UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Related to Dkt. No. 207

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. Pro. No. 16-01251 (MG)

DEFENDANT ALLIED WORLD'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A STAY OF THE ARBITRATION ORDER PENDING THEIR MOTION FOR LEAVE TO APPEAL

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

Defendant Allied World Assurance Company, Ltd ("Allied World") respectfully submits this brief in opposition to Plaintiffs' motion for a stay of the arbitration order pending their motion for leave to appeal (Adv. Dkt. 207).

PRELIMINARY STATEMENT

This Court should deny Plaintiffs' motion for a stay pending appeal of the Court's order compelling arbitration. Each of the four of the traditional factors weighs against granting such a stay. *First*, Plaintiffs have no likelihood of success, among other reasons, because their appeal is procedurally barred by the Federal Arbitration Act, 9 U.S.C. § 16(b), and because they have identified no basis to argue that this Court clearly erred in interpreting its own order. *Second*, Plaintiffs do not identify *any* irreparable injury that they would suffer if the parties proceeded to arbitration. *Third*, delaying arbitration would substantially injure Allied World by further depriving it of the "streamlined proceedings and expeditious results" that were "prime objective[s] of [its] agreement to arbitrate", *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011). *Fourth*, granting Plaintiffs' request would disserve the public interest and turn the Federal Arbitration Act upside-down: when a trial court has decided that a dispute is arbitrable, the Act requires a stay of further litigation—not a stay of arbitration, as Plaintiffs request.

ARGUMENT

In evaluating a motion for a stay pending appeal, courts evaluate the four traditional stay factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 425-26 (2009). A stay applicant must "satisf[y] the first two factors" before "the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest". *Id.* at 435;

see also In re N.Y. Skyline, Inc., 520 B.R. 1, 4 (S.D.N.Y. 2014) ("The first two factors are the most critical." (citing *Nken*, 556 U.S. at 434)). As Plaintiffs previously acknowledged, the "burden on the movant seeking the extraordinary relief of a stay is a '*heavy*' one". (Pls.' Mot. to Strike 4 (Adv. Dkt. 171) (quoting *In re Sabine Oil & Gas Corp.*, 551 B.R. 132, 142 (Bankr. S.D.N.Y. 2016) (emphasis supplied by Plaintiffs)).)

Plaintiffs have no likelihood of success. As a procedural matter, their motion for leave to appeal is barred by § 16(b) of the Federal Arbitration Act, 9 U.S.C. § 16(b). Under that section, "[e]xcept as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order" that compels arbitration or stays court proceedings in favor of arbitration under the Act, *id.*; *see also Preferred Care of Del. v. Estate of Hopkins*, 845 F.3d 765, 768 (6th Cir. 2017) (explaining that § 16(b) "prohibits appeals from . . . interlocutory orders that favor arbitration, such as those 'granting' stays in favor of arbitration, 'directing' or 'compelling' arbitration, or 'refusing' to enjoin an arbitration"). When it applies, § 16(b) of the Federal Arbitration Act "supersed[es]" any "possible sources of appellate jurisdiction", with the exception of § 1292(b). *Preferred Care of Del.*, 845 F.3d at 769; *Moglia v. Pac. Emp'rs Ins. Co.*, 547 F.3d 835, 838 (7th Cir. 2008).

Here, Plaintiffs moved pursuant to 28 U.S.C. § 158(a)(3) for leave to appeal this Court's interlocutory order compelling arbitration and staying proceedings under the Federal Arbitration Act. (Notice of Appeal 1 (Adv. Dkt. 203).) That motion for leave to appeal is fatally defective because, under the circumstances at issue here, § 16(b) "supersede[s]" the § 158(a)(3) "source of appellate jurisdiction" that Plaintiffs invoke, *Preferred Care of Del.*, 845 F.3d at 769;

Moglia, 547 F.3d at 838.[2] Accordingly, in this case, the Federal Arbitration Act "explicitly denies the right to an immediate appeal from" this Court's "interlocutory order that compels arbitration [and] stays proceedings", *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015).

Not only do Plaintiffs lack any viable procedural avenue for an appeal, but they also have no likelihood of overturning this Court's order on its merits, for reasons this Court knows well. Plaintiffs seek to appeal only this Court's holding that the arbitration clause was not displaced by the Plan of Liquidation. (Pls.' Mot. for Leave to Appeal 4 (Adv. Dkt. 204).) But the Plan is an order of this Court, and Plaintiffs themselves have emphasized this Court's unique position to interpret the meaning and application of its own orders. (Pls.' Opp'n to Mot. to Compel Arb. 46 (Adv. Dkt. 125) (quoting, inter alia, *In re Casse*, 198 F.3d 327, 333 (2d Cir. 1999) ("The bankruptcy court [is] in the best position to interpret its own orders."); *In re Texaco Inc.*, 182 B.R. 937, 947 (Bankr. S.D.N.Y. 1995) ("A bankruptcy court is undoubtedly the best qualified to interpret and enforce its own orders including those providing for discharge and injunction . . . .").) "[A] bankruptcy court's interpretation of its own order warrants customary appellate deference." *In re Bernard L. Madoff Inv. Secs. LLC*, 740 F.3d 81, 87 n.7 (2d Cir. 2014). Plaintiffs might disagree with this Court's interpretation, but they offer no reason to believe that appellate deference would be unwarranted or that this Court somehow clearly erred in interpreting its own order. (Pls.' Mot. for Leave to Appeal 5-9 (Adv. Dkt. 204).)[3]

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[2] Section 1292(b) does not provide a source of appellate jurisdiction in this case. That section vests appellate jurisdiction in the courts of appeals to review certain interlocutory orders certified by district courts. 28 U.S.C. § 1292(b). It does not authorize appeals from bankruptcy courts to district courts, which are instead governed by 28 U.S.C. § 158(a).

[3] There are numerous independent, alternative reasons why Plaintiffs would be unable to prevail in any appeal. For one, Plaintiffs' Plan argument fails because Allied World was not a creditor bound by the Plan. (Allied World's Reply in Supp. of Mot. to Compel 7-10 (Adv. Dkt. 133).) Additionally, Plaintiffs' preferred interpretation of the Plan must be wrong because

The second factor weighs against a stay because Plaintiffs never suggest that they will suffer irreparable injury absent such a stay. (*See id.* at 11-12.) The only injury that Plaintiffs say they might suffer is the "time and expense [of] arbitrating this dispute", but Plaintiffs never contend that such injury is irreparable or cite authority for such a proposition. (*Id.* at 11.) Plaintiffs have the burden of proof in moving for a stay, *N.Y. Skyline, Inc.*, 520 B.R. at 5, and they have made no effort to carry that burden with respect to the second stay factor.

Because Plaintiffs have no likelihood of success and have claimed no irreparable harm absent a stay, this Court can properly deny their stay motion without considering the balance of harms or the public interest. *See Nken*, 556 U.S. at 435. In any event, both Allied World and the public interest would be harmed by further delaying arbitration.

A stay would substantially injure Allied World. Allied World gave notice of its intent to arbitrate this dispute in February 2016, more than a year and a half ago (J. McCarrick Ltr. (Adv. Dkt. 13-3)), and a further delay of indefinite duration would substantially injure Allied World by continuing to deprive it of the "streamlined proceedings and expeditious result[]" that were "prime objective[s] of [its] agreement to arbitrate", *Concepcion*, 563 U.S. at 346.

A stay of arbitration would also disserve the public interest by undermining Congress's policy choices. In particular, the Federal Arbitration Act embodies Congress's "underlying policy to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible". *Katz*, 794 F.3d at 346 (quoting *Moses H. Cone Mem'l Hosp. v.*

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adopting it would violate Article III. In particular, Plaintiffs misinterpret the Plan as empowering this Court to render "final judgment *on the merits*" (Pls.' Opp'n to Mot. to Compel Arb. 2, 10 (Adv. Dkt. 125) (emphasis added)), but that would be unconstitutional because this dispute is non-core and Allied World has never "knowing[ly] and voluntar[il]y" consented to merits adjudication by this Court, *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015); (*see also* Reconsideration Order 3 (Adv. Dkt. 202); Allied World's Reply in Supp. of Mot. to Compel n.1 (Adv. Dkt. 133)).

Mercury Constr. Corp., 460 U.S. 1, 22 (1983)). Accordingly, when a trial court decides that a dispute is arbitrable, the Act requires a stay of the litigation—not the arbitration—so that the "parties [can] proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation". *Id.* The relief Plaintiffs request would turn the policy objectives of the Federal Arbitration Act upside-down: it would force the arbitration to wait while the parties are encumbered with further litigation.

CONCLUSION

This Court should deny Plaintiffs' motion for a stay pending appeal of the arbitration order.

September 25, 2017

Respectfully submitted,

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by

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CERTIFICATE OF SERVICE

I certify that, on September 25, 2017, a copy of Defendant Allied World's Brief in Opposition to Plaintiffs' Motion for a Stay of the Arbitration Order Pending Their Motion for Leave to Appeal will be served upon counsel of record for all parties by CM/ECF contemporaneously with filing.

Dated: September 25, 2017

/s/ Daniel Slifkin

Daniel Slifkin