG Ins. Co., 1999 U.S. Dist. Lexis 22938, at *9 (emphasis added).

Levin itself explained that "Section 1213's legislative history indicates that defending on the merits"—not filing threshold motions to deny a New York court the ability to

hear the merits—is what "requires the posting of a bond". Levin, 742 N.E.2d at 111 n.3 (collecting legislative history).[2] Levin concluded that motions to dismiss may be considered pleadings under Section 1213, even before the filing of an answer, but the particular facts of that case justified a security because the motion there invoked defenses on the merits. As the First Department explained, the motion to dismiss at issue in Levin "invited the court to treat [it] as a summary judgment motion", and dispensing with a security under those circumstances would thus "permit[] a foreign unauthorized insurer to contest the merits of a claim . . . contrary to the legislative purpose and policy behind the statute". 268 A.D.2d 205 (N.Y. App. Div. 1st Dep't 2000) (emphasis added). The Court of Appeals affirmed that holding, explaining that the motion was "founded upon documentary evidence", 742 N.E.2d at 110, and the movant told the court that "it would not object if the court were to treat the motion as one for summary

[2] This statement from Levin is not mere "dicta", as Drennen v. Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC), No. 12-12020 (MG), Adv. No. 15-01025 (SHL), 2016 WL 6155925 (Bankr. S.D.N.Y. Oct. 21, 2016) ("Drennen")) suggests. It is appended to Levin's core holding about how a court is to proceed in a case, like this, when a party claims that any new type of motion "falls within the category of a 'pleading'". Levin, 742 N.E. 2d at 111. As described below, the principle that merits-based motions fall under Section 1213 is the reason why Levin holds that a motion treated as one for summary judgment qualifies as a pleading. In any event, Drennen (where the Court ultimately held that the dispute there should be arbitrated and that no bond should be posted) was wrong to disregard a considered statement from the New York Court of Appeals. When confronted with an issue that a state has not yet resolved—here, whether a motion to compel arbitration is a "pleading"—"the job of the federal courts is to predict carefully how the highest court of the forum state would resolve the uncertainty or ambiguity". Finkel v. Closter Dock Steel Corp., No. 05 Civ. 3090 (DRH) (WDW), 2007 WL 776781, at *2 (E.D.N.Y. Mar. 12, 2007) (quoting Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 199 (2d Cir. 2003)). When making this "Erie-guess" about how a state would rule, courts recognize that dicta from the state's highest court should inform the prediction. See, e.g., Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C., 620 F.3d 558, 564 (5th Cir. 2010) (explaining that the "rationales and analyses underlying [a State] Supreme Court decision" and "dicta by the [state] Supreme Court" are valuable data points in determining state law (citation omitted)).

judgment", id. at 110. Under CPLR 3211(c), a motion to dismiss treated as one for summary judgment "allows the court to order an 'immediate trial of the issues raised in the motion'"—resolving the "heart" of the case and potentially resulting in a judgment on the merits. Id. at 112. The Court of Appeals agreed with the plaintiff below that that particular motion to dismiss was defending "on the merits", and therefore a security under Section 1213 was required. Id. at 110.

The legislative history reinforces Levin's assessment of the Legislature's purpose in enacting Section 1213(c), which is intended only to require a bond when a motion (or traditional pleading under CPLR 3011) seeks to contest the lawsuit on the merits. See Rep. of the Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 2, Bill Jacket, L. 1949, ch. 826 at 46 (Apr. 18, 1949) ("The bill would also provide that, in any action against such a foreign insurer, it would have to provide security for any judgment that might be rendered against it before defending on the merits" (emphasis added)). The bill jacket to Section 1213, for example, favorably cites Ownbey v. Morgan, 256 U.S. 94 (1920), as support for the constitutionality of the proposed New York insurance bond requirement. Mem. to the Governor at 3, Bill Jacket, L. 1949, ch. 826 at 7 (Mar. 30, 1949). Ownbey, in turn, describes a Delaware prejudgment attachment statute and summarizes related caselaw as holding that a security "has been made a condition precedent to the entering of appearance and making defense upon the merits by a nonresident individual defendant". 256 U.S. at 107 (emphasis added).

Consistent with the legislative history, state and federal courts in New York describe the bond as a first step insurers must take before they can "defend a case on the merits in the New York courts", British Int'l Ins. Co. v. Seguros La Republica, S.A., 212 F.3d 138, 140 (2d Cir. 2000) (per curiam), and thus apply it almost exclusively to answers or counterclaims.

See John Hancock Prop. & Cas. Ins. Co. v. Universale Reins. Co., 147 F.R.D. 40, 42 (S.D.N.Y. 1993) ("[S]ection 1213(c)(1) is essentially a condition precedent to filing an answer"); Curiale v. Ardra Ins. Co., 667 N.E.2d 313, 319 (N.Y. 1996) ("The foreign or alien insurer is merely required to post security as a precondition of filing an answer").[3]

By contrast, objections to jurisdiction, the propriety of the forum and other initial grounds, such as immunity to suit, present "threshold question[s]" that if successful result in dismissal "short of reaching the merits" and therefore preclude the court from entering a judgment. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431 (2007). The legislative history confirms that a bond is not a prerequisite to making (or succeeding on) non-merits motions of this type. To illustrate, the legislative history reflects that defendants can move to dismiss, without posting a security, on grounds broader than those described in the Section 1213(c)(3) exception for motions to set aside service for want of an enumerated act under Section 1213(b)(1). See Rep. of the Assoc. of the Bar of the City of N.Y., Comm. on State Legis. at 4, Bill Jacket, L. 1949, ch. 826 at 49 (Apr. 18, 1949) (explaining that "it is quite probable that, since the general requirement . . . for obtaining security is a condition precedent to 'pleading', it would not be a condition precedent to any motion to vacate the service of process made on any ground" (emphasis added)); Mem. of N.Y. Law Rev. Comm'n at 27, Bill Jacket, L

[3] See also, e.g., Dukes Bridge LLC v. Sec. Life of Denver Ins. Co., No. 10 CV 5491 (ILG)(RML), 2011 WL2971392, at *2-3 (E.D.N.Y. July 20, 2011) (denying motion for "pre-answer security" and to strike answer and counterclaims); McKenney v. Nat'l Rural Letter Carriers Ass'n, No. 07-CV-584A, 2009 WL 902506, at *2 (W.D.N.Y. Apr. 2, 2009) (denying as premature a motion to post a bond "to secure a judgment as a pre-condition to serving an answer" pending jurisdictional discovery); Republic Ins. Co. v. Atl. Ins. Co., No. 91 Civ 8362, 1994 WL 163705, at *1 (S.D.N.Y. Apr. 28, 1994) (denying motion for "pre-answer security" as precondition to filing counterclaims).

1949, ch 826 at 38 (Apr. 8, 1949) (statutory exception permitting defendant "to appear specially to set aside the service without depositing security" is merely a "partial statement[] of the rule applicable in any case" (emphasis added)).

Courts have likewise considered motions to dismiss premised on the "threshold grounds for denying audience to a case on the merits" implicated by Sinochem, 549 U.S. at 431 (citation omitted), without requiring the defendant to post a security. For example, courts have interpreted the exception permitting a foreign insurer to file "a motion to set aside service" on grounds that "such unauthorized insurer has not done any act enumerated" in Section 1213(c)(3) to encompass motions to dismiss for personal jurisdiction more generally. See McKenney v. Nat'l Rural Letter Carriers Ass'n, No. 07-CV-584A, 2009 WL 902506, at *6 (W.D.N.Y. Apr. 2, 2009) (finding that "a determination with respect to whether the bond" requirement of Section 1213 applied would "be premature" absent further proceedings on service of process and personal jurisdiction); Assoc. Aviation Underwriters v. DAP Holding, N.V., No. 02 Civ. 7446 (HB), 2003 WL 21277148, at *4 (S.D.N.Y. May 30, 2003) ("[A]n alien insurer is not required to post this security if it challenges the court's jurisdiction"). Similarly, courts have resolved motions to dismiss for lack of subject matter jurisdiction without a bond. See Gerling Global Reins. Corp. v. Sompo Japan Ins. Co., 348 F. Supp. 2d 102, 106 (S.D.N.Y. 2004); John Hancock Prop. & Cas. Ins. Co. v. Universale Reins. Co., No. 91 Civ. 3644 (CES), 1993 WL 267345, at *2 (S.D.N.Y. July 12, 1993).

In addition to jurisdictional objections to the court's authority over the suit (e.g., personal or subject matter jurisdiction), courts have recognized that motions that contest the forum where the suit is being heard do not require a bond before they may be granted. In

Ghose v. CNA Reinsurance Co., 43 A.D.3d 656, 659 (N.Y. App. Div. 1st Dep't 2007), appeal denied, 891 N.E.2d 308 (N.Y. 2008), the defendant foreign reinsurers "moved to dismiss the complaint . . . on the ground that New York is an inconvenient forum" and argued that the "appropriate forum 'would seem to be Australia'". The plaintiff then "cross-moved for an order pursuant to Insurance Law § 1213(c)" to require the reinsurers to post a bond. Id. New York's First Department agreed that Australia was the proper forum for the dispute and thus granted the motion to dismiss on forum non conveniens grounds. Id. at 661. The court then explained that Plaintiff's "appeal of that part of the order denying his request to have a bond posted is thus rendered academic". Id. It added that the purpose of Section 1213 is "to assure that a foreign carrier's funds will be available in this State to satisfy any potential judgment". Id. (quoting Levin, 742 N.E.2d at 111). The reasoning and conclusions of New York's First Department—both before and after Levin—establish that Insurance Law Section 1213 permits a defendant to move to dismiss a New York lawsuit on forum non conveniens grounds (and win) without being required to post a bond. Ghose, 43 A.D. 3d at 661; see also Brown v. Sec. Union Tit. Ins. Co., 192 A.D.2d 386, 387 (N.Y. App. Div. 1st Dep't 1993) (holding that there is "no merit to plaintiff's argument that the foreign defendant insurance company was required to post a bond pursuant to Insurance Law § 1213(c)(1) since by moving to dismiss on forum non conveniens grounds, defendant has not sought to interpose a pleading").

B. Rather than Contest the Case on the Merits, a Motion To Compel Arbitration Seeks To Move the Dispute to Another Forum.

A motion to compel arbitration, like a motion to dismiss for lack of personal jurisdiction, subject matter jurisdiction or on forum non conveniens grounds, similarly does not reach the merits of the underlying claim (the concern animating Levin). It is thus not a

"pleading" under Insurance Law Section 1213. See Ramasamy v. Essar Global Ltd., 825 F. Supp. 2d 466, 467 n.1 (S.D.N.Y. 2011) (relying on Sinochem to treat both a motion to compel arbitration and objection to personal jurisdiction as "threshold grounds for denying audience to a case on the merits" and explaining that a motion to compel is not a "responsive pleading that shows the defendant has acceded to the district court's jurisdiction") (citation omitted).

In contrast to the motion to dismiss converted to a motion for summary judgment in Levin, the Second Circuit has instructed that courts should not "convert a motion to compel arbitration under the Convention and the [FAA] into one for summary judgment". David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 248-49 (2d Cir. 1991). Rather, granting the motion to compel arbitration "amounts to a refusal to adjudicate the merits" and therefore "plainly presents an . . . issue separate from the merits". Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983). It is axiomatic that in deciding the motion to compel arbitration, "'a court is not to rule on the potential merits of the underlying claim'"—it "must limit its inquiry to whether the . . . claims are arbitrable". United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Local 4-5025 v. E.I. Dupont de Nemours & Co., 565 F.3d 99, 102 (2d Cir. 2009) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)).

Courts in New York and those applying analogous bond statutes elsewhere have followed this approach and declined to require defendants to file a bond in order to enforce their contractual right to arbitrate. TIG Ins. Co., from the Eastern District of New York, is particularly instructive. 1999 U.S. Dist. Lexis 22938. There, the plaintiff insurance company sued a reinsurer for failing to contribute to a policy it had paid out. Id. at *3. The plaintiff moved for

the defendant to post a bond under Section 1213, and the defendant cross-moved to compel arbitration under the FAA. Id. at *4. The court first explained that it would decide the motion to compel arbitration as a threshold issue before deciding the bond motion, as "determination of whether security must be posted depends in part on whether" arbitration was required. Id. at *4-5. The court then granted the motion to compel arbitration and denied the motion to post a security, reasoning that "[n]either the purpose nor the plain meaning of section 1213 will be served by the imposition of a security requirement" as a prerequisite to filing the motion to compel arbitration:

> "Section 1213 requires the posting of security 'sufficient to secure payment of any final judgment which may be rendered' by the court before an 'alien insurer' files a pleading. **Accordingly, both the plain meaning of section 1213 and common sense dictate that the possibility of a judgment against the defendant must exist before that defendant can be required to post security to ensure the payment of that judgment**. Moreover, the decisions of the New York courts support the conclusion that a possible judgment is a prerequisite to the requirement of pre-answer security because the purpose of the law is to prevent New York insurers from having to 'resort to far-flung forums for satisfaction of their judgments' against foreign insurers.
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> "The dismissal of the plaintiff's complaint will eliminate any possibility that the plaintiff will obtain a judgment against the defendant in this court at this juncture. **Neither the purpose nor the plain meaning of section 1213 will be served by the imposition of a security requirement on the defendant by this court**".
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> Id. at *8-9 (emphasis added) (internal citations omitted).

The Second Circuit has explained that courts "look to the language of other jurisdictions on the same issue and other sources the state's highest court might rely upon in deciding the [state law] question". DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir. 2005). This

data point similarly demonstrates why a successful motion to compel arbitration does not trigger Insurance Law Section 1213's bond requirement. See Am. Centennial Ins. Co. v. Gerling Global Int'l Reins. Co., No. 04 CIV 4605 TPG, 2005 WL 743092, at *3-4 (S.D.N.Y. Mar. 31, 2005) (granting motion to compel arbitration and denying motion to strike pursuant to Section 1213); Greenberg v. Park Indem. Ltd., No. LA CV 12-10756 JAK (AJWx), 2013 WL 12123695, at *8 (C.D. Cal. Oct. 8, 2013) (holding that a motion to compel arbitration was not a "pleading" under California's version of Insurance Law Section 1213). In Greenberg, the Central District of California explained that because the motion to compel arbitration "challenges whether this court is the proper forum for the resolution of the instant disputes", it "does not present allegations about the substance of claims or defenses" and therefore is not a "pleading". Id.

These cases establish the unmistakable proposition that motions to dismiss premised on the court's inability to hear the case—because it lacks authority or the dispute has been brought in the wrong forum—do not require a security. This is because, if successful, such motions "will eliminate any possibility that the plaintiff will obtain a judgment against the defendant in th[e] court at this juncture", which is the "prerequisite to the requirement of a pre-answer security". TIG Ins. Co., 1999 U.S. Dist. Lexis 22938, at *9.[4] There is no principled basis for distinguishing a motion to compel arbitration from the forum non conveniens motions that New York's First Department in Ghose and Brown have already concluded do not trigger a

[4] Plaintiffs suggest that a judgment in this Court may not be enforceable in Bermuda. (Adv. Dkt. 118 at 19.) If the Court grants the motion to compel arbitration, however, there is no question that Plaintiffs can seek to enforce the arbitral award before the Bermuda Supreme Court. (See Adv. Dkt. 1-2 at 8 ("All awards made by the Arbitration Board may be enforced . . . and judgment may be entered pursuant to the terms of the award by leave from the Supreme Court of Bermuda").)

Section 1213 bond. See DiBella, 403 F.3d at 112 (Second Circuit directing that "[p]rincipally, we consider the language of the state intermediate appellate courts to be helpful indicators of how the state's highest court would rule"). This Court should not hold that a motion to compel arbitration triggers the bond, in the face of the considered analyses on this issue from the New York Court of Appeals and New York First Department.[5]

Plaintiffs seek to avoid this result by arguing that this Court must stay the action, rather than grant a full dismissal, if it grants the motion to compel arbitration, suggesting that this is somehow a reason to grant a bond. (Adv. Dkt. 118 at 19-20.[6]) The TIG Insurance court refuted that suggestion, explaining that even if it stayed the case pending arbitration (as opposed to dismissing it), "[p]ost-arbitration proceedings which this court may properly address [would] not include a review of the merits of the plaintiff's claims" and would "necessarily seek relief outside of the scope of the present complaint". 1999 U.S. Dist. Lexis 22938, at *7. The same is true here: Plaintiffs' complaint seeks a finding of liability and damages, but the only relief they could seek after arbitration would be to confirm or set aside the award. Thus, a security would not be required even if the case were stayed (rather than dismissed) because this Court would not enter a judgment on the claims presented in this complaint once the case is referred to arbitration.

[5] Reinforcing this conclusion is that the New York Court of Appeals in Cooper (as discussed below) has recognized a strong policy in favor of arbitration in the face of state prejudgment attachment regimes. (See Part III.)

[6] Citations to page numbers in Adv. Dkt. 118 refer to the ECF pagination.

C. Plaintiffs' Authorities Provide No Basis for Concluding That the Bond Applies to Motions To Compel Arbitration.

Plaintiffs rely on Drennen as support for their contention that both motions to compel arbitration and motions to dismiss for lack of subject matter jurisdiction are "pleadings" requiring a bond under Section 1213. (Adv. Dkt. 118 at 11-12 (citing Drennen, 2016 WL 6155925).) This reliance is misguided.

1. As in Drennen, Section 1213 Does Not Apply Because Plaintiffs Do Not Allege that Any Policy Was Issued in or Mailed to New York.

The Bermuda Insurers maintain and incorporate by reference their objections to the Court's exercise of personal jurisdiction over them. (Adv. Dkt. 14-1, Adv. Dkt. 17, Adv. Dkt. 36-37, Adv. Dkt. 53, Adv. Dkt. 89.) Regardless, as Drennen demonstrates, the Court need not revisit its personal jurisdiction holding to deny Plaintiffs' motion for a bond.

Drennen is most notable for its outcome: it denied plaintiffs' motion to require a Section 1213 bond because the policies were not issued in or mailed to New York, declined to consider personal jurisdiction and granted the Bermudian defendants' motions to compel arbitration. Its rationale for denying the bond fully applies here because in Drennen, as here, it was "undisputed that the Bermuda Insurers' policies were issued in Bermuda and delivered in Bermuda" to the plaintiffs' broker and therefore there was no predicate act under 1213(b)(1)(A). 2016 WL 6155925, at *17-18.[7]

[7] Perhaps recognizing that this authority precludes application of Section 1213 here, Plaintiffs allege—for the first time, and in a footnote—that the Bermuda Insurers "ultimately" issued policies "in New York". (Adv. Dkt. 118 at 15 n.10.) Plaintiffs offer no factual support for that conclusory statement, nor could they, as the only evidence before the Court reflects that the Bermuda Insurers' policies were issued and delivered in Bermuda to Plaintiffs' Bermudian insurance broker. See Adv. Dkt. 13-7 ¶ 12 ("The Allied World Policy was negotiated, underwritten, issued, delivered, and paid for exclusively in Bermuda, through Willis (Bermuda)

Plaintiffs' argument that personal jurisdiction in any form can substitute for the mailing requirement is unavailing.[8] First, the posture of Drennen defeats this suggestion. The Court held that "no security was required before the filing of the Bermuda Insurers' motions" and "[a]ll other motions are denied as moot", including pending motions "to dismiss for lack of personal or subject matter jurisdiction". Id. at *1 & n.6. Judge Lane explicitly did not decide the personal jurisdiction issue, instead confining his analysis to whether defendants committed one of the predicate acts under Section 1213(b)(1). Id. at 780-83. If Plaintiffs' interpretation of Section 1213 were correct, Judge Lane could not have denied the personal jurisdiction motion as "moot", because either his analysis of the predicate acts would have been determinative of that motion (i.e., no mailing and thus no personal jurisdiction), or resolving the personal jurisdiction motion would have been a necessary step to determining whether the bond requirement applied (i.e., under Plaintiffs' theory that personal jurisdiction is a substitute for statute's predicate acts). Instead, Judge Lane treated predicate acts and personal jurisdiction as two independent inquiries.

Second, Plaintiffs' argument flies in the face of the First Department's Ghose decision. There, the defendant conceded the existence of personal jurisdiction, yet the First Department still concluded that the bond request was "academic", going on to explain that

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Ltd. ("Willis"), a Bermuda-based broker that was acting on MFGH's behalf in Bermuda"); Adv. Dkt. 18 ¶ 19 ("The Excess Follow Form Liability Policy bearing policy number No. ISF0000508 issued to MF Global Holdings Ltd. . . . was solicited, underwritten, negotiated and issued exclusively in Bermuda. . . . with and through Willis (Bermuda) Ltd.").

[8] Grasping at straws, Plaintiffs seek to distinguish Drennen on the basis that the policy there had a Michigan mailing address as opposed to the New York address for Plaintiffs here. (Adv. Dkt. 118 at 15 n.10.) The basis for Judge Lane's decision was that under what he described as "the majority approach", Insurance Law § 1213 "require[s] that the relevant policy be issued or delivered in New York". 2016 WL 6155925, at *17 (citation omitted). No fair reading of that opinion can bear Plaintiffs' suggestion that the Michigan address was somehow dispositive.

"inasmuch as the policy was not issued or delivered in New York, [Section 1213] is not applicable". Ghose, 43 A.D.3d at 661. This was not a casual or ill-considered statement. That is clear because, in Ghose, plaintiffs advanced the same argument as Plaintiffs do here, namely, that the predicate act of a mailing to New York is not required when personal jurisdiction exists over the foreigner insurer.[9] The First Department was unswayed, and this Court should consider that decision in Ghose—and not the decade-older case Plaintiffs cite—as the best evidence of how the New York Court of Appeals would resolve this issue. See DiBella, 403 F.3d at 112.

Third, requiring a mailing makes perfect sense in light of the purposes of Section 1213, which New York's Superintendent of Insurance described as "regulating insurance written through the medium of the mail". Mem. to the Governor at 4, Bill Jacket, L 1949, ch 826 at 8 (March 30, 1949).

2. Drennen Was Wrong To Hold That Motions To Dismiss for Lack of Subject Matter Jurisdiction Are Pleadings—But the Bermuda Insurers Did Not File Such a Motion.

Although the Drennen court reached the right result (that no bond was necessary for the Bermuda Insurers to successfully compel arbitration), the Bermuda Insurers submit that Drennen's conclusion that a motion to compel arbitration constitutes a pleading under Section

[9] Compare (Adv. Dkt. 118 at 16 (arguing that "because this Court has personal jurisdiction over the Bermuda Insurers, and they filed a 'pleading,' the bond requirement has been triggered" (citing Travelers Ins. Co. v. Underwriting Members of Lloyd's of London, 240 A.D.2d 278 (N.Y. App. Div. 1st Dep't. 1997))), with Reply Brief for Plaintiff-Respondent-Cross-Appellant at 8, Ghose v. CNA Reins. Co., 43 A.D.3d 656 (N.Y. App. Div. 1st Dep't 2007) (No. 2007-1332), 2007 WL 5040579, at *8 (plaintiff in Ghose arguing that, under Travelers, the predicate act required by Section 1213(b)(1) is unnecessary when there is no personal jurisdiction)). Further undermining Travelers' persuasiveness is that the panel in that case unanimously ruled that its determination was uncertain enough to warrant granting leave to the New York Court of Appeals (something Plaintiffs fail to mention). See Travelers, 245 A.D. 2d 1152 (Dec. 2, 1997).

1213 does not withstand scrutiny. Drennen adopted the most expansive gloss on Levin possible by concluding that not only is a motion to compel arbitration a pleading, but so too is a motion to dismiss for lack of subject matter jurisdiction. Id. at *16. Thus, under Drennen, in a future case in which the foreign insurer had mailed a policy to the forum (thus performing a predicate act under Section 1213(b)(1)), the court could order a bond despite lacking any authority over the case, in support of a judgment that it would lack jurisdiction to enter. That is at odds with both the text and purpose of Section 1213 and a "long and venerable line" of cases holding that "'[w]ithout jurisdiction, the court cannot proceed at all in any cause'"—"'the only function remaining to the court is that of announcing the fact and dismissing'". Steel Co. v. Citizens for a Better Env., 523 U.S. 83, 94 (1998) (quoting Ex Parte McCardle, 7 Wall 506, 514 (1868)); see Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008) ("Determining the existence of subject matter jurisdiction is a threshold inquiry" (citation omitted)), aff'd 561 U.S. 247 (2010). There are no motions to dismiss for lack of subject matter jurisdiction that could trigger a bond, and even if the Bermuda Insurers had filed such motions, they would likewise present a non-merits threshold ground for denying audience to the adversary proceeding that would be exempt from Section 1213's bond requirement. Accordingly, a motion to dismiss for lack of subject matter jurisdiction—had the Bermuda Insurers ever filed one—would, like a motion to compel arbitration, fall outside Section 1213's definition of a pleading. In any event, the Bermuda Insurers did not file "separate Motions to Dismiss for Lack of Subject Matter Jurisdiction" as Plaintiffs claim (Adv. Dkt. 118 at 8); rather, they raised subject matter jurisdiction as a defense in response to an Order to Show Cause (Adv. Dkt. 35-38).

3. Plaintiffs' Other Caselaw Is Unavailing.

Drennen and Plaintiffs cite two additional cases to justify the application of the Section 1213 security to motions to compel arbitration, regardless of the outcome of the motions to compel. See Drennen, 2016 WL 6155925, at *16; (Adv. Dkt. 118 at 11, 20.) Neither is persuasive. First, Northwestern National Insurance Co. v. Kansa General Insurance Co. held in two sentences that a bond was required under Section 1213, without analyzing the legislative history and purposes of Section 1213. No. 92 Civ. 7433 (LFJ), 1992 WL 367085, at *3 (S.D.N.Y. Nov. 25, 1992). Nonetheless, what Plaintiffs fail to mention about Kansa is significant: it did not order any specific bond amount (and thus is no support for Plaintiffs' request that the Court order a $60 million bond here). Instead, Kansa held that if the parties could not agree on the bond amount, "the arbitration panel will then resolve the issue" under Section 1213, id. at *3, which is consistent with the argument below in Parts II and III. Kansa, however, did not explain why the arbitration panel could not also decide whether a bond should be posted at all.

Second, Marsh & McLennan Cos. v. GIO Insurance Ltd. likewise misses the mark. No. 11 Civ. 8391 (PAC), 2013 WL 4007555 (S.D.N.Y. Aug. 6, 2013). The Marsh court weighed the Legislature's purposes in enacting Section 1213 as instructed by Levin and recognized that its "policy rationale is diminished somewhat" because, as here, the plaintiff "is a sophisticated business entity that entered multiple agreements requiring arbitration [elsewhere] under foreign law". Id. at *5. Marsh then cited to Kansa as its only precedent for applying a bond to a motion to compel arbitration, but inexplicably did not follow Kansa in referring the bond amount to the arbitrators. Id.

Importantly, the courts in Drennen, Kansa, and Marsh failed to consider TIG Insurance, Gerling, Greenberg, the full legislative history or the principle requiring courts to confirm their jurisdiction before binding the parties. This Court should be guided by all of these data points when predicting how a New York court would approach the issue of whether a motion to compel arbitration is the kind of pleading the Legislature had in mind in enacting Section 1213. That inquiry leads to the inevitable conclusion that Section 1213 requires a bond as a precondition to contesting the merits, not when the defendant argues that the court either lacks authority over the dispute or that the dispute has been brought in the wrong forum.

Levin did note the concern that a foreign insurer "could wage extensive, costly motion practice, and yet avoid the bond requirement by simply advancing a host of defenses before interposing a formal answer". 742 N.E.2d at 112; (see Adv. Dkt. 118 at 5, 11-12, 18). Plaintiffs allege that the litigation to date has involved "precisely [this] type of 'extensive, costly motion practice'". (Adv. Dkt. 118 at 12). This is a puzzling charge in the face of the Bermuda Insurers' motions to compel arbitration, "which the Supreme Court has admonished should receive a 'summary and speedy disposition'". ISC Holding AG v. Nobel Biocare Fin. AG, 688 F.3d 98, 114 (2d Cir. 2012) (quoting Moses H. Cone, 460 U.S. at 29). The Bermuda Insurers sought a "summary and speedy disposition" without extensive motion practice by filing their motions to compel arbitration at the outset and requesting that they be considered at the outset. (Adv. Dkt. 13-1 at 15). Indeed, if Plaintiffs had honored the arbitration clauses they agreed to, there would not have been any motion practice in this court, and they could have months ago requested a bond before the arbitration panel. In any event, the Bermuda Insurers' allegedly "numerous submissions" to date (Adv. Dkt. 118 at 12) in this Court and in the District Court

have been premised on personal jurisdiction (and Plaintiffs concede, as they must, that personal jurisdiction motions are exempt from the Section 1213 bond requirement, (Adv. Dkt. 118 at 15)).[10]

D. A Motion To Compel Arbitration in a Foreign Forum Presents an Even Stronger Case Against a Bond Requirement.

Section 1213 is additionally limited in an important respect not discussed by Plaintiffs and expressly reserved from consideration by Drennen: it exists only to safeguard judgments that could exist in New York, not judgments that properly exist elsewhere. See Stephens v. Nat'l Distillers & Chem. Corp., No. 91 CIV 2901 (JSM) (KAR), 1993 WL 228851, at *1 (S.D.N.Y. June 18, 1993) ("§ 1213 was specifically designed to have local application only in regulating the procedure of New York courts."), aff'd, 69 F.3d 1226 (2d Cir. 1995), amended (Jan. 11, 1996). The preamble to Section 1213 itself expressly declares that its purpose is to subject foreign insurers to the jurisdiction of New York courts through substituted service to address the concern of "many residents of this state" that they face an "often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under" insurance policies. N.Y. Ins. L. § 1213(a). The legislative history likewise explains that the "purpose of the bill is to enable the insureds or beneficiaries under such insurance contracts to maintain suits thereon in the courts of this State." Mem. for the Governor at 1, Bill Jacket, L 1949, ch 826 at 9 (Apr. 5, 1949). These concerns are not implicated where the parties to the insurance contract have already contractually resorted to another forum to resolve the dispute:

[10] They also concede that "no New York court" has ever held that these filings are "pleadings" under Section 1213. (Adv. Dkt. 118 at 12.) Indeed, it would be strange to read Levin as requiring bonds over appeal-related documents given that Levin itself involved two appeals, neither of which the Court of Appeals held required the posting of a bond.

here, Bermuda. (See Adv. Dkt. 1-2 at 8 ("Any and all disputes arising under or relating to this policy, including its formation and validity . . . shall be finally and fully determined in Hamilton, Bermuda"); Adv. Dkt. 1-3 at 4 ("any dispute. . . shall be referred to and fully and finally resolved solely by Arbitration held in Hamilton, Bermuda.").)

The parties in Drennen argued that the "bond requirement does not apply because the insured agreed to litigate in a foreign forum", but because the court determined there was no predicate act triggering Section 1213, it found it "unnecessary to address this argument". 2016 WL 6155925, at *16 n.20. Drennen (like Kansa and Marsh) therefore failed to consider the line of cases holding that a non-New York resident is not entitled to invoke Section 1213, with reasoning that applies equally to New York residents that agree to litigate elsewhere. By selecting Bermuda as the forum for all disputes arising out of the Bermuda Insurers' policies, Plaintiffs "are clearly not in the class of persons who were intended to be the beneficiaries of Insurance Law § 1213". Am. Ind. Ins. v. Heights Chiropractic Care, P.C., 811 N.Y.S.2d 904, 906 (N.Y. Sup. Ct. 2006). The statute exists "to allow New York residents to assert their legal rights in New York courts", Quanta Specialty Lines Ins. Co. v. Inv'rs Cap. Corp., No. 06 Civ 4624 (PKL), 2008 WL 1910503, at *8 (S.D.N.Y. Apr. 30, 2008) (emphasis added), but Plaintiffs seek a far broader reading of Section 1213.

Such a reading would be contrary to the Supreme Court's instruction that "when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its 'venue privilege' before a dispute arises". Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 582 (2013). A "plaintiff who files suit in violation of a forum-selection

clause enjoys no such 'privilege' with respect to its choice of forum, and therefore it is entitled to no concomitant 'state-law advantages'". Id. at 583. "Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship" Id. Reading into Section 1213 a requirement that parties to a facially valid forum selection agreement must post a bond in a proceeding that is precluded by that agreement in order to enforce that agreement has no basis in the text or history of Section 1213.[11]

II. IF THE COURT GRANTS THE MOTION TO COMPEL ARBITRATION, IT MUST ALLOW THE ARBITRATORS TO DECIDE THE ISSUE OF ANY POTENTIAL SECURITY.

It is black letter law that "procedural questions which grow out of the dispute and bear on its final disposition"—such as whether a bond is required under Section 1213—"are presumptively not for the judge, but for an arbitrator, to decide". Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (emphasis in original). Once a party files a motion to compel arbitration, courts may "conduct only a limited review of discrete issues before compelling arbitration, leaving the resolution of all other disputes to the arbitrators". Citigroup, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d 126, 129 (2d Cir. 2015). This is not merely a discretionary policy, but rather a jurisdictional doctrine, because if the dispute is arbitrable, a

[11] The conclusion that Section 1213 does not apply to the Bermuda Insurers is bolstered by specific language that negates the application of any state statute. On this score, the Iron-Starr policy states that "[n]otwithstanding any provision of the Followed Policy or Underlying Policies, this Policy shall not conform to the Statutes of any State of the United States of America . . . and the Company does not consent to either the service of suit within the United States of America . . . or the jurisdiction of any federal, territorial or state court of the United States of America." (Adv. Dkt. 1-3 at 4.) Allied World's binder confirmation also states that Allied World will not follow state amendatory provisions.

court "lack[s] subject matter jurisdiction to resolve" any other issue. UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc., 660 F.3d 643, 655 (2d Cir. 2011).

Accordingly, "[c]ourts in this Circuit have firmly established the principle that arbitrators" have the power to require the posting of a prejudgment bond to secure a potential arbitration award, explaining that arbitrators may invoke Section 1213 or determine that it does "not, by itself, apply". British Ins. Co. of Cayman v. Water St. Ins. Co., 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000); see TIG Ins. Co., 1999 U.S. Dist. Lexis 22938, at *10 (explaining that the question of whether a prejudgment bond must be posted is "a procedural question . . . for the arbitrator to determine"). The parties here contemplated exactly this result by incorporating rules permitting the arbitrators to decide the issue of any bond. See Adv. Dkt. 1-2 at 8 (the arbitration "shall be finally and fully determined in Hamilton, Bermuda under the provisions of The Bermuda International Conciliation and Arbitration Act of 1993"); Adv. Dkt. 1-3 at 5 (similar); Bermuda International Conciliation and Arbitration Act of 1993, art. 17 (providing that "the arbitral tribunal may consider [it] necessary in respect of the subject-matter of the dispute" to "require any party to provide appropriate security").

The Court should adhere to the rule that these types of procedural questions are for the arbitrator and honor the parties' choice to arbitrate by declining to adjudicate whether a bond is required until it considers the motion to compel arbitration.

III. A HOLDING THAT A BOND MUST BE POSTED BEFORE A PARTY CAN MOVE TO COMPEL AN IMPROPERLY FILED LAWSUIT TO ARBITRATION WOULD BE PREEMPTED BY THE NEW YORK CONVENTION.

Were this Court to interpret Section 1213 as requiring the posting of a bond before a party can defensively invoke an arbitration clause with a motion to compel arbitration,

as Plaintiffs urge (Adv. Dkt. 118 at 9-12), that result would be preempted by the New York Convention. See McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974); Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239, 1241-43 (N.Y. 1982).

The Convention is an international treaty mandating that courts in signatory states "shall, at the request of one of the parties [to an arbitration agreement], refer the parties to arbitration". Scherk v. Alberto-Culver Co., 417 U.S. 506, 527 (1974) (citing the Convention, art. II, § 3). The Bermuda Insurers explicitly invoked the Convention in their motions to compel arbitration. (Adv. Dkt. 13-1 at 18-19; Adv. Dkt. 20 at 19-20.) The United States signed the Convention in 1970, which Congress subsequently codified "by amendment of the Federal Arbitration Act". Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985); see 9 U.S.C. §§ 201-208. Bermuda has also joined the New York Convention, which has been "given effect to in Bermuda domestic law". Huawei Tech Invs. Co. v. Sampoerna Strategic Holdings Ltd., [2014] SC (Bda) 8 Civ, ¶ 14 (14 February 2014). The New York Convention thus reinforces "the emphatic federal policy in favor of arbitral dispute resolution", which "applies with special force in the field of international commerce". Mitsubishi, 473 U.S. at 631.

Beginning with McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974), courts have held that prejudgment attachment may not be used as a precondition to arbitration under the Convention. In McCreary, an Italian corporation, sued in Pennsylvania federal court for breach of contract by a Pennsylvania corporation, moved to dissolve a foreign attachment against it and to stay or dismiss the case pending arbitration under the Convention. See id. at 1033-34, 1036. Those motions were denied, and the Third Circuit reversed. Id. at 1038. First, the Third Circuit explained that "[t]here is nothing discretionary about" motions to

stay in favor of arbitration under the Convention, as it "states that district courts shall at the request of a party to an arbitration agreement refer the parties to arbitration". Id. at 1037 (emphasis added). The Convention "demonstrates the firm commitment of Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context". Id. Second, it held that the prejudgment foreign attachment "is a violation of [the plaintiff's] agreement to submit the underlying disputes to arbitration"—a bypass "prohibited by the Convention if one party to the agreement objects". Id. at 1038. Because the "Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate", it plainly forecloses a court ordering an attachment unless the attachment is the method sought to "enforce an arbitration award". Id. Ordering an attachment as a precondition to moving to compel arbitration is clearly foreclosed, and the Second Circuit has held that the "posting of security required under New York Insurance Law § 1213 constitute[s] the functional equivalent of a prejudgment attachment". Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003).

The Second Circuit has favorably cited McCreary while refining its holding, explaining that the McCreary rule forbids courts from granting relief that would "bypass arbitration" under the Convention. Borden, Inc. v. Meiji Milk Prods. Co., 919 F.2d 822, 826 (2d Cir. 1990). Under Borden, courts are empowered to grant prejudgment relief such as attachment for parties seeking "to have the court compel arbitration". Id. (emphasis in original). Borden leaves unaffected McCreary's core prohibition: a party may not attempt to use prejudgment attachment as a sword to frustrate or oppose a motion to compel arbitration. See id.; accord E.A.S.T., Inc. of Stamford, Conn. v. M/V Alaia, 876 F.2d 1168, 1173 (5th Cir. 1989) (permitting

pre-arbitration attachment in admiralty and explaining that while the "plaintiff in McCreary had sought actively to avoid arbitration", the instant relief sought was "as an aid to arbitration"); I.T.A.D. Assocs., Inc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981) (vacating attachment plaintiff obtained and bond defendant posted because arbitration was mandatory under the Convention).[12] That is precisely what Plaintiffs seek to do here. (See Adv. Dkt. 118 at 13 (urging that, rather than decide the Bermuda Insurers' pending motion to compel, the Court should "enter a default judgment against them unless and until they" post a $60 million prejudgment bond in New York).)

The New York Court of Appeals, following McCreary, held that a New York prejudgment attachment provision could not be used as an obstacle to arbitration under the Convention. See Cooper v. Ateliers de la Motobecane, S.A., 442 N.E.2d 1239 (N.Y. 1982). In Cooper, plaintiff sued a French corporation for breach of contract in New York, notwithstanding that the agreement provided that disputes "were to be resolved by arbitration in Switzerland". Id. at 1240. In connection with its claim for money damages, the plaintiff "obtained an ex parte attachment" under CPLR 6201 of a debt owed to the French corporation, which in turn moved to vacate the attachment and dismiss in favor of arbitration. Id. at 1240-41. Rejecting this maneuvering, the Court of Appeals explained that the Convention "was drafted to minimize the uncertainty of enforcing arbitration agreements and to avoid the vagaries of foreign law for international trades", which "would be defeated by allowing a party, contrary to contract, to

[12] A partial abrogation was recognized in Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355 n.19 (4th Cir. 2012) ("We determined in Podar Bros. that a district court lacked authority to issue a prejudgment attachment because it was contrary to the parties' agreement to arbitrate and the Convention" but Podar has been overruled to the extent it foreclosed "retention of jurisdiction over a dispute subject to arbitration under the Convention" (quotations omitted)).

bring multiple suits and to obtain an order of attachment before arbitration". Id. at 1240. Because the Convention "does not contemplate significant judicial intervention until after an arbitral award is made", permitting pre-arbitration attachments would be "the antithesis of the UN Convention's purpose". Id. at 1242-43 (emphasis in original).

Following Cooper, the New York Legislature amended CPLR Section 7502 to follow Borden and overrule Cooper to the extent that Cooper precluded courts from issuing "preliminary injunctions and attachments in aid of all arbitrations including those involving foreign parties or in which the arbitration is conducted outside of New York". In re Sojitz Corp. v. Prithvi Info. Sols. Ltd., 82 A.D.3d 89, 93 (N.Y. App. Div. 1st Dep't 2011) (emphasis added). CPLR Section 7502, as amended, provides that attachment is available "only upon the ground that the [arbitral] award to which the applicant may be entitled may be rendered ineffectual without such provisional relief", and that if "an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void". CPLR § 7502(c). Thus, neither Cooper, nor Sojitz, nor CPLR Section 7502 permit what Plaintiffs seek—a prejudgment attachment as a means to resist a motion to compel arbitration. Plaintiffs are opposing arbitration, so there is no argument that the bond they seek is "in aid of arbitration". Rather, these cases confirm that prejudgment attachments may not be used to impede arbitration by the party opposing arbitration under the Convention.

Under these authorities, the Convention would preempt Section 1213 if Section 1213 is read to require that a party moving to compel arbitration under the Convention must post a prejudgment security to do so. See David L. Threlkeld & Co., 923 F.2d at 250

(holding that the Convention preempts state laws that "effectively reincarnate the former judicial hostility towards arbitration").[13]

Seemingly recognizing that their interpretation of Insurance Law Section 1213 runs headlong into the preemptive force of the Convention, Plaintiffs attempt to argue that the McCarran-Ferguson Act blocks the application of the Convention and the FAA. (See Adv. Dkt. 68 at 2 n.5.) Congress passed the McCarran-Ferguson Act out of a concern that the Supreme Court's Commerce Clause jurisprudence "might undermine state efforts to regulate insurance", and so provided that "'silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States'". Humana Inc. v. Forsyth, 525 U.S. 299, 306 (1999) (quoting 15 U.S.C. § 1011). It provides that "when Congress enacts a law specifically relating to the business of insurance, that law controls", but where

[13] The McCreary/Cooper rule is subject to a number of exceptions, none of which is relevant here. For example, cases holding that a prejudgment attachment is always available in admiralty cases, even where there is an arbitration clause, nevertheless recognize that the "Convention itself makes no provision for pre-arbitration attachment, and it has been held, at least in non-maritime disputes or when attachment is sought pursuant to state law, that pre-arbitration attachment is unavailable in actions arising under the Convention". Atlas Chartering Servs., Inc. v. World Trade Grp., Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978) (citing McCreary). Likewise, there is no prohibition on prejudgment attachment where both parties are citizens of the United States, see Coastal States Trading, Inc. v. Zenith Navigation S.A., 446 F. Supp. 330, 341 (S.D.N.Y. 1977), or where the parties agree to have the court, rather than arbitrators, decide prejudgment remedies, see CanWest Glob. Commc'ns. Corp. v. Mirkae Tikshoret Ltd., 804 N.Y.S. 2d 549, 566-67 (N.Y. Sup. Ct. 2005). McCreary and its progeny have also been abrogated to the extent they mandated courts to find that they lacked subject matter jurisdiction for all purposes when entertaining a motion to compel arbitration; rather, courts "have subject matter jurisdiction" to "entertain requests for provisional remedies in aid of arbitration even where the request for remedies does not accompany a motion to compel arbitration or to confirm an award". Venconsul N.V. v. Tim Int'l N.V., No. 03 Civ. 5387 (LTS) (MHD), 2003 WL 21804833, at *3 (S.D.N.Y. Aug. 6, 2003) (emphasis added). None of the exceptions recognized in these cases permits courts to "entertain requests for provisional remedies" in opposition to arbitration, which Plaintiffs seek here.

Congress passes "general" legislation, it should "not be 'construed to invalidate, impair, or supersede'" any state law regulating the insurance business. Id. (quoting 15 U.S.C. § 1012(b)).

The McCarran-Ferguson Act does not apply, for at least three reasons. First, McCarran-Ferguson was "directed to implied preemption by domestic commerce legislation [and] cannot sensibly be construed to address preemption . . . in foreign affairs". Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 428 (2003) (emphasis added); see also FTC v. Travelers Health Ass'n, 362 U.S. 293, 299-300 (1960) ("There was no indication [in the passing of McCarran-Ferguson] of any thought that a State could regulate activities carried on beyond its own borders."). This distinction matters here because the Bermuda Insurers have invoked arbitration under the Convention and its implementing legislation, and the Supreme Court has explained that in this context, "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that [courts] enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context". Mitsubishi, 473 U.S. at 629 (emphasis added). The Fourth Circuit has likewise recently held that because McCarran-Ferguson is limited to preemption of domestic legislation, the Convention and its implementing legislation "fall[] outside of its scope". See ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 390 (4th Cir. 2012); see also id. at 395 (Wilkinson, J., concurring) (explaining that "[t]o hold that the McCarran-Ferguson Act empowers state law to displace the Convention" would, among other things, "contradict" Garamendi). Even if the Court were to determine that McCarran-Ferguson reverse preempts application of the FAA to Section 1213,

that would not matter for the Convention and its implementing legislation, which govern international affairs, not "domestic commerce". Garamendi, 539 U.S. at 428.

Second, McCarran-Ferguson does not apply to the Convention because it is a treaty, not ordinary federal legislation. See Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 721-25 (5th Cir. 2009) (en banc) (15-3 vote), cert. denied, 562 U.S. 827 (2010). As the Fifth Circuit explained, McCarran-Ferguson, by its terms, provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any" state insurance law. Id. at 720 (quoting 15 U.S.C. § 1012(b)) (emphasis added). The Convention is not an "Act of Congress"; it is an international treaty, and Congress "did not intend the term 'Act of Congress,' as used in the McCarran-Ferguson Act, to reach a treaty such as the Convention" or its implementing legislation. Id. at 724-5. Even if Congress intended the Convention to come within the ambit of McCarran-Ferguson, because the Convention is a treaty, it supersedes the McCarran-Ferguson Act "by virtue of the Supremacy Clause" of the Constitution. Id. at 732 (Clement, J., concurring).[14]

[14] The Second Circuit previously suggested that the McCarran-Ferguson Act reverse preempted the Convention's implementing legislation. See Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) ("Stephens I"). That suggestion is not good law today for several reasons. First, its analysis that the McCarran-Ferguson Act applied to the Convention pre-dates the Supreme Court's contrary decision in Garamendi, which explained that McCarran-Ferguson applies to federal laws regulating domestic activity only. Second, it "undertook no textual analysis and set forth no reasons to support its conclusion" that the Convention was not self-executing, and was decided before Medellin v. Texas, 552 U.S. 491 (2008), which established the test for whether a treaty is self-executing. Safety Nat'l, 587 F.3d at 737 (Clement, J., concurring). Third, its holding was immediately called into question by a subsequent panel of the Second Circuit, which held that McCarran-Ferguson did not apply to the Foreign Sovereign Immunities Act. Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1223 n.6, 1224 (2d Cir. 1995), amended (Jan. 11, 1996). Even if Stephens I were still good law, Monarch (discussed below) reconciles it with the Convention. Monarch explained that state insurance laws expressly limiting arbitration could not be preempted by the FAA under McCarran-Ferguson, 47 N.E.2d at

Third, even if McCarran-Ferguson did apply, it would not save from preemption under the Convention an interpretation of Section 1213 requiring a bond to move to compel arbitration. The New York Court of Appeals' recent reconciliation of the McCarran-Ferguson Act and the FAA in this manner is illustrative. See Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co., 47 N.E.2d 463 (N.Y. 2016). In Monarch, the New York Court of Appeals considered whether the McCarran-Ferguson Act reverse preempted application of the FAA to litigation arising out of a California insurance law requiring disclosure of forum selection and arbitration clauses in workers' compensation agreements. See id. at 468-70. The court answered "no" under the McCarran-Ferguson reverse preemption test set forth in Humana, 525 U.S. 299. Under that test, the McCarran-Ferguson Act can only save a state law from federal preemption if "the federal statute at issue would invalidate, impair, or supersede the state law". Monarch, 47 N.E.3d at 470 (citations omitted).

Quoting Humana, the court explained that when "application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application". Id. at 471. Critically, it found that mandating arbitration of the claims related to the disclosures in workers' compensation agreements would not invalidate, impair or supersede the California law because the statute did not "prohibit, limit, or regulate the use or form of arbitration clauses in insurance contracts". Id. The "clearest example" of how state insurance regulations could reverse preempt the FAA through the McCarran-Ferguson Act, the court explained, is where a "state law expressly

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471, and the law at issue in Stephens I explicitly prohibited arbitration, see 66 F.3d at 42. Section 1213, by contrast, says nothing of arbitration.

prohibits arbitration of insurance related disputes". Id. (emphasis added). In other words, state law can only be saved under McCarran-Ferguson if the state law evidences a specific interest contrary to arbitration. As explained in Part I above, Section 1213 is addressed not at arbitration but at securing potential U.S. judgments. Arbitration would therefore would not "invalidate, impair, or supersede" Plaintiffs' ability to request a Section 1213 bond, because by "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum". Mitsubishi, 473 U.S. at 628; see also Organ v. Conner, No. A91-0510-CV (HRH), 1994 WL 581469, at *1-3 (D. Alaska Jan. 21, 1994) (holding that McCarran-Ferguson did "not come into play" to save Alaska's insurance bond law from FAA preemption where the insurance law did "not expressly or by any necessary implication void arbitration agreements" providing for foreign arbitration). Accordingly, under Monarch and Humana, McCarran-Ferguson could not block the Convention even if it were possible (and it is not) for McCarran-Ferguson to reverse preempt an international treaty.

Plaintiffs' citation of Skandia to suggest that it would be permissible under the Convention for the Court to grant a motion to compel arbitration yet still require a bond turns that case on its head. (See Adv. Dkt. 118 at 10 n.4 (citing Skandia Am. Reins. Corp. v. Caja Nacional de Ahorro Y Segoro, No. 96 CIV. 2301(KMW), 1997 WL 278054, at *3 (S.D.N.Y. May 23, 1997)). In Skandia, the petitioner "moved to confirm an arbitration award", and the respondent moved to set it aside. Id. at *1. The petitioner therefore asked the court to "order respondent to post security pursuant to N[.]Y. Ins. Law § 1213(c)". Id. Skandia held that because the "purpose of the New York Convention was to encourage the enforcement of arbitral

awards, the New York Convention allows for the posting of prejudgment security . . . only if the respondent makes an application for the setting aside or the suspension of the award". Id. at *5 (emphases added; quotation marks omitted). Thus, the Skandia rule is that a party challenging an arbitration award can be ordered to post a security—not the party seeking to enforce the arbitral award. Skandia's reasoning thus further counsels against compelling a bond as a precondition to arbitration.

* * *

The Court should defer consideration of the bond requirement until after it decides the motion to compel arbitration. If the Court grants the motion to compel arbitration, the arbitrators will properly decide whether prejudgment security should be posted.

IV. EVEN IF THIS COURT ORDERS THAT A BOND IS REQUIRED, PLAINTIFFS' REQUESTED SUM OF $60 MILLION IS BASELESS AND MUST INSTEAD CORRESPOND TO THE POLICY LIMITS.

Plaintiffs claim that, collectively, the Bermuda Insurers must post a bond in the amount of $60 million "to satisfy any judgment rendered against them" or otherwise suffer a default judgment (Adv. Dkt. 118 at 5)—even though the policies underlying the claims against the Bermuda Insurers are worth only $20 million (id. at 12-13 n.9). They base this hypothetical $60 million judgment on an alleged "$40 million due to the Dissenting E&O Insurers' bad faith" as alleged in the Complaint. (Id. (citing Adv. Dkt. 1 at ¶¶ 114-16).) If the Court determines that the Bermuda Insurers must post a bond, Plaintiffs' "bad faith" damages theory should be rejected in calculating the bond amount.

Plaintiffs offer nothing more than the insufficient, conclusory allegation that they "believe" they have incurred at least $40 million in additional damages. (See Adv. Dkt. 1 ¶ 116

(claiming that Plaintiffs incurred damages "in amounts to be proven at trial but believed to total no less than $40 million").) Missing entirely from their Complaint (and their Bond Brief) is any substantive allegation or articulation of the basis for a bond that is 300 percent greater than the $20 million combined amount in controversy under the policy with Allied World and Iron-Starr. For example, Plaintiffs assert consequential damages from increased "personal liability, financial exposure, and out-of-pocket payments" that the "Individual Insureds" are exposed to without the funds under the policies (id.), but nowhere do they attempt to quantify, let alone approximate, the "personal liability" or "out-of-pocket payments" to date from any Individual Insured or allege any facts to substantiate these conclusions. Nor could they, as this Court's orders and the Global Settlement it approved provide for payment of defense costs to the Individual Insureds both retrospectively, see, e.g., No. 11-15059 (MG), Dkt. 2154 at 1 ("Order Concerning Advances of Defense Costs Under Certain Insurance Policies of Debtors"), and prospectively, see, e.g., No. 11-15059 (MG), Dkt. 2271-2 at 124 (explaining that "the Global Settlement provides for payment to a settlement fund . . . subject to the payment of defense costs and the establishment of certain reserves").

Plaintiffs cite no authority for the proposition that a bond properly can total anything close to three times the policy limits of the contract at issue. As a result, they are not entitled to a bond in excess of the contractual policy limits. See Morgan v. Am. Risk Mgmt., Inc., No. 89CIV2999 (JSM) (KAR), 1990 WL 106837, at *8 (S.D.N.Y. July 20, 1990) (rejecting plaintiff's request for a bond worth over $40 million because its future damages estimates "remain estimates" until they have been incurred, and entering a bond worth $7 million instead); Crobak v. Pepsi Cola Metro. Bottling Co., 271 N.Y.S.2d 912, 916 (N.Y. Sup. Ct. 1966) (denying

motion for a security where "no bill of particulars has been served by the plaintiff" and "nature and extent of plaintiff's injuries have not been ascertained"); Kraus v. Monticello Ins. Co., 160 N.Y.S.2d 27, 29 (N.Y. Sup. Ct. 1957) (rejecting plaintiff's argument for a bond of $24,000 where plaintiff "contracted for a coverage of $8,000", and setting bond at $8,000); see also Hartford Accident & Indem. Co. v. Ace Am. Reins. Co., 930 A.2d 701, 712 (Conn. App. Ct. 2007) (citing Section 1213 to hold that defendants are "entitled to a remand for a determination of the appropriate amount of prepleading security" where "both parties will be entitled to present evidence about 'the amount to be fixed by the court'").[15]

Plaintiffs are also seeking to recoup damages on behalf of Individual Insureds who were not New York residents, and therefore, any alleged consequential damages must be reduced in respect of the amounts claimed by Insureds domiciled outside the State when the policies were entered. New York State courts have long held that Section 1213 "was not intended to protect a domestic corporation which brought suit as the assignee of a foreign corporation which was not authorized to do business here" or of "persons who were not residents of this state . . . when the insurance contracts were executed". Food Fair Stores, Westchester, Inc. v. Gen. Excess Ins. Co., 21 A.D.2d 684 (N.Y. App. Div. 2d Dep't 1964); see also, e.g., Allstate Ins. Co. v. Administratia Asigurarilor De Stat, 875 F. Supp. 1022, 1026 (S.D.N.Y. 1995)

[15] Curiale v. Ardra Insurance Co., 189 A.D.2d 217 (N.Y. App. Div. 1st Dep't 1993), aff'd, 667 N.E.2d 313 (N.Y. 1996), is not to the contrary. There, defendants sought a "formal hearing" on the bond amount, not to challenge "the correctness of plaintiff's calculations or the appropriateness of the amount established by the Supreme Court", but to argue "that it can only afford to post $1 million", and the Appellate Division rejected that request. Id. at 220-21. As the Court of Appeals later explained, the trial court there had already "reviewed evidence submitted [by plaintiff] . . . on the magnitude of the losses covered by" the insurance agreements "before setting the amount of preanswer security". 667 N.E.2d at 319.

("[A]n assignee or successor-in-interest of a non-resident has no rights under section 1213"). At least one of the Individual Insureds (and there are likely more) was not a New York resident in 2011 when the Bermuda Insurers' policies were executed. Compare Mark Maurer, Former Gov. Corzine Talks About Life in Hoboken, the Corruption Scandal and the Future, Jersey J. (Feb. 8, 2010 6:44 PM), https://goo.gl/2d7Op2 (noting that after leaving office, Governor Corzine became "a full-time resident of Hudson County") with Michael J. De La Merced, Corzine is Seeking $2.9 Million for Hoboken Penthouse, N.Y. Times DealBook (Jan. 30, 2012 7:41 PM), https://goo.gl/bBfuJD. Accordingly, as the assignees for Governor Corzine's policy, Plaintiffs may not "stand[] in any better position" than the Governor did, and therefore cannot put his alleged damages toward any bond. Allstate, 875 F. Supp. at 1026.

Moreover, even were the $40 million in bad faith damages cognizable (it is not), it would need to be apportioned among all three defendants, including Federal. Plaintiffs concede, as they must, that the bond amount must be reduced by the amount of Federal's policy (Adv. Dkt. 118 at 10-11 n.9), but they fail to reduce the bond amount by the supposed "bad faith" damages attributable to Federal. Plaintiffs thus not only import what are unsupported "bad faith" consequential damages, they import unsupported "bad faith" consequential damages from another defendant into their proposed bond amount.

At bottom, Plaintiffs' unsupported position that the bond should be $40 million greater than the underlying insurance policy is a transparent attempt to impose a hefty tax on the Bermuda Insurers' exercise of their contractual rights to have this dispute arbitrated in Bermuda. See, e.g., Cooper, 442 N.E.3d at 1243 ("The essence of arbitration is resolving disputes without the interference of the judicial process and its strictures"). It is not intended to secure a potential

judgment in this controversy over $20 million in indemnity policies, and for that reason should be rejected.

Plaintiffs' $40 million request for additional consequential damages fails for a separate reason that, under New York law, attorney's fees cannot be recovered as consequential damages. See Globecon Grp., LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 177 (2d Cir. 2006) ("Under New York law, 'an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy.'" (quoting N.Y. Univ. v. Cont'l Ins. Co., 662 N.E.2d 763, 772 (N.Y. 1995))). Plaintiffs' complaint makes clear that they seek to recover attorney's fees due to the alleged bad faith denial. (Adv. Dkt. 1 ¶ 116 (alleging that as a result of "these breaches of contract and the implied covenant of good faith and fair dealing, the MFG Plaintiffs are entitled to attorney's fees in bringing this coverage action").)

Attorney's fees are recoverable for alleged bad faith denials—but not as consequential damages—only against foreign insurers per the limits specified in Section 1213(d). Section 1213(d) provides that recovery of such fees "shall not exceed twelve and one-half percent of the amount the court finds the plaintiff is entitled to recover against the insurer". Here, only $15 million was allegedly due under the Allied World Policy, (Adv. Dkt. 1-2 at 2 ("Limit of Liability: USD 15,000,000"); see Adv. Dkt. 1-1 at 2 ("Allied World Assurance - $15MM aggregate")), and only $5 million was allegedly due under the Iron-Starr Policy (Adv. Dkt. 1-3 at 2 ("Limit of Liability: USD 5,000,000")). That is the extent of damages that Plaintiffs can plausibly claim given the speculative and conclusory nature of their supposed $40 million in "consequential and other damages". (Adv. Dkt. 1 ¶ 116.) Accordingly, under Section 1213, Plaintiffs would not be entitled to claim more than $1,875,000 in attorneys' fees against

Allied World if they recovered fully on that policy, bringing their total potential judgment against Allied World to $16,875,000. Likewise, they would not be able to claim more than $625,000 in attorneys' fees against Iron-Starr, bringing their total potential judgment against Iron-Starr to $5,625,0000. As Section 1213(d) therefore makes clear, were a bond appropriate in this case, the sum relative to the Bermuda Insurers must relate to their combined policy limit of $20 million and cannot properly exceed $16.875 million for Allied World and $5.625 million for Iron-Starr, let alone $60 million for either.

Finally, were this court to hold that a bond were required, the Court must give the Bermuda Insurers reasonable time to post or settle a bond before ordering further Section 1213 remedies. All of the cases Plaintiffs cite (Adv. Dkt. 118 at 18) give defendants a reasonable time after the issuance of a bond decision to comply with the order, and none require the drastic remedies of striking pleadings and entering a default or default judgment as initial remedies. Section 1213 specifically empowers courts to "order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions" of Section 1213 "and to defend such proceeding". 1213(c)(2).

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion to Require the Bermuda Insurers' Compliance with New York Insurance Law § 1213(c) should be denied.

Dated: March 24, 2017

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CERTIFICATE OF SERVICE

I, Daniel Slifkin, certify that on March 24, 2017, I caused the foregoing Bermuda Insurers' Joint Opposition to Plaintiffs' Motion to Require the Bermuda Insurers' Compliance with New York Insurance Law § 1213 to be filed with the Clerk of the Court and served upon all counsel of record via the Court's CM/ECF system.

/s/ Daniel Slifkin
Daniel Slifkin