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 REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS TO COMPEL ARBITRATION[2]

[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.

[2] The Bermuda Insurers do not consent to the entry of final orders or judgment by the Bankruptcy Court. See Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015) (parties may only consent to a bankruptcy court's constitutional jurisdiction knowingly and voluntarily). By filing this reply, the Bermuda Insurers do not waive their rights to contest personal jurisdiction, subject matter jurisdiction, Article III jurisdiction, service of process or their right to arbitrate, or to move to withdraw the reference.

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The Bermuda Insurers respectfully submit this reply in support of their motions to compel arbitration (Adv. Dkt. 13, Adv. Dkt. 19).

PRELIMINARY STATEMENT

Plaintiffs' opposition cannot overcome the fact that they bring a quintessential non-core claim—"a state-law contract claim against an entity that was not otherwise part of the bankruptcy proceedings", Stern v. Marshall, 564 U.S. 462, 485 (2011)—that is fully subject to the "emphatic federal policy in favor of arbitral dispute resolution". Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

First, Plaintiffs assert that some of their claims against Allied World can avoid arbitration because the contract only calls for "permissive" arbitration. But, in fact, the Allied World policy mandates that "any and all disputes arising under or relating to this policy" must be arbitrated in Bermuda. (See Part I.)

Second, Plaintiffs say that the Plan of Liquidation strips the Bermuda Insurers of their rights to arbitrate. But the Plan does not bind the Bermuda Insurers (non-parties who were not creditors), and the Court's entry of a Plan that calls for the Court to retain jurisdiction to adjudicate adversary proceedings "to the full extent legally permissible" manifestly does not self-empower the Court to retain non-core suits that it otherwise must refer to arbitration. (See Part II.)

Third, Plaintiffs urge that their state-law contract claims be deemed core bankruptcy claims because they seek to augment the estate's assets and invoke the catch-all provisions of 28 U.S.C. § 157(b)(2)(A) and (O). But the cases that hold to the contrary are

numerous. That Plaintiffs' contracts are pre-petition and the suit arises after confirmation only cements the conclusion that this dispute is non-core. (See Part III.)

The Court should thus grant the Bermuda Insurers' motions to compel arbitration, relief that should not be encumbered with a bond or delayed by a stay.[3] (See Part IV.)

ARGUMENT

I. THE IRON-STARR AND ALLIED WORLD POLICIES EACH HAVE MANDATORY ARBITRATION CLAUSES THAT APPLY TO THE ENTIRE DISPUTE WITH PLAINTIFFS.

A. The Iron-Starr Claims Are Subject to Mandatory Arbitration.

As to Iron-Starr, Plaintiffs concede that they are contractually subject to mandatory arbitration on all of their claims. (See Adv. Dkt. 125 ("Opp.") at 52[4] (acknowledging that, per the contract, a "Bermuda arbitration panel would decide all claims against Iron-Starr (the intermediate excess layer)").)

B. All Claims Under the Allied World Policy Are Subject to Mandatory Arbitration.

As to Allied World, Plaintiffs argue that there was no agreement to arbitrate the claims originally held by MFGI and the Individual Insureds under the Allied World Policy. Specifically, Plaintiffs contend that the Allied World 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." (Opp. 24.) Plaintiffs are doubly wrong:

[3] In response to Plaintiffs' argument that the Court should not entertain their motions to compel arbitration (Opp. 17), the Bermuda Insurers incorporate their joint opposition to Plaintiffs' motion to require a bond under New York Insurance Law § 1213, (Adv. Dkt. 127).

[4] Citations to page numbers in filings refer to the ECF pagination.

first, the "mandatory arbitration provision" binds any and all of Plaintiffs' claims; second, there is no "permissive" arbitration clause at all.

First, the opening paragraph of Section IX (Arbitration) of the Allied World Policy provides for the mandatory arbitration of "any and all disputes".[5] Plaintiffs selectively quote from this clause to make it appear as though arbitration applies narrowly to the "Named Insured", which they argue means MFGH alone. (Opp. 24.) They do this by placing ellipses over a critical word: "including". (Id.) Restoring the full contractual language, the arbitration clause reflects that "any and all disputes" arising under or relating to the policy must be arbitrated, "including" those against the "Named Insured":

> "**Any and all disputes arising under or relating to this policy**, **including** its formation and validity, and 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** . . . ." (Adv. Dkt. 1-2 at 8 (emphasis added).)

By its plain meaning, this mandatory arbitration clause does not address "only matters relating to the singular 'Named Insured'" (Opp. 24)—it addresses "any and all disputes arising under or relating to" the policy, including those between the Insurer and the Named Insured or any person asserting rights under the policy. Courts have long recognized that use of "including" in a sentence "makes clear that the examples enumerated in the text are intended to be illustrative, not

[5] Whether the parties agreed to arbitrate "is determined by state law". Shaw Grp. Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 120 (2d Cir. 2003). The Allied World Policy contains a mixed choice-of-law clause calling for modified New York substantive law. (Adv. Dkt. 1-2, art. X.) Under New York contract law, courts "should enforce the plain meaning" of the contract, giving "full meaning and effect to all of its provisions". PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996).

exhaustive". Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2170 (2012). Consistent with this, courts do not limit the broad scope of clauses providing for the arbitration of "any and all" disputes on the basis of an "including" clause. See, e.g., Drulcrest PTY Ltd. v. Jamar Prods., Inc., No. 85 Civ. 2174 (PNL), 1986 WL 4547, at *1 (S.D.N.Y. Apr. 11, 1986). The claims against Allied World in this Adversary Proceeding—"any and all" of them—are "disputes arising under or relating to" the Allied World Policy.

Plaintiffs' argument about the mandatory arbitration clause here fails for another reason. Even if the Court, for the sake of argument, agreed with Plaintiffs' theory that (i) Named Insured applies only embraces MFGH[6] and (ii) that "including" somehow limits the generality of "any and all disputes", Plaintiffs' efforts to escape arbitration would still fail. MFGI and the Individual Insureds are clearly "person[s] or [an] entity deriving rights through or asserting rights on behalf of the Named Insured". (Adv. Dkt. 1-2 at 8.) Plaintiffs admit that "professional liability insurance is typically procured by corporations, not individuals like the Individual Insureds". (Opp. 28.) Consistent with this, MFGH procured the insurance here. The Individual Insureds and MFGI are therefore "deriving rights through" MFGH (Adv. Dkt. 1-2 at 8 (emphasis added)). But for MFGH procuring the policy and paying the premiums, they would not have any rights. The Individual Insureds' and MFGI's ability to sue directly under the policy (see Opp. 30

[6] It should not: the definitions in the underlying MF Global captive insurance policy (the "followed policy") provide that "Named Insured" and "Named Insureds" both cover the singular and plural. As Plaintiffs concede, the Allied World Policy does not itself define the terms "Named Insured" and "Named Insureds" (Opp. 24), and a term not defined "shall have the same meaning in this policy as is attributed to it in" the MF Global followed policy, (Adv. Dkt. 1-2 at 5). The MF Global followed policy, in turn, states that "[w]ords and expressions in the singular include the plural and vice versa". (Adv. Dkt. 1-5 § 5.17.)

n.16) cannot alter the reality that they derive all of their "rights through" MFGH, when MFGH decided to buy the policy.[7]

Second, in an attempt to distract from the broad reach of the mandatory arbitration provision, Plaintiffs purport to find in the Allied World Policy a "permissive" arbitration clause affording MFGI and the Individual Insurers the right—but not the duty—to arbitrate. As putative support, they rely exclusively on a portion of the last sentence of the eighth paragraph of Section IX, on "Arbitration". (Adv. Dkt. 1-2, § IX.) That final sentence, in full, states:

> The Named Insureds shall be entitled to assert claims against the Insurer for coverage under this policy including, without limitation, for amounts by which the Named Insured reduced judgment against such other insurers in respect of such claims for indemnity or contribution, in an arbitration between the Insurer and the Named Insureds pursuant to this clause; provided, however, that the Insurer in such arbitration in respect of such reduction of any judgment shall be entitled to raise any defenses under this policy and any other defenses (other than jurisdictional defenses) as it would have been entitled to raise in the action or proceeding with such insurers. (Adv. Dkt. 1-2 at 9.)

Plaintiffs claim that the words "shall be entitled" from this lengthy sentence permit MFGI and the Individual Insureds to bring suit against Allied World under the policy in any forum they wish. Plaintiffs' interpretation is entirely divorced from context. First, the final

[7] Not only is Plaintiffs' argument textually foreclosed, it also fails under the doctrine of direct-benefits estoppel, whereby a plaintiff "cannot both seek coverage under a policy and claim not to be bound by its provisions". In re Kensington Ins. Co. v. James Riv. Specialty Ins. Co., 122 A.D.3d 537, 537 (N.Y. App. Div. 1st Dep't 2014). The authority this Court raised (see Feb. 23, 2017, Hr'g. Tr. 17-19) directly supports Allied World. In Janvey v. Alguire, 847 F.3d 231, 243 (5th Cir. 2017), the Fifth Circuit explained that the "direct benefits theory of equitable estoppel" means that "a nonsignatory cannot sue under an agreement while at the same time avoiding its arbitration clause". Plaintiffs are trying to do exactly that with their argument that non-signatory "MFGAA, as MFGI's and the Individual Insureds' assignee" (Opp. 32) can assert coverage claims under the policy that avoid the policy's arbitration clause (Opp. 52). Their effort to distinguish Janvey fails (Opp. 31); instead of addressing direct-benefits estoppel, Plaintiffs argue why the other theory of equitable estoppel advanced by the defendant in Janvey (the "intertwined claims theory") might not apply. Equitably and textually, Plaintiffs are bound.

sentence is, by its own terms, subordinate to the mandatory arbitration clause that begins and frames Section IX. It discusses the Named Insureds' claims "in an arbitration . . . pursuant to this clause", i.e., pursuant to the clause committing "any and all" disputes to arbitration. (Id.) Second, the sentence, like the rest of this final paragraph of Section IX, concerns a situation that has nothing whatsoever to do with exempting certain entities from the obligation to arbitrate; instead, the paragraph concerns what happens when an attempt is made to implead Allied World, or another insurer seeks to sue Allied World for indemnity or contribution. A review of each of the paragraph's sentences, in turn, shows that Plaintiffs' gloss is unsupportable:

- The first sentence explains that if one of the insureds is sued, the insured may not join or implead Allied World in that dispute.[8]
- The second sentence explains that if another insurer sues Allied World for indemnity or contribution, the insureds will assist in seeking dismissal of the claims against Allied World.[9]
- The third sentence provides that if dismissal is not secured, and a court holds that the other insurers must pay a judgment and seek indemnification from Allied World, the insureds will seek to reduce their award by the amount Allied World might owe, so that others cannot sue Allied World for contribution.[10]

[8] "No person or organization shall have any right under this policy to join the Insurer as a party to any action against the Named Insureds to determine the Named Insureds' liability, nor shall the Insurer be impleaded by the Named Insureds or their legal representatives." Adv. Dkt. 1-2 at 9.

[9] "The Insurer and the Named Insureds agree that in the event that claims for indemnity or contribution are asserted in any action or proceeding against the Insurer by any of the Named Insureds' other insurers in a jurisdiction or forum other than that set forth in this clause, the Named Insureds will in good faith take all reasonable steps requested by the Insurer to assist the Insurer in obtaining a dismissal of these claims (other than on the merits.)." Adv. Dkt. 1-2 at 9.

[10] "The Named Insureds will, without limitation, undertake to the court or other tribunal to reduce any judgment or award against such other insurers to the extent that the court or tribunal determines that the Insurer would have been liable to such insurers for indemnity or contribution pursuant to this policy." Adv. Dkt. 1-2 at 9.

- The final sentence—on which Plaintiffs' entire theory rests—provides that, if the insureds take the above steps to reduce their award from other insurers, so as to extinguish a contribution action against Allied World, then the insureds may seek to recoup the difference from Allied World directly, in an arbitration pursuant to the mandatory arbitration clause, and otherwise subject to Allied World's coverage defenses.[11]

This final sentence (and this final paragraph) of Section IX does not apply to the present dispute because this case does not involve impleader or suits brought by other insurers. In no way can this sentence be read to extinguish the policy's mandatory arbitration clause.

The Allied World policy is clear and unambiguous: "any and all disputes arising under or relating to" the policy must be arbitrated.

II. THE PLAN CANNOT AND DOES NOT DISPLACE THE BERMUDA INSURERS' RIGHTS TO ARBITRATE.

Plaintiffs argue that they are excused from their arbitration agreements because the Bermuda Insurers did not object to the Plan's statement that this Court retained jurisdiction to "adjudicate" any "adversary proceedings", (Opp. 17-18), such that the Bermuda Insurers are now barred by res judicata from invoking arbitration, (id. at 20 n.5). This is wrong for two reasons.

First, the Plan does not apply to the Bermuda Insurers because they are not creditors and were not parties to the Chapter 11 proceeding. "[O]ne is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been

[11] "The Named Insureds shall be entitled to assert claims against the Insurer for coverage under this policy including, without limitation, for amounts by which the Named Insureds reduced judgment against such other insurers in respect of such claims for indemnity or contribution, in an arbitration between the Insurer and the Named Insureds pursuant to this clause; provided, however, that the Insurer in such arbitration in respect of such reduction of any judgment shall be entitled to raise any defenses under this policy and any other defenses (other than jurisdictional defenses) as it would have been entitled to raise in the action or proceeding with such insurers." Adv. Dkt. 1-2 at 9.

made a party by service of process." Hansberry v. Lee, 311 U.S. 32, 40 (1940). In bankruptcy, this rule means that a "chapter 11 plan cannot be considered a final judgment on the merits" with preclusive effect over future defendants that "were not creditors or a party in interest in the chapter 11 case". Cross Media Mkt'g Corp. v. CAB Mkt'g Inc., (In re Cross Media Mkt'g Corp.), 367 B.R. 435, 447 (Bankr. S.D.N.Y. 2007) (Glenn, J.); see 11 U.S.C. § 1141(a) ("[T]he provisions of a confirmed plan bind the debtor . . . and any creditor").[12] Here, it is undisputed that the Bermuda Insurers were not creditors; did not file proofs of claim in the Chapter 11 proceeding; did not appear in the Chapter 11 proceeding; and were not joined in that proceeding. Therefore, the Bermuda Insurers cannot be bound by any language in the Plan, let alone language purporting to extinguish their contractual rights.[13]

Seeking to avoid this result, Plaintiffs incorrectly cast the Bermuda Insurers as "'Holder[s] of a Claim' in the MFGH bankruptcy". (Opp. 21.) Their primary argument is that the Bermuda Insurers should have assumed that the MFG Parties would someday breach their duty "to defend and contest any claim made against them" or "any other provision of the policy"

[12] Plaintiffs' argument that the Bermuda Insurers should have objected to the Plan, based on In re Residential Capital, LLC, No. 12-12020 (MG), 2013 WL 6709253 (Bankr. S.D.N.Y. Oct. 21, 2013), (Opp. 22-23), is misguided. The insurers who objected there were not the Bermuda Insurers. Here, as discussed below, the Bermuda Insurers did not reasonably understand the Plan to be an attempt to preclude their rights to arbitrate this non-core dispute, and by objecting risked waiving their personal jurisdiction defense, In re Petrie Retail, Inc., 304 F.3d 223, 231 (2d Cir. 2002).

[13] Moreover, the Bermuda Insurers were not "parties in interest" to the liquidation such that they were bound by related orders. (Opp. 22 n.10). The Bankruptcy Code lists examples of "parties in interest", such as "the debtor, the trustee, a creditors' committee" and others, none of which applies to the Bermuda Insurers. 11 U.S.C. § 1109. The Second Circuit has "long held that only creditors and the debtor (or, equivalently, the trustee) have party-in-interest standing to request relief from the automatic stay or challenge a bankruptcy settlement". In re Dunne, No. 16-1778-BK, 2017 WL 1164379, at *1 n.1 (2d Cir. Mar. 28, 2017).

and interposed a claim for breach of contract on that basis. (Opp. 21.) This fails. The Plan can only apply to claims that exist at the time of confirmation. See 11 U.S.C. § 1141(d)(1)(A) (Chapter 11 "discharges the debtor from any debt that arose before the date of such confirmation"); Holywell Corp. v. Smith, 503 U.S. 47, 58 (1992) ("Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, we do not see how it can bind . . . with respect to postconfirmation claims."). Moreover, the Bermuda Insurers are not claiming any breach of the duty to defend (at any time pre- or post-petition); instead, they concede exhaustion with respect to the layers below them and the reasonableness of the settlement. (See Jan. 4, 2017 Hr'g Tr. 65:16-68:14.)

The Bermuda Insurers' now-discontinued requests for attorney's fees in the Bermuda actions cannot be classified as a "contingent" creditor claim either. (Opp. 11.) A "claim" exists if there is (1) a right to payment, that (2) "arose before the filing of the petition". Pension Ben. Guar. Corp. v. Oneida Ltd., 562 F.3d 154, 157 (2d Cir. 2009). To determine if a claim arises, courts "look to the substantive non-bankruptcy law that gives rise to the debtor's obligation". Id. Absent statutory entitlements, New York law only permits recovery of attorney's fees for breach of contract if the parties expressly contracted to provide for attorney's fees as a remedy for breach. Hooper Assocs., Ltd. v. AGS Computs., Inc., 548 N.E.2d 903, 904 (1989). Nothing in the text of the Bermuda Insurers' policies or in the underlying followed policy provides the Bermuda Insurers an express right for attorney's fees for breach. (See Adv. Dkt. 1-2, 1-3, 1-5.) Thus, because there was no pre-petition right to payment, there was no contingent creditor claim. See In re Metro Affiliates, Inc., No. 13-13591 (SHL), 2014 WL 3767552, at *3 (S.D.N.Y. July 31, 2014) ("Importantly, where there is no legal right to payment,

there can be no claim").[14] In keeping with this, the Bermuda Insurers sought attorney's fees in the Bermuda action based on the Bermuda Court's statutory powers to order that one party's reasonable costs of Bermuda litigation (including attorney's fees) be paid by another party to the litigation, in the exercise of the Bermuda Court's discretion.[15] Seeking payment of such fees under Bermuda law, at the Bermuda Court's statutory discretion, "does not fall under contract law" because "no enforceable contract to pay attorney's fees was formed". In re Water Valley Finishing, Inc., 139 F.3d 325, 328-39 (2d Cir. 1998) (per curiam).

Second, even if the Plan bound the Bermuda Insurers, its language does not preclude their arbitration rights. The Plan does not list the claims against the Bermuda Insurers, or even coverage disputes more generally, among the disputes over which it claims to retain exclusive jurisdiction. (Dkt. 126-2 at art. XII.) Ignoring this, Plaintiffs selectively quote the Plan to the effect that "this Court expressly retained jurisdiction to 'adjudicate' any 'adversary proceedings' 'that may be pending on the Effective Date or brought thereafter'". (Opp. 17.) Plaintiffs fail to mention, however, that the Bankruptcy Court's jurisdiction extends only "to the full extent legally permissible". (Dkt. 126-2 at art. XII.) A bankruptcy court in the

[14] Plaintiffs' case, In re Grove, 100 B.R. 417 (C.D. Ill. 1989), is inapposite. Plaintiffs cite no New York contract law that breach of a duty to defend clause creates a right to payment the moment the contract is signed. In any event, Grove is distinguishable because there the litigation invoking the "duty to defend" arose pre-petition. Id. at 420-21. Here, the customer claims triggering Plaintiffs' duty to defend arose post-petition. Compare In re MF Global Holdings, Ltd., No. 11-15059 (MG), Dkt. 1 (S.D.N.Y. Oct. 31, 2011) with Deangelis v. Corzine, No. 11-cv-07866-VM-JFC, Dkt. 1 (S.D.N.Y. Nov. 3, 2011).

[15] See AWAC Skeleton Argument ¶ 34 (Nov. 7, 2016) (citing "Buchanan v. Lawrence [2012] Bda LR 47, per Kawaley J, and Re A Trust [2013] Bda LR 21, per Kawaley CJ"). In Re A Trust, the Bermuda Supreme Court explains that, for example, that "the way the litigation has been conducted . . . may be relevant in determining whether or not the circumstances" make an award of costs or fees just. [2013] Bda 21 ¶ 20.

Second Circuit has explained that the language "'to the fullest extent permitted by law,' should not be construed in a manner that is fundamentally at odds . . . with the strong 'federal policy favoring arbitration agreements'". In re CIT Grp., Inc., No. 09-16565-ALG, 2012 WL 831095, at *2 (Bankr. S.D.N.Y. Mar. 9, 2012). CIT thus rejected the identical argument Plaintiffs advance here, that where the defendant "was sufficiently aware of the Plan's provisions to serve and file a proof claim", id. at *2-3, it lost its right to arbitrate when it did not object to Plan language that the Court "shall retain exclusive jurisdiction" to, among other things "[h]ear and determine any and all adversary proceedings", No. 09-16565-ALG, Dkt. 197, art. XII.E (Dec. 10, 2009). That language does not "suffice to demonstrate that the Court or [the defendant] understood [the language] to override" the right to arbitrate, particularly because the court "has no discretion to refuse to compel arbitration" and therefore denying arbitration was not "permitted by law" under the Plan. CIT at *2-3 & n.3.

In CIT, the court recognized that it would be error for a bankruptcy court to conclude that language in a plan precluded arbitrations that, under the Second Circuit's test from MBNA, do not involve "core bankruptcy matters, which by their nature implicate interests central to the bankruptcy process". 2012 WL 831095, at *2. Plaintiffs rely on a divided panel opinion from the Seventh Circuit, Ernst & Young, LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753 (7th Cir. 2002) (Opp. 18-23), but that opinion, unlike CIT, did not consider the impact of the qualifier "to the fullest extent permitted by law" or the Second Circuit's controlling test from MBNA. 2012 WL 831095, at *2-3. Indeed, the dissenting judge in Ernst & Young exposed this flaw. See Ernst & Young, 304 F.3d at 759 (Fairchild, J., dissenting) (explaining that the Plan did not bar arbitration because "[c]onfirmation does not alter the basic jurisdictional analysis

applicable to bankruptcy courts" or the "strong federal policy favoring arbitration"). Here, as in CIT, it would not have been "legally permissible" for this Court to empower itself with discretion to deny arbitration, which it otherwise lacks, through a plan of reorganization. (See Part III.)

III. PLAINTIFFS CANNOT SHOW THAT CONGRESS INTENDED TO PRECLUDE ARBITRATION OVER THESE STATE-LAW DISPUTES.

Plaintiffs recognize the "federal policy favoring arbitration agreements" but argue this is a case where the Court can and should override that policy and the parties' agreements by refusing arbitration. (Opp. 33-35.) That is incorrect.

The Court must "distinguish between claims over which bankruptcy judges have discretion to refuse arbitration and those that they must send directly to arbitration". MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006). The Second Circuit holds that bankruptcy courts "generally do not have discretion to refuse to compel arbitration of 'non-core' bankruptcy matters, or matters that are simply 'related to' bankruptcy cases". Id. Although courts "are more likely to have discretion" with respect to core bankruptcy matters, "even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code". Id. (reversing bankruptcy court's denial of arbitration even over a "core" matter). Plaintiffs here, as the party opposing arbitration, have "the burden of showing that Congress intended to preclude arbitration of the statutory rights at issue". Id.

There are no statutory bankruptcy rights at issue here. Plaintiffs' Adversary Proceeding for "Breach of Contract" does not arise from the Bankruptcy Code. (Adv. Dkt. 1 at 1.) It is, to quote the complaint, "an insurance coverage action" (Adv. Dkt. 1 ¶ 1) arising under state law and concerning pre-petition contracts that does not implicate any "core" function, such as creditor priority or the sale of estate property. It is thus the type of non-core dispute that must be sent to arbitration. (See Part III.A.) Plaintiffs' efforts to avoid this result fails. (See Part III.B.)

A. This Pre-Petition State-Law Contract Dispute Is Non-Core.

i. This Dispute Is Non-Core Based on Article III Limitations.

The parties agree that the Constitution's limits must inform this Court's analysis of whether the dispute is "core" or "non-core". See Mt. McKinley Ins. Co. v. Corning, Inc., 399 F.3d 436, 448 (2d Cir. 2005); (Opp. 26 (recognizing that "core proceedings" must be given an interpretation "congruent with constitutional limits as set forth in Marathon")). The Supreme Court first distinguished between core and non-core claims in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion). In Marathon, the court considered whether non-Article III bankruptcy judges "could constitutionally be vested with jurisdiction to decide a state-law contract claim against an entity that was not otherwise part of the bankruptcy proceedings". Stern, 564 U.S. at 485 (citing Marathon, 458 U.S. at 87 n.40). On the one hand, there are claims involving "the restructuring of debtor-creditor relations, which are at the core of the federal bankruptcy power", and on the other hand, there are claims involving "the adjudication of state-created private rights, such as the right to recover contract damages", which are non-core. Marathon, 458 U.S. at 71. "[S]tate-law causes of action for breach of

contract . . . are paradigmatic private rights [i.e., non-core claims], even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings". Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989) (emphasis added). State-law contract claims are non-core because they are unlike "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res" that lie at the core of the Bankruptcy Court's power. Id. Put differently, "a claim is non-core if it does not depend on bankruptcy laws for its existence and could proceed in a court that lacks federal bankruptcy jurisdiction." In re Residential Capital, LLC, 519 B.R. 593, 600 (S.D.N.Y. 2014) ("ResCap (Castel)"). Plaintiffs' state law contract claims against the Bermuda Insurers are thus paradigmatic non-core claims.

ii. That the Insurance Contracts Are "Pre-Petition" and "Independent of the Reorganization" Confirm That the Disputes Here Are Non-Core.

When evaluating whether there are unusual circumstances warranting a departure from the rule that state-law contract claims are non-core, courts consider "(1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization." Mt. McKinley, 399 F.3d at 448. "[T]he Second Circuit has held that a 'breach-of-contract action by a debtor against a party to a pre-petition contract, who has filed no claim with the bankruptcy court, is non-core.'" In re Lenders Abstract & Settlement Serv. Inc., 493 B.R. 385, 394 (E.D.N.Y. 2013) (quoting In re Orion Pictures Corp. v. Showtime Networks, Inc., 4 F.3d 1095, 1102 (2d Cir. 1993)).

Under both prongs of Second Circuit's test from Mt. McKinley, Plaintiffs' claims are non-core. First, Plaintiffs' claims are for breach of contract "against a party to a pre-petition contract, who has filed no claim with the bankruptcy court". Orion, 4 F.3d at 1102. None of the Bermuda Insurers filed proofs of claim against the estate, or otherwise consented to the

Bankruptcy Court's jurisdiction. (See Part II.) And, as Plaintiffs concede (Opp. 36), their contracts with the Bermuda Insurers were executed prior to Plaintiffs' bankruptcy petition. See Compl. ¶ 4; Adv. Dkt. 1-2 at 12; Adv. Dkt. 1-3 at 2. Thus, prong one of Mt. McKinley strongly supports a holding that the dispute is non-core. See, e.g., In re Residential Capital, LLC, No. 14-CV-6015 (RA), 2015 WL 739829, at *6 (S.D.N.Y. Feb. 20, 2015) ("ResCap (Abrams)") ("[S]tate-law contract claims arise from a pre-petition contract, and [the defendant] did not file a claim with the bankruptcy court. The proceedings here are "non-core," notwithstanding . . . arguments to the contrary."); In re Lawrence Grp., Inc., 285 B.R. 784, 787 (N.D.N.Y. 2002) (holding that "the timing of the contract (pre-petition) weighs against a finding that this matter is core"); In re Stone & Webster, Inc., 367 B.R. 523, 529 (Bankr. D. Del. 2007) ("Pre-petition state law contract claims are precisely the type of claim that the Supreme Court held could not be decided by non-Article III judges in Northern Pipeline [v. Marathon]").

Accordingly, courts repeatedly have held that coverage disputes over pre-petition insurance contracts are non-core.[16] For example, the Boston Chicken case this Court has cited (e.g., Adv. Dkt. 66, Adv. Dkt. 99) held that "an insurance coverage dispute, involving a post-petition breach of a pre-petition contract is a non-core proceeding". BCE W., L.P., No. 06-0325-

[16] Plaintiffs incorrectly suggest that insurance disputes often are "core". See Opp'n at 37 (citing In re DPH Holdings Corp., 437 B.R. 88, 96 (Bankr. S.D.N.Y. 2010) and In re U.S. Lines, 197 F.3d 631, 637 (2d Cir. 1999)). U.S. Lines only applies when two factors—not present here—exist. (See Part III.B.i.) In DPH Holdings, the court concluded that the case could merely have been "related to" bankruptcy jurisdiction. 437 B.R. at 96. Even the statement that the case was "core" was based on an essential bankruptcy function not present here—the "allowance or disallowance" of claims against the estate under § 157(b)(2)(B).

PHX-JAT, 2006 WL 8422206, at *4 (D. Ariz. Sept. 20, 2006) ("Boston Chicken").[17] Cases across the Second Circuit confirm that pre-petition insurance disputes are non-core. See, e.g., In re Lenders Abstract, 493 B.R. at 394 (holding that "a dispute over coverage under an insurance contract that was entered into prior to Lenders filing its bankruptcy petition" is "a non-core matter"); Brenenstuhl v. Amica Mut. Ins. Co., No. 10-CV-1365, 2013 WL 3327954, at *4 (N.D.N.Y. July 1, 2013) (holding that dispute "over insurance coverage under an insurance contract which was entered into before plaintiffs filed a bankruptcy petition" is non-core).

Second, Plaintiffs' claims are "independent of the reorganization." Mt. McKinley, 399 F.3d at 448. Importantly, the Plan of Liquidation has already been determined and entered by this Court. The Plan details how creditors are to receive distributions of Available Cash, including litigation recoveries. See Plan Art. I.A.7, Art. III.B. The current coverage disputes cannot impact "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power" or "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res". Granfinanciera, 492 U.S. at 56; 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, at *11 (Bankr. S.D.N.Y. Oct. 21, 2016) ("Drennen (Bankr.)") ("Like in MBNA American Bank, arbitration of the Plaintiffs' claims here will not jeopardize core bankruptcy functions because the Plan has been confirmed."); Drennen v. Certain Underwriters at Lloyd's of London (In re: Residential Capital, LLC), No. 15-CV-2712 (JPO), 2015 WL 9302834, at *4 (S.D.N.Y. Dec. 21, 2015) ("ResCap (Oetken)") (holding insurance coverage

[17] This Court inquired whether U.S. Lines "may have resulted in a different conclusion" from that in Boston Chicken. (Adv. Dkt. 66 n.7.) U.S. Lines, however, applies only to a fact-pattern not present in this case. (See Part III.B.i.)

dispute non-core because "the structure of [the debtor's] bankruptcy does not hinge on the outcome of Plaintiffs' suit, since a Chapter 11 Plan has already been confirmed"); In re Singer Co. N.V., No. 00 CV 6793 LTS, 2001 WL 984678, at *6-7 (S.D.N.Y. Aug. 27, 2001) (holding that "the Bankruptcy Court lacked discretion to deny the motion to compel arbitration" because the post-plan adversary proceeding would "not affect the allocation of assets among creditors, nor [was] it essential to the debtor's ability to reorganize").

Because this Adversary Proceeding involves a pre-petition contract and a dispute that is independent from the bankruptcy's structure, it is non-core and must be sent "directly to arbitration". MBNA, 436 F.3d at 108.

B. Plaintiffs' Arguments That This Dispute Is Core Are Routinely Rejected by Courts.

Plaintiffs propose two reasons why they can avoid mandatory arbitration: supposedly, the case requires "(1) interpreting and enforcing prior Bankruptcy Court orders; and (2) disbursing critical assets of the bankruptcy estate". (Opp. 37.) But neither of these arguments renders an action core, as Judges Abrams, Castel, Oetken and Lane all recently held.[18]

i. The Dispute's Potential To Augment the Estate Does Not Render It Core.

Plaintiffs argue this proceeding is core because it involves "disbursing critical assets of the bankruptcy estate". (Opp. 37 & 48-49.) But that does not render it core. The claims asserted in the Adversary Proceeding concern whether Plaintiffs are entitled to any

[18] See Drennen (Bankr.), 563 B.R. at 771-72 (rejecting argument that the Adversary Proceeding was core on the bases that it (1) "requires interpretation and enforcement of the bankruptcy court's prior orders" and (2) "any recovery under the [policies] will 'significantly impact the assets available for distribution to creditors'"); see also ResCap (Oetken), 2015 WL 9302834, at *4; ResCap (Abrams), 2015 WL 739829, at *6; ResCap (Castel), 519 B.R. at 599.

coverage and proceeds under the policies. There can be no serious dispute that a contractual claim to augment estate assets—even when the suit is brought by a debtor in bankruptcy—is non-core. See Marathon, 458 U.S. at 71-72 (debtor's "right to recover contract damages to augment its estate is 'one of private right'" not public right that is core under bankruptcy); In re Lenders Abstract, 493 B.R. at 395 (holding, in the context of insurance coverage disputes, that "the Supreme Court has held, and the Second Circuit has recognized that such a contract claim" cannot be finally adjudicated under Article III, which "makes this a non-core matter"); ResCap (Oetken), 2015 WL 9302834, at *3 n.3 (explaining that "this state law breach of contract claim is clearly outside" the bounds of a "public right").

Nor does alleging that this "is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O)" because it could implicate "the assets of the estate", (b)(2)(O), or the "administration of the estate", (b)(2)(A), change the analysis. Courts in this Circuit routinely recognize that bankruptcy disputes solely invoking the "catch-all" subparts (A) and (O) of § 157(b)(2) are non-core. See, e.g., Rescap Liquidating Trust v. CMG Mortg., Inc., No. 14CV4950, 2014 WL 4652664, at *2–3 (S.D.N.Y. Sept. 10, 2014) (noting plaintiffs' argument "that this action is core because it concerns the administration of its estate and affects the liquidation of the estate's assets" and explaining that the "Second Circuit rejected exactly this argument in Orion"); In re EMS Fin. Servs. LLC, 491 B.R. 196, 203 (E.D.N.Y. 2013) ("[W]hile the debtor's rights under its insurance policies are property of a debtor's estate, the contract claims are not rendered core simply because they involve property of the estate."); Blanco v. Hoehn (In re Gaston & Snow), 173 B.R. 302, 305 (S.D.N.Y. 1994) (explaining that "the two

'catchall provisions, § 157(b)(2)(A) and (O)" "must not be read too broadly", lest they "obliterate the core/non-core distinction itself").

Seeking to avoid the principles that contract claims to augment the estate and adversary proceedings solely based on the "catch-all" provisions of § 157(b)(2)(A) and (O) are non-core, Plaintiffs cite to U.S. Lines and County Seat Stores. (Opp. 48-49.) As innumerable courts including the Second Circuit have held, these two authorities are sui generis. The Second Circuit has since clarified that U.S. Lines was "based on the mutually re-enforcing effects of two factors" suggesting that the adversary proceeding was not independent from the bankruptcy proceeding. Mt. McKinley, 399 F.3d at 448. First, in U.S. Lines, "the policies were the only asset available" to pay creditors. Id. Second, the policies were pay-first policies that required the trustee to pay the claims and then seek indemnification. Id. If the trustee had paid claims without knowing whether they would be indemnified, it may not have had the money to pay subsequent claims at the pro rata amount, and thus "the estate's assets would not be equitably distributed", affecting the core function of the bankruptcy court. Id.[19] Similarly, the Second Circuit has explained that County Seats Stores "involved an insurance policy owned by the debtor that (1) provided the only source of potential payment for tort claims and (2) might have been the most important estate asset." Mt. McKinley, 399 F.3d at 450. "[A]ssuming without deciding that County Seats Stores was correctly decided", the court held that in the absence of those factors, the case did not apply. Id.

[19] That U.S. Lines only applies to those facts is widely recognized. E.g., Drennen (Bankr.), 2016 WL 6155925, at *10; Dynegy Danskammer, LLC v. Peabody Coaltrade Int'l Ltd., 905 F. Supp. 2d 526, 531-32 (S.D.N.Y. 2012); Bowles v. Massey Energy Co., 2012 WL 6628953, at *7 (S.D. W. Va. Dec. 19, 2012); In re Felice, 480 B.R. 401, 423 (Bankr. D. Mass. 2012).

The key features of U.S. Lines and County Seats Stores are missing here. The Bermuda Insurers' policies do not have pay-first provisions and, moreover, nothing about this coverage dispute will jeopardize the equitable distribution to creditors (since the Plan has already fixed priority). See Mt. McKinley, 399 F.3d at 448; Adv. Dkt. 1-5 at § 2.19. The $20 million in insurance policies at issue here are far from "only source of potential payment" to creditors in this bankruptcy. See In re S.W. Bach, 425 B.R. 78, 95 (S.D.N.Y. Bankr. 2010) (Glenn, J.) (rejecting trustee's attempt to rely on U.S. Lines as a basis for deeming the claim "core" because the insurance policy did not "represent[] the only potential source of cash available").

Recognizing that this case does not fit within the holding or rationale of U.S. Lines or County Seats Stores, Plaintiffs try to move the goalpost, by arguing that it is "among the most significant remaining assets". (Opp. 39 n.37 (emphasis added).) That is not the test, as evidenced by Plaintiffs' lack of authority. It also has no limiting principle because post-plan confirmation efforts to retrieve additional assets could always be described as the most significant "remaining" asset.

ii. Interpretation and Enforcement of the Court's Orders Is Not a Valid Basis on Which To Conclude That This Dispute Is Core.

Plaintiffs argue that this is a "core" dispute because it requires "interpreting and enforcing prior Bankruptcy Court orders". (Opp. 27; see also id. at 29.) Specifically, Plaintiffs say they intend to contest certain insurance coverage defenses that they speculate the Bermuda Insurers will assert during arbitration or trial by citing to orders of this Court. Such a rule, which would enable any plaintiff in bankruptcy to escape arbitration through creative argument, is legally unsupported.

First, in ResCap, multiple Southern District judges heard and rejected this argument. There, the bankrupt debtor and adversary plaintiff (RFC) claimed that "an action is core where it requires the 'application and enforcement' of a bankruptcy court's orders". ResCap (Castel), 519 B.R. at 601. Exactly as Plaintiffs do here, (Opp. 41), RFC contended "that the adjudication of its claims for indemnification will require reference to the terms of the Global Settlement, which was approved by the bankruptcy court with its confirmation of RFC's Chapter 11 liquidation plan". Id. (the court noted that "[t]o support this argument, RFC cites an array of cases that generally stand for the proposition that all courts, including bankruptcy courts, retain the jurisdiction to interpret and enforce their own orders").[20] The court explained that although "this principle is well-established, it is irrelevant to the question of whether a case is core or non-core". Id. (emphasis added). It is irrelevant because all this principle establishes is the potential for bankruptcy jurisdiction, not "core" bankruptcy jurisdiction—the key issue when deciding whether to compel arbitration. See Stern, 564 U.S. at 471 (explaining that bankruptcy courts issue reports and recommendations to the district court over "non-core" matters). Thus, Plaintiffs' "cases fail to support their contention that any proceeding that may involve a bankruptcy court's order is a core proceeding". ResCap (Castel), 519 B.R. at 601; see ResCap (Oetken), 2015 WL 9302834, at *4 (same); ResCap (Abrams), 2015 WL 739829, at *6 (same).

Second, the Bermuda Insurers' coverage defenses are not properly part of core/non-core inquiry because they are not elements of Plaintiffs' claims. E.g., In re Agway Gen. Agency, Inc. v. Burkeholder (In re Agway, Inc.), No.02-65872, 2006 Bankr. LEXIS 4552,

[20] Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009) (see Opp. 37) is one of the "array of cases" that ResCap expressly considered and distinguished. 519 B.R. at 601.

at *8 (Bankr. N.D.N.Y. Mar. 6, 2006) (holding that the fact that the "Court has been asked to interpret its Order of Confirmation in connection with the . . . defense of res judicata" did "not constitute a basis for finding the adversary proceeding to be core"); In re Hoffman, 99 B.R. 929, 931–32 (N.D. Iowa 1989) (court must refer to Plaintiffs' claims "to determine core or non-core status, not [to] defendant's defenses"). Plaintiffs' only response is that they brought a declaratory judgment claim. (Opp. 40 n.28 (arguing that "[b]ecause the MFG Parties' Complaint seeks a judicial declaration . . . the Bermuda Insurers' argument regarding 'potential coverage defenses' is inapposite"); Adv. Dkt. 13-1 at 20, Adv. Dkt. 20 at 23). But, like their breach of contract cause of action, Plaintiffs' declaratory judgment claim asks the Court to "interpret the terms of the Dissenting E&O Policies and establish the rights and obligations of the parties under those Policies". (Adv. Dkt. 1, Compl. ¶ 105 (emphasis added).) That is classic state-law non-core work, not core bankruptcy law.[21] See, e.g., Drennen (Bankr.), 563 B.R. at 773 (bankruptcy court "not 'uniquely able to interpret and enforce' the provisions of the Third Excess Policies").

Third, where courts have discussed the interplay of a case with bankruptcy orders it has been because that specific dispute implicated a genuinely core bankruptcy function (i.e., under 28 U.S.C. § 157(b)(2)(B)-(N)). Plaintiffs rely on two Second Circuit cases as the basis for their principle that "where the proceeding seeks enforcement of the bankruptcy court's prior orders, it is deemed a core proceeding". (Opp. 38-39 (citing In re Millennium Seacarriers, Inc., 458 F.3d 92 (2d Cir. 2006) and In re Petrie Retail, Inc., 304 F.3d 223 (2d Cir. 2002)).) Neither case is authority for such a sweeping proposition. In Millennium Seacarriers, the arbitration

[21] As Boston Chicken makes clear, "it is the nature of the underlying matter . . . that determines whether a proceeding is core or non-core", not the "remedies that derive from the underlying matter", such as the declaratory relief sought here. 2006 WL 8422206, at *5.

sought to frustrate the bankruptcy court's "Sale Order provid[ing] for the sale of the principal asset of [the] debtor", a ship. 458 F.3d at 94. As Plaintiffs' own block quotation reveals (Opp. 39), the holding was driven by the fact that "Orders approving the sale of property" are core proceedings under § 157(b)(2)(N). Id. at 95. Likewise, in Petrie Retail, the issue that made the case "core" was that the parties' rights derived from the sale order. See Mt. McKinley, 399 F.3d at 449 (holding that "Petrie is not relevant" because the dispute "uniquely affected and was uniquely affected by core bankruptcy functions because the dispute between the two parties was based on rights established in the sale order") (emphasis added). Thus, Plaintiffs' own authorities reinforce that this Court's analysis of "core"/"non-core" must be guided by the nature of the underlying dispute: here, a state-law breach of contract dispute that only invokes the "catch-all" bankruptcy code provisions (§ 157(b)(2)(A) and (O)). E.g., In re Stone & Webster, 367 B.R. at 526 (explaining that "courts generally find that state law causes of action by or on behalf of the debtor, which do not fall within the provisions of 28 U.S.C. § 157(b)(2)(B)-(N) are non-core matters"). (See Part III.A.)

Fourth, Plaintiffs' only basis for concluding that resolving the merits implicates the Court's orders is that they plan to argue that the Court's orders have issue preclusive effect. They do not. Issue preclusion requires "that the issue was actually litigated and decided" and was "necessary to support a valid and final judgment on the merits". Interoceania Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997). Here, the Court did not invite briefing on the state-law coverage defenses and did not issue a final judgment on their merits.

Lastly, underlying Plaintiffs' "interpretation and enforcement" argument is the meritless supposition that if these disputes go to arbitration to determine coverage, the parties'

jointly selected arbitrators cannot be relied on to fairly approach orders of this Court. (See Opp. 13, 35.) The case of In re Belton is instructive. See In re Belton, No. 15 CV 1934 VB, 2015 WL 6163083 (S.D.N.Y. Oct. 14, 2015). There, the bankruptcy court denied arbitration under the FAA but the district court reversed. Id. at *10. The district court explained that Second Circuit precedent dictates "that 'arbitration is presumptively an appropriate and competent forum for federal statutory claims'". Id. at *8 (quoting MBNA, 436 F.3d at 110). It held that it had been error to presume that "the bankruptcy court was more qualified than an arbitrator to adjudicate a claim alleging violations of the automatic stay". Id.

C. Plaintiffs' Four Reasons Why This Court Should Retain This Dispute Even if Non-Core Fail.

"Bankruptcy courts generally do not have discretion to refuse to compel arbitration of 'non-core' bankruptcy matters, or matters that are simply 'related to' bankruptcy cases." MBNA, 436 F.3d at 108. Plaintiffs argue that even if this Court finds this proceeding is "non-core", they can still avoid arbitration under "the second prong of the two part test" prescribed by the Second Circuit. (Opp. 49.) But, under that prong, "the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code". MBNA, 436 F.3d at 108 (emphases added). Indeed, "the fact that a plaintiff alleges a violation of an important, even fundamental, Bankruptcy Code provision is not enough to exempt such a claim from arbitration". In re Belton, 2015 WL 6163083, at *6. Plaintiffs offer four reasons why they can carry the extraordinary burden of denying arbitration over this non-core dispute. All four assertions fail.

Plaintiffs' first two reasons are what they portray as the prospect for decentralization and delay. (See Opp. 52-53.) First, they note that Federal (the highest tier excess carrier), unlike the Bermuda Insurers, does not have an arbitration clause and contend that because of "decentralized, duplicative proceedings" this Court should deny the Bermuda Insurers their bargained for right to arbitrate. Plaintiffs' argument is contrary to controlling law. "The Supreme Court has held that the Arbitration Act requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel' even when doing so would create 'separate proceedings in different forums'". Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985)." Drennen (Bankr.), 563 B.R. 756, 766-67 (emphasis added). This rule is mandatory even when those decentralized proceedings have common facts. See Nilsen v. Prudential-Bache Sec., 761 F. Supp. 279, 284 (S.D.N.Y. 1991) (holding that, under Dean Witter, "[w]hen some claims before the court are arbitrable and others are not, a court has no discretion to hear the arbitrable claims, notwithstanding that those claims are based on facts common to the non-arbitrable claims") (emphasis added).

Second, Plaintiffs complain of allegedly "exorbitant costs associated with multiple foreign arbitral panels" and potential delay. (Opp. 53.) They offer no record facts documenting such "exorbitant" costs, and therefore the "costs of arbitration . . . cannot serve as a basis for invalidating the arbitration agreements". In re Belton, 2015 WL 6163083, at *10. Similarly, with respect to potential delay, it is well-established that "[i]f the presumption in favor of arbitration means anything, the mere possibility of delay cannot alone provide the Bankruptcy Court with discretion to deny arbitration". Cibro Petroleum Prods. v. City of Albany (In re Winimo Realty Corp.), 270 B.R. 108, 124 (S.D.N.Y. 2001). Even if the potential for delay and

cost were not off-the-table legally, Plaintiffs' invocation of these considerations would still fall flat. Parties elect to arbitrate—and federal policy favors it—because arbitration is an efficient way to resolve disputes. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011).

Third, Plaintiffs argue, citing In re Lehman Brothers, that the Court may deny arbitration because the MF Global bankruptcy is a "large, complex proceeding[]". (Opp. 53.) Size and complexity are not independent justifications for a court to decline to compel arbitration, and Lehman does not hold otherwise. Lehman explained that "the dispute before it—determining 'where the claimants' claims fall in the priority scheme of distributions to [the debtor's] general creditors'—is a core proceeding". In re Lehman Bros. Holdings, Inc., No. 14 CIV. 7643 ER, 2015 WL 5729645, at *4 (S.D.N.Y. Sept. 30, 2015). This Court has already determined issues of priority among creditors and all that remains after any arbitrations would be, potentially, to distribute assets pursuant to the Plan. (See Part III.A.ii.)

Fourth, and finally, Plaintiffs repeat their argument that this Court has the power to interpret its own orders. (Opp. 56.) This argument, as already explained, is not a basis on which to conclude that this dispute is "core" because (a) it, at most, creates "related to" jurisdiction; (b) involves coverage defenses; (c) arises here in a dispute not implicating any "core" bankruptcy function (i.e., § 157(b)(2)(B)-(N)); and (d) rests on the incorrect premise that arbitrators cannot interpret bankruptcy orders. (See Part III.B.ii.) These are all reasons why permitting arbitration of these claims would not "necessarily jeopardize the objectives of the Bankruptcy Code" such that arbitration must be compelled. MBNA, 436 F.3d at 108. But—even if none of this were true—Plaintiffs' resort to court orders as a basis to avoid arbitration

would still fail. This is because it is factually and legally incorrect that the arbitrators will need to "interpret and enforce" bankruptcy court orders to resolve this coverage dispute:

> **Crime/Fraud Exclusion**: Plaintiff say that the Bermuda Insurers will rely on the CFTC Consent Order "as a 'final adjudication' of wrongful conduct giving rise to the criminal or fraudulent acts exclusion", despite the fact that the order states that it "shall not be used, admissible, or given preclusive effect in any other proceeding". (Opp. 44-45.)

At no time have the Bermuda Insurers cited the CFTC Consent Order for this purpose, nor have they argued—or will they argue—that the crime/fraud exclusion applies here. Incredibly, the Plaintiffs argue that because MFG Assurance Company Limited cited the CFTC Consent Order as a basis for a crime/fraud defense (in a way Plaintiffs deem improper), the Court can conclude that the Bermuda Insurers will as well. (Adv. Dkt. 1-7 (cited at Opp. 45).) Moreover, contrary to Plaintiffs' suggestion (Opp. 45), the arbitrators can police any attempt to use the CFTC Consent Order for an improper evidentiary purpose. See Bermuda International Conciliation and Arbitration Act of 1993, art. 19 (arbitrators have "the power to determine the admissibility, relevance, materiality and weight of any evidence"); Adv. Dkt. 1-2 at 8, Adv. Dkt. 1-3 at 5.

> **Insured v. Insured Exclusion**: Plaintiffs state that the "Insured vs. Insured" coverage exclusion implicates this Court's NES Approval Order and its SAA Approval Order pertaining to the transfer of claims to Plaintiffs. (Opp. 46-47; see Adv. Dkt. 1-5 § 3.8.)

The Bermuda Insurers have not—and will not—make "any challenge to the validity of the assignments that would require interpretation" (Opp. 46) of any of this Court's orders.[22] The claims MFGAA is now pursuing are claims that were previously held by MFGI and the

[22] Whether MFGH made its own direct claim for coverage, as Plaintiffs contend, is subject to dispute. Determining that factual question is not a matter of interpreting bankruptcy court orders, but of reviewing letters to the insureds. See In re Lenders Abstract, 493 B.R. at 395.

Individual Insureds. To the extent that MFGI and/or MFGH held claims against the former directors, officers and/or employees of MFGI/MFGH that were assigned to Plaintiffs, the Insured v. Insured exclusion may apply.

> **Uninsurable as a Matter of New York Public Policy**: Plaintiffs say they will argue that the entry of this Court's "9019 Order approving the MDL Settlement Agreement", offensively precludes the Bermuda Insurers from asserting the coverage defense that the risk is "uninsurable" as a matter of New York public policy. (Opp. 41-44.)

Plaintiffs' argument (Opp. 43) that this Court's determination that the settlement of claims was "reasonable" and "fairly and properly" exhausted precludes the Bermuda Insurers from arguing as a coverage defense that aspects of the claims are uninsurable as a matter of New York law fails. The reasonableness standard applied by this Court to a settlement of claims is legally distinct from—and thus does not control—a decision on the merits regarding the scope of New York's public policy exception. Compare In re Ashford Hotels, Ltd., 226 B.R. 797, 802-03 (Bankr. S.D.N.Y. 1998) (settlement approval decision, under § 9019 of the Bankruptcy Code, guided by a "full and fair assessment of the wisdom of the proposed compromise"); with J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 992 N.E. 2d 1076 (N.Y. 2013) (rule driven by concern that there be no "indemnification for the disgorgement of [insureds'] illicit gains").[23]

IV. THE COURT SHOULD NOT STAY THE BERMUDA INSURERS' ARBITRATION PENDING FEDERAL'S POTENTIAL TRIAL.

Plaintiffs filed this Adversary Proceeding despite already having received, on February 11, 2016, Allied World's notice that the dispute must be arbitrated in Bermuda and

[23] Plaintiffs concede that the Bermuda Insurers agreed not to challenge the reasonableness of the settlement or to exert an exhaustion defense based on the claims in the preceding tiers of the insurance tower. The Bermuda Insurers do not "challenge the validity of the assignments authorized by the NES Approval Order, SAA Approval Order, and 9019 Order" either. Opp. 47.

after the parties already had selected two arbitrators and exchanged lists to select the final arbitrator. (Adv. Dkts. 13-3, 13-4, 13-5.) Now—more than a year later—although this is a case the Court "must send directly to arbitration", MBNA, 436 F.3d at 108, Plaintiffs request a stay of arbitration pending the trial of claims against Federal (a U.S. insurer, without an arbitration provision that sits at the top of the insurance tower). A stay, and further delay in proceeding to arbitration, is not warranted.

In deciding whether to stay arbitrations, courts often analyze the following factors: whether allowing those proceedings to go first "would (i) threaten the debtor's insurance coverage, (ii) increase the debtor's indemnification liability, (iii) result in inconsistent judgments, (iv) expose the debtor to risks of collateral estoppel . . . and (v) burden and distract the debtor's management by diverting its manpower from reorganization to defending litigation". S.W. Bach, 425 B.R. at 99-100. Plaintiffs' argument that the arbitrations would "divert[] necessary manpower and funds away from administering the estate" fails. (Opp. 59.) This is because, as this Court has held, "factors (i), (ii) and (v) are not present" when the claims are asserted on behalf of the bankrupt entity. Id. at 100. Such a rule makes sense given that a plaintiff can hardly be heard to complain that its own case is burdensome or a distraction.

Plaintiffs are also wrong that Factors (iii) and (iv)—inconsistent judgments and the risk of collateral estoppel—support their request for a stay of the arbitrations in this case. (Opp. 58-59.) As to Factor (iv), the ultimate disposition and rulings by the Bermuda arbitrators are confidential. This alone will prevent Federal from arguing for the application of collateral estoppel against Plaintiffs: it will not even have knowledge of what occurs. In addition, as this Court has recognized, "whether a court applies collateral estoppel regarding an arbitration

decision is within the Court's broad discretion". S.W. Bach, 425 B.R. at 102. Thus, even if Federal somehow learned what happened in the Bermuda arbitrations, collateral estoppel would not "depriv[e] this Court of its jurisdiction to rule" (Opp. 59); instead, this Court would decide whether, and to what extent, to grant any preclusive effect to the arbitral rulings in Bermuda.

Nor have Plaintiffs explained how reversing the sequence of the Bermuda arbitrations and Federal's U.S. litigation increases any risk of inconsistent judgments (Factor (iii)). Because this "court has no discretion to hear the arbitrable claims" against the Bermuda Insurers, Nilsen, 761 F. Supp. at 284, there is no escaping the reality that arbitrators will decide some of Plaintiffs' claims and a court will decide others. It is the mere fact of multiple decision makers, not the order in which claims are adjudicated, that creates any "inconsistent judgment risk". That "risk" is something Plaintiffs knowingly assumed when they entered certain insurance contracts with arbitration clauses and others without. That cannot be enough to stay arbitration since it would mean that—in every case with both arbitrable and non-arbitrable claims based on common facts—arbitration would need to wait for litigation, a sweeping rule that the cases do not support and that even Plaintiffs do not advance. This case is distinguishable from S.W. Bach, where this Court imposed a stay, because allowing the arbitrators to rule first (or simultaneously with Federal's trial) will not frustrate any "core" adjudication in this Court. See 425 B.R. at 104. There is no basis for a stay.

CONCLUSION

The Bermuda Insurers respectfully request that the Court grant their motions to compel arbitration.

Dated: April 7, 2017

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CERTIFICATE OF SERVICE

I, Daniel Slifkin, certify that on April 7, 2017, I caused the foregoing Bermuda Insurers' Joint Reply Memorandum in Support of their Motions To Compel Arbitration 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