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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OMNIBUS RESPONSE MEMORANDUM OF LAW ON THE BERMUDA DEFENDANTS' CONTINUED VIOLATION OF THIS COURT'S BAR ORDER

[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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

PRELIMINARY STATEMENT

Based on the facts established to date, the Bermuda Defendants commenced the Bermuda proceedings in a calculated and improper effort to prevent this Court from exercising its jurisdiction to decide the arbitrability of an adversary proceeding brought by the MFG Parties as Insureds and as assignees of the Individual Insureds for the Bermuda Defendants' refusal to fund the MDL Settlement approved by this Court on August 10, 2016.[2] The Bermuda Defendants cannot reconcile their conduct in the Bermuda forum with their pending motions to compel arbitration in this adversary proceeding, and have failed to explain why their conduct does not violate the Bar Order and the Barton doctrine. This Court would be required to retain jurisdiction over the claims against the Bermuda Defendants even assuming, *arguendo*, that the Court ultimately referred certain of the claims to arbitration, which the MFG Parties strongly dispute should occur here. As such, the Bermuda Defendants' claim that the anti-suit injunction proceeding was merely "defensive" is nothing more than a blatant attempt at stripping this Court of its rightful jurisdiction. The Bermuda Defendants' strained interpretation of the Bar Order and clear disregard for the Court-approved settlement agreements effectuating the MDL Settlement only further demonstrates why a permanent injunction requiring the dismissal of the Bermuda proceedings is both appropriate and necessary here. Such injunctive relief is the only way to ensure that the question of arbitrability – which itself requires careful interpretation and application of this Court's prior orders – is properly decided by this Court.

[2] Indeed, as counsel for AWAC represented to this Court, the Bermuda Defendants initiated the Bermuda proceedings for the *exclusive* purpose of obtaining anti-suit injunctions barring this adversary proceeding. Joyce Aff., Exh. B, Jan. 4 Hr'g Tr. 64:23 – 65:6 ("Ms. Kerstein: Well, I would just like to add that *the only issue before the Bermuda court was an anti-suit injunction*. Your Honor said we were allowed to prosecute whether arbitration was allowed to move forward but that couldn't have been our interpretation of your TRO because *the only issue before the Bermuda court was an anti-suit injunction*. So *when the order says you're allowed to prosecute the action, it's prosecuting the anti-suit injunction*." (emphasis added)).

ARGUMENT

I. TO PROTECT THE NEW YORK INSUREDS, THIS COURT SHOULD REQUIRE THE BERMUDA DEFENDANTS TO POST A BOND, AS REQUIRED BY NEW YORK LAW

The MFG Parties' opening brief[3] (TRO Br. at 19–22) established that, where, as here, an unauthorized insurer[4] appears in a New York court for any purpose other than to contest personal jurisdiction and service of process, it is required to post a bond in an amount "sufficient to secure payment of any final judgment which may be rendered in the proceeding." N.Y. Ins. L. § 1213(c).[5] The Bermuda Defendants have filed multiple "responsive pleadings" here, including their Motions to Compel Arbitration and their Motion to Dismiss for Lack of Subject Matter Jurisdiction. In this briefing, they reincorporate the arguments made in their prior filings in this Court, including their challenges to this Court's subject matter jurisdiction. Iron-Starr Opp. Br. at 1 nn. 1-2 (Adv. D.I. 64); AWAC Opp. Br. at 1 nn. 1-2 (Adv. D.I. 62). Given that this insurance statute has been routinely applied to require foreign insurers to deposit funds to remain in escrow through the entire pendency of the insurance dispute, including during any referred arbitration,[6] this Court should require the Bermuda Defendants to post a $60 million bond pursuant to Insurance Law § 1213. See, e.g., Marsh & McLennan Cos. Inc. v. GIO Ins. Ltd., 2013 WL 4007555, at *5 (S.D.N.Y. Aug. 6, 2013)

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[3] MFG Parties' December 28, 2016 Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order (filed under seal) (the "TRO Br.").

[4] An "authorized insurer" is "an insurer authorized as such to do an insurance business in this state in compliance with this chapter, by reason of a license so to do issued and in force pursuant to the laws of this state or of a corporate charter granted and in force pursuant to the laws of this state." N.Y. Ins. Law § 107(a)(10).

[5] The MFG Parties note that under the McCarron-Ferguson Act, this New York insurance law is "not invalidated or impaired by the provisions of the Federal Arbitration Act." Corcoran v. Ardra Ins. Co., 156 A.D.2d 70, 73 (N.Y. App. Div. 1990). Thus, federal courts in New York routinely require insurers to post a bond pursuant to Insurance Law § 1213 even where, as here, the Federal Arbitration Act is being invoked. See, e.g., Marsh & McLennan Cos., Inc. v. GIO Ins. Ltd., 2013 WL 4007555, at *5 (S.D.N.Y. Aug. 6, 2013).

[6] Even if this Court compels arbitration, it must retain jurisdiction and merely stay this adversary proceeding. See Drennen v. Certain Underwriters at Lloyd's of London (In re Res. Cap., LLC), 2016 WL 6155925, at *1 n.3 (Bankr. S.D.N.Y. Oct. 21, 2016) (granting motions to compel arbitration and staying adversary proceeding); Katz v. Cellco P'ship, 794 F.3d 341, 345 (2d Cir. 2015) (holding FAA requires a stay, rather than dismissal of a proceeding sent to arbitration).

(explaining that "in deference to New York's public policy regarding unauthorized foreign insurers . . . the Court will not release [an insurer's] security pending the arbitration.").[7]

The Bermuda Defendants offer no response to this requirement. Rather, the Bermuda Defendants misstated to the District Court in their recent motions for leave to appeal that this Court had already rejected the applicability of the New York Insurance Law. Adv. D.I. 53 at 13 n.9. The Bermuda Defendants also threatened when they first served the anti-suit injunctions on the MFG Parties that they would seek to prevent the enforcement of any favorable U.S. judgment. Dec. 27 Letter, at Exh. D-1 at p. 2 and Exh. E-1 at p. 2. Thus, conditioning any further participation by the Bermuda Defendants in this Court on posting the bond required by the New York Insurance Law is especially critical at this time.[8]

II. THE BERMUDA DEFENDANTS HAVE CLEARLY VIOLATED THE BAR ORDER

A. The Bermuda Defendants Have Not Refuted The Fact That Their *Ex Parte* Injunction Applications Impermissibly Assert "Claims" Against The MFG Parties Related To The MF Global Actions

The Bermuda Defendants strenuously argued that the term "claim" within the Bar Order must be given its Bankruptcy Code definition (Adv. D.I. 28 at pp. 7, 9; Adv. D.I. 32 at pp. 9–10), and yet did not and could not dispute the well-established law that demands for costs and attorneys' fees constitute "claims" under § 105(5) of the Bankruptcy Code. See Matter of Southmark Corp., 88 F.3d 311, 317 (5th Cir. 1996) ("judicial demands for costs and attorneys' fees were 'claims' within the intendment of [§ 101(5)] of the bankruptcy code"); In re Benalcazar, 283 B.R. 514, 536

[7] The Bermuda Defendants' pending motions to compel arbitration will require this Court to determine, in the first instance, the particular individuals and entities subject to the Policies' arbitration clauses. For example, and as explained in the MFG Parties' opening brief, the AWAC Policy unambiguously provides that the Policy's arbitration provision is limited to MF Global Holdings Ltd. (and those deriving rights through, or asserting rights on behalf of, MF Global Holdings Ltd.) and not persons (like the Individual Insureds) who seek recovery under the policies directly, and in whose shoes the MFG Parties stand under the irrevocable assignment of the Individual Insureds' rights, which was a cornerstone of the MDL Settlement. TRO Br. at 17.

[8] As noted in the MFG Parties' opening brief, the Bermuda Defendants were almost certainly aware that this bonding requirement would apply given that here, unlike in Drennen, the policyholder was provided with the relevant excess E&O policies at its Fifth Avenue address to cover risks for an enterprise with its principal place of business in New York. TRO Br. at 20 n.16.

(Bankr. N.D. Ill. 2002) ("[T]o the extent that [Defendant] has a right to be compensated for its attorneys' fees and costs in pursuing its citation proceedings against [Debtor], that right is a 'claim' in this bankruptcy case.").[9] Nor do the Bermuda Defendants deny that their *ex parte* injunction applications affirmatively seek an award of costs and attorneys' fees through their request for "indemnity costs." The Bermuda Defendants also do not challenge the MFG Parties' demonstration that the plain meaning of "claim" includes both requests for injunctive relief and attorneys' fees. See TRO Br. at 5–6 (a claim encompasses "every species of legal demand").[10]

Perhaps because the Bermuda Defendants now recognize that the *ex parte* injunction applications do assert a "claim" under the Bar Order, the meaning of that term—which had featured prominently in the Bermuda Defendants' own Order to Show Cause briefing (Adv. D.I. 28; Adv. D.I. 32)—is now apparently "completely beside the point." Iron-Starr Opp. Br. at 5 (Adv. D.I. 64). According to the Bermuda Defendants, *now*, the issue of whether there has been a violation of the Bar Order hinges on "conventional principals [sic] of fairness." Id. at 5–6. They claim that because the Bar Order does not preclude the MFG Parties from asserting claims against the Bermuda Defendants, the "Bar Order cannot preclude the [Bermuda] Defendants from defending against those claims, *including obtaining injunctive relief to enforce their rights under a binding arbitration clause*." Id. at 5 (emphasis added).

[9] Rather than address the decisions cited by the MFG Parties directly interpreting the § 101(5) definition of "claim," the Bermuda Defendants instead cite generally to a pair of decisions that stand for the inapposite proposition that prevailing party attorneys' fees under 42 U.S.C. § 1988 are released in a settlement agreement only when expressly waived. (Adv. D.I. 64 at 8; Adv. D.I. 62 at 4, n. 5). See Parker v. Metro Water Reclamation Dist., 782 F. Supp. 387, 388 (N.D. Ill. 1992); Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1201 (10th Cir. 1998).

[10] The Bermuda Defendants further erroneously contend that even if the term "claim" were given its commonly understood meaning, there can still be no violation of the Bar Order because the Bermuda Defendants do not bring claims for "contribution, indemnity or comparative fault" – a position that plainly reads the words "*without limitation*" out of the operative provision of the Bar Order. Compare Bar Order (D.I. 2282), ¶ 7 (prohibiting Dissenting Insurers from "commencing, prosecuting, or asserting any claims, including, *without limitation*, claims for contribution, indemnity, or comparative fault (however denominated and on whatsoever theory), arising out of or related to the MF Global Actions . . . ."), with AWAC Opp. Br. at 6 (Adv. D.I. 62) ("Allied World has not violated the Bar Order because it has not . . . brought claims such as contribution, indemnity or comparative fault.").

The Bermuda Defendants' own motions to compel arbitration in this adversary proceeding belie their contention that construing the Bar Order to prohibit the commencement of *ex parte* foreign proceedings designed to obstruct this Court's ability to hear litigation properly before it would leave them unable to enforce their rights under the Policies' arbitration provisions. The parties agree that the Bermuda Defendants' motions to compel arbitration submitted to this Court do not violate the Bar Order, and the Bermuda Defendants have offered no explanation of why their pending motions are not sufficiently protective, or how the determination of arbitrability by this Court would be "unfair." In sum, neither fairness nor—more importantly—the actual definition of the term "claim" support the Bermuda Defendants, and thus the plain language of the Bar Order is violated by the commencement of the Bermuda proceedings.

B. The Bermuda Defendants Continue To Collaterally Attack The Reasonableness Of The MDL Settlement

The Bermuda Defendants' vague statements to the contrary cannot obscure their continued challenges to the "Reasonableness of Settlement" in violation of this Court's Bar Order. As defined in the MDL Settlement Agreement, and incorporated by reference in the Bar Order, "Reasonableness of Settlement" means:

> (a) the Settlement[11] is reasonable; (b) the amounts paid towards the Settlement and comprising Defendants' Financial Obligation are reasonable; and (c) the amounts paid under the D&O Funding Agreement, E&O Funding Agreement, and Federal Funding Agreement are reasonable and that, in addition to amounts previously paid, such amounts ***constitute proper, full, fair, and complete exhaustion with respect to those policies in accordance with, and pursuant to, their terms and conditions***. D.I. 2271-2 at 22 (emphasis added).

[11] "Settlement" is defined as "the settlement and related terms between the Parties as set forth in this Agreement and related agreements, including without limitation the Funding Agreements." D.I. 2271-2 at 31. Accordingly, "Settlement" as referenced in the "Reasonableness of Settlement" definition encompasses the MDL Settlement Agreement and all related agreements, including the assignment of rights to the MFG Plaintiffs made pursuant to the Assignment Agreement (D.I. 2271-2, Exhibit A).

Although claiming not to dispute the exhaustion of the underlying E&O policies contributing to the MDL Settlement Agreement or its "reasonableness,"[12] the Bermuda Defendants nevertheless expressly reserve their rights to assert *any* coverage defenses "available in law, equity, or under the terms of its Policy." AWAC Opp. Br. at 2 n. 3 (Adv. D.I. 62); Iron-Starr Opp. Br. at 4 n. 4 (Adv. D.I. 64). Thus, they attempt to preserve defenses that would unquestionably challenge *whether the contributing E&O Policies were "properly" and "fairly" exhausted "in accordance with, and pursuant to, their terms and conditions" (which the Dissenting E&O Policies themselves follow*), even though doing so directly violates the Bar Order.

Indeed, the very arguments raised by the Bermuda Defendants here are improper collateral attacks on the MDL Settlement. For example, the Bermuda Defendants grossly misstate that MFGH has no actionable right to pursue coverage under the Dissenting E&O Policies for the underlying Customer Claims at issue in this adversary proceeding:

> "While there have been numerous assignments of the Customers' and SIPA Trustee's interests in the Customer Claims, none of these claims have ever been assigned to, or owned by MFGH. Rather, the Customer Claims have been assigned and presently are all owned by MFGAA . . . . MFGH has no rights to pursue the Customer Claims owned by MFGAA." Iron-Starr Opp. Br. at 12 (Adv. D.I. 64).
>
> "MFGAA is now the only entity that is allegedly entitled to recover any proceeds available under the Allied World Policy. . . . *MFGH does not hold title to and is not pursing [sic] any right to and is not pursuing any recover [sic] proceeds under the Allied World Policy* . . . ." AWAC Opp. Br. at 5–6 (Adv. D.I. 62).

First, as detailed in the MFG Parties' Complaint, the Customer Claims for which insurance coverage is sought under the Dissenting E&O Policies include two distinct sets of claims asserted

[12] As detailed in their letter dated January 10, 2017, Joyce Aff., Exh. A, the MFG Parties have requested that the Bermuda Defendants clarify their representations made to this Court at the January 4, 2017 hearing that they "will not challenge the reasonableness of the Global settlement that was entered and approved by the bankruptcy court and district court," Joyce Aff., Exh. B., Jan. 4 Hr'g Tr. 65:5-12. The Bermuda Defendants have not responded, and if the Bermuda Defendants believed that any of the matters set forth in the MFG Parties' Jan. 10 Letter remain open despite the express language of the Bar Order, they should not be permitted to hide behind broad reservations of rights when the time to contest the MDL Settlement has come and gone.

by MF Global's commodity futures customers: (1) claims directly against MFGI and MFGH through customer proofs of claim[13]; and (2) claims against MF Global's former directors and officers, who are Individual Insureds under the Dissenting E&O Policies, in the MDL Customer Class Action. Complaint at ¶¶ 6–8 (Adv. D.I. 1). As part of the global resolution of these claims, the MDL Settlement Agreement preserved, in relevant part, MFGH's direct rights under the Dissenting E&O Policies for the Customer Claims asserted directly against MFGH. Graber Decl. at ¶ 7 n.14 (D.I. 2271-3) ("The Settlement also avoids any risks or costs associated with commencing litigation on account of the *Direct E&O claims held by MFGH* and MFGAA against the funding E&O Policies (although claims are preserved against any E&O Policies not contributed to the settlement, including the Identified Dissenters' Policies)."); see also D.I. 2271 at 3 n. 7.

Second, under the MDL Settlement Agreement and accompanying Assignment Agreement, the Individual Insureds also expressly assigned their rights under the Dissenting E&O Policies to all three "MFG Plaintiffs," defined within the Assignment Agreement as: (1) MFGAA, (2) MFGH as Plan Administrator *and* (3) the Litigation Trustee of the MF Global Litigation Trust. D.I. 2271-2, ¶ 1(c)(i-ii); D.I. 2271-2, Exhibit A. The MDL Settlement Agreement and Assignment Agreement further vest *each* of the "MFG Plaintiffs"—MFGAA, MFGH, and the Litigation Trustee of the MF Global Litigation Trust—with the right to prosecute the Individual Insureds' assigned claims under the Dissenting E&O Policies:

> *Each of the MFG Plaintiffs, as it deems advisable in its sole and absolute discretion, may prosecute, collect, settle, compromise and grant releases on any or all of the claims to enforce the Assigned Rights against any Dissenting Insurer.*

[13] The customer proof of claim filed against MFGH (referred to therein as "MF Holdings") asserted an unsecured claim against the MFGH estate in the amount of $1.6 billion based on MFGH's (i) alleged aiding and abetting of MFGI's alleged violations of segregation requirements under the Commodity Exchange Act ("CEA") and U.S. Commodities Futures Trading Commission ("CFTC") rules and regulations, and alleged breach of fiduciary duty, and (ii) alleged conversion of funds of MFGI's customers. (D.I, 1911, Exhibit A). MFGH was able to satisfy these claims by agreeing to the advance of MFGI estate funds that otherwise belonged to the Debtors as creditors of the MFGI estate, and thus asserted a direct claim for its losses under the E&O policies.

D.I. 2271-2, Exhibit A at ¶ 6; see also D.I. 2271-2 at ¶ 1(c)(ii) (providing that "the Insurance Assignees (*or any one of them* or their assignee) shall commence efforts to settle with or sue the Dissenting Insurers for all sums that the Insurance Assignees, in their sole and reasonable judgment, deem sufficient to satisfy Defendants' Financial Obligation.").[14]

Under the terms of the MDL Settlement Agreement and Assignment Agreement approved by this Court, MFGH, through this adversary proceeding, accordingly pursues both its own direct rights*, as well as the assigned rights of the Individual Insureds*, under the Dissenting E&O Policies. By arguing that MFGH holds no actionable rights to pursue coverage under the Dissenting E&O Policies, the Bermuda Defendants undeniably again collaterally attack the MDL Settlement's express terms in violation of the Bar Order. This attack further demonstrates that this Court should find that the Bar Order requires dismissal of the competing Bermuda proceedings and that this Court should retain jurisdiction over the issue of arbitrability, which will require careful interpretation and application of this Court's prior orders.

III. THE BERMUDA DEFENDANTS VIOLATED THE BARTON DOCTRINE

The MFG Parties' TRO brief established that the Bermuda Defendants willfully violated the Barton doctrine by obtaining the Injunctions and the Mandatory Injunction against the MFG Parties. The MFG Parties initiated this adversary proceeding to marshal and liquidate the assets of the estate. The adversary complaint (Adv. D.I. 1) provided notice to the Bermuda Defendants that the MFG Parties were acting in their official capacity. See TRO Brief at 12–13; Compl. ¶¶ 21–22 (Adv. D.I. 1). It is uncontested that (1) the Bermuda Defendants obtained injunctive relief that was directed at

[14] Per the terms of the Allocation Agreement between and among the MFG Plaintiffs, entered into after this Court's approval of the MDL Settlement Agreement, the consideration received by the MFG Plaintiffs under the MDL Settlement Agreement, including any proceeds recovered under the Dissenting E&O Policies, are to be divided 50/50 between the Litigation Trust Claims and the MFGI/Customer Claims on the other. D.I. 2322-1; see also D.I. 2291 at ¶ 4, n. 10 ("The Allocation Agreement applies to all consideration provided to the MFG Plaintiffs under the Settlement Agreement, *i.e.*, the proceeds that will be available as of the Effective Date as well as the assigned rights against the Dissenting Insurers . . . .").

MFGH, MFGAA, counsel to the MFG Parties, and the directors and officers of MFGH; (2) they did not seek leave of this Court before doing so; and (3) they were aware of the Barton doctrine. Finally, this action clearly falls within the scope of the Barton doctrine, suing estate representatives in proceedings which unquestionably are within the Bankruptcy Court's jurisdiction.[15]

At the outset, it should be noted that the Bermuda Defendants do not claim to have been unaware of the Barton doctrine.[16] Instead, the briefs of the Bermuda Defendants again try to challenge whether the Barton doctrine applies to the Adversary Proceeding by claiming incorrectly that MFGAA (i) is not protected by Barton, and (ii) is the only relevant party. Neither is true. Just as the Bermuda insurers were found to have violated the Barton doctrine by bringing anti-suit injunctions in Smith v. ACE Ins. Co. (In re BCE West, L.P.), 2006 U.S. Dist. LEXIS 62772 (D. Ariz. Aug. 31, 2006), this Court should find that the commencement of the Bermuda proceedings here (and certainly their continued prosecution after receiving the MFG Parties' November 21 letter

[15] The Barton doctrine "applies whenever the plaintiff's suit is 'related to' the bankruptcy proceeding using the 'conceivable effect' test." In re CDC Corp., 610 Fed. App'x 918, 922 (11th Cir. 2015) (citing Lawrence v. Goldberg, 573 F.3d 1265, 1269-70 (11th Cir. 1998)). Courts in the Second Circuit have also employed the "conceivable effect" test. Post Investors LLC v. Gribble, 2012 WL 4466619, at *3 (S.D.N.Y. Sept. 27, 2012) ("Litigation is 'related to' a bankruptcy proceeding 'if the action's outcome might have any conceivable effect on the bankrupt estate.'") (citing Parmalat Cap. Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2011)) (quoting In re Cuyahoga Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992)). The adversary proceeding clearly will have an effect on the bankruptcy estate because the determination of coverage will either expand or contract the size of the estate. As the Injunctions and the Mandatory Injunction both effect the "handling and administration of [the] bankruptcy estate" they "fall within the scope of the Barton doctrine because they are 'related to' [the] bankruptcy proceeding." Lawrence, 573 F.3d at 1271. Moreover, this proceeding to enforce the Bar Order entered, *inter alia*, to prevent collateral attacks on the extensively negotiated MDL Settlement, is clearly within this Court's core jurisdiction to interpret and enforce its own orders, as will be many other issues likely to be raised by the Bermuda Defendants in trying to circumvent the clear rights of (i) the Individual Insureds to have all E&O insurers contribute to the MDL Settlement, and (ii) the MFG Parties to have amounts paid to the Customers paid as "Loss" under the policies. Although these issues are for another day, there can be no question that these issues and the determination of arbitrability are within this Court's retained jurisdiction in supervising these liquidating estates. See D.I. 1288 at 42, ¶ 89; D.I. 1382 at 66–67; D.I. 2123 at 15; D.I. 2282 at ¶ 13; and SIPA D.I. 7208 at 4.

[16] The Drennen decision, which discusses Barton at some length, was cited in the Bermuda Defendants' November 8, 2016 Skeleton to the Bermuda Court. The Bermuda Defendants cited the Bermuda side of the Boston Chicken proceedings in their Bermuda briefing (discussed at length at the December 22, 2016 Bermuda hearing). Yet the Bermuda Insurers failed to bring to the Bermuda Court's attention the U.S. decisions that came after Chief Justice Kawaley's decision in Boston Chicken. Notably, Jones Day's November 21, 2016 letter, see Joyce Aff., Exh. C, made the Bermuda Defendants aware (if they had not been before) that, in Smith, the Bermuda insurers' conduct in seeking anti-suit injunctions had been found to be an unconscionable interference with the Bankruptcy Court's determination of the arbitrability issue, and to constitute a sanctionable violation of the Barton doctrine.

citing Smith and this Court's Order to Show Cause dated November 22, 2016), was in knowing violation of the Barton doctrine and set a separate hearing to determine appropriate damages.

First, the Bermuda Defendants cannot and do not dispute that this Court has already held that the Dissenting E&O Policies are property of the estate. In re MF Global Holdings Ltd., 469 B.R. 177, 190 (Bankr. S.D.N.Y. 2012); In re MF Global Holdings Ltd., 515 B.R. 193, 203-4, 207 (Bankr. S.D.N.Y. 2014); AWAC Opp. Br. 5 n.8 (Adv. D.I. 62). This dispute turns on this Court's interpretation of the Dissenting E&O Policies. As the bankruptcy court has *in rem* subject matter jurisdiction over the property of the estate, "allowing the unauthorized suit to proceed 'would [be] a usurpation of the powers and duties which belong[] exclusively to another court.'" In re Crown Vantage, Inc., 421 F.3d 963, 971 (quoting Barton v. Barbour, 104 U.S. 126, 127 (1881)).

Second, the replies submitted by the Bermuda Defendants ignore the provisions of the Plan and misstate the history of these chapter 11 proceedings. Utilizing its authority under the Plan,[17] MFGH as Plan Administrator created MFGAA to hold, *inter alia*, MFGI's rights against insurers and MFGI's rights (pursuant to the assignment and subrogation agreements with the Customer Class) to all recoveries from the Individual Insureds on account of the Net Equity Claims. See D.I. 2123 at 8 (order approving Sale and Assumption Agreement, requiring that the Dissenting E&O Policies "and their proceeds shall be allocated among the Chapter 11 Debtors by the Plan Administrator" in the same pro rata shares as "the amounts of their allowed claims in the MFGI Proceeding"). MFGAA is merely the vehicle created by MFGH under the Plan to hold the assets

[17] The Plan clearly provides that the Dissenting E&O Policies and proceeds are property of the estate and MFGAA was created pursuant to the Plan Administrator's authority under the Plan. "Property of the Estate" is defined in the Plan as "all property of a Debtor pursuant to § 541 of the Bankruptcy Code or otherwise, including . . . (v) receivables on account of Claims against another Debtor or claims against an Affiliate . . . (vii) any rights under any insurance policies relating to any of the foregoing, and (viii) the proceeds, products, rents, and/or profits of any of the foregoing." Plan, § 1.134 (D.I. 1382) (emphasis added). Likewise, the Plan empowers the Plan Administrator to either create liquidating trusts to hold the property of the estate, or to "issue New Securities." Id. § IV.C.xv. In turn, section XIII.G of the Plan provides that the Plan Administrator may "form and transfer certain assets of the Debtors to new . . . entities . . . to hold certain assets of the Debtors." Id. § XIII.G.

assigned by MFGI to satisfy the Debtors' allowed claims in the SIPA proceeding (*i.e.*, proceeds of claims, by definition are property of the estate under the plan.[18]

Third, the Sale and Assumption Agreement transferred all of MFGI's illiquid assets (the "Assigned Rights"), including its rights in the Dissenting E&O Policies, to MFGH or its designee in exchange for the forbearance of the MF Global entities' allowed claims against MFGI. D.I. 2114 § 1.1. MFGH as Plan Administrator retains the responsibility[19] under the Plan and the Sale and Assumption Agreement to marshal and liquidate estate assets for the benefit of the Debtors and thus for MFGAA, the special-purpose subsidiary created under the Plan to hold the assets assigned in satisfaction of the Debtors' claims against MFGI). As the three remaining Debtors are the only members of MFGAA, the Dissenting E&O Policies' proceeds will flow to them, and MFGH is responsible, as both the managing member of MFGAA and under the Sale and Assumption Agreement, for prosecuting the claims under the Dissenting E&O Policies. See Declaration of Erik Graber, dated July 24, 2015, D.I. 2115 at ¶ 5 ("Consistent with its duties under the Plan, the Plan

[18] This is precisely why the Lawrence decision is applicable here. Cf. Iron-Starr Opp. Br. at 10 (Adv. D.I. 64); AWAC Opp. Br. at 4 n.7 (Adv. D.I. 62). Lawrence holds that non-trustee entities, such as attorneys, investigators and creditors that assist the trustee are protected by the Barton doctrine. In Lawrence, the bankruptcy court had approved a financing arrangement by which certain creditors would advance funds necessary to recover property of the estate. Id. at 1270. The Eleventh Circuit held that "to the extent the creditors financed the Trustee's efforts to locate hidden assets on behalf of the estate, they likewise functioned as the equivalent of court appointed officers." Id. At the very least, MFGAA serves a similar role to the creditors protected by the Barton doctrine in Lawrence. MFGAA was created by the Plan Administrator to ensure that the Debtors would receive funds obtained from the rights assigned by MFGI in proportion to their respective claims against MFGI. Declaration of Erik Graber, dated July 24, 2015, at ¶ 5 (D.I. 2115). MFGAA exists in part to assist the Plan Administrator's efforts to efficiently recover and distribute the property of the estate in accordance with the terms of the Sale and Assumption Agreement.

[19] The Bermuda Defendants are also mistaken in their assertion that the assignment divested MFGH of its responsibilities under the Sale and Assumption Agreement. The Closing Sale and Assumption Agreement executed by MFGAA and the SIPA Trustee explicitly provided that "[t]he terms and provisions of the [Sale and Assumption] Agreement shall control the extent of the assignment, delegation, acceptance and assumption made pursuant to this Agreement. This Agreement is intended only to effect the assignment, delegation, acceptance and assumption of the Assigned Rights and Assumed Liabilities and Obligations, which shall be governed by the terms of the Agreement." D.I. 2129 at ¶ 2. The claim in Iron-Starr's brief (Iron-Starr Opp. Br. at 13 (Adv. D.I. 64)) that "the Closing Agreement made clear that the assignments were being made by the SIPA Trustee (on behalf of MFGI) directly to MFGAA" ignores the whole agreement. The assignment to MFGAA was predicated upon the provisions in the Sale and Assumption Agreement that required the Plan Administrator to be jointly and severally liable for all obligations under the agreement. See D.I. 2114 § 7 (conditioning the assignment to MFGAA on MFGH being "jointly and severally liable with such designee for all Liabilities and Obligations under this [Sale and Assumption] Agreement, the Closing Sale and Assumption Agreement and the Final Sale and Assumption Order.").

Administrator will administer the Assigned Rights for the benefit of the MFGH Entities as though the Assigned Rights were distributed among the MFGH Entities in the amounts that the MFGH Entities would otherwise receive from the MFGI estate . . . .").

Fourth, as part of the MDL Settlement Agreement, and as noted above, the Individual Insureds assigned to MFGAA, MFGH, and the Litigation Trustee[20] their rights in the Dissenting E&O Policies. D.I. 2271-2, Exhibit A. The Adversary Complaint noted this as well. Adv. D.I. 1 at ¶ 22 ("MFGH and MFGAA now hold the right to recover on the Individual Insureds' claims under the Dissenting E&O Policies."); id. at 1 n.3; id. at ¶ 14 n.8. As such, the assertion that the claims of the Individual Defendants "were assigned directly to MFGAA" (meaning *only* MFGAA) is flat wrong. Iron-Starr Opp. Br. at 15 (Adv. D.I. 64); AWAC Opp. Br. at 6 (Adv. D.I. 62). Indeed, the fact that MFGH was also assigned the claims is fatal to the Bermuda Defendants' arguments (and cannot now be challenged as somehow inappropriate without collaterally attacking the MDL Settlement, which is expressly prohibited by the Bar Order).

The fact that MFGH, MFGAA, and the Litigation Trustee were all assigned the Individual Insureds' rights against the Dissenting E&O Insurers renders the Barton doctrine applicable here. Smith v. ACE Ins. Co. (In re BCE West, L.P.), 2006 U.S. Dist. LEXIS 62772 (D. Ariz. Aug. 31, 2006). As in Smith, the Plan Administrator was assigned the rights of former directors and officers

[20] Contrary to statements made by the Bermuda Defendants, the Litigation Trust is an entity created pursuant to the Plan that is separate from the Plan Administrator with a distinct legal existence and separate fiduciary duties. See Iron-Starr Opp. Br. at 14 (Adv. D.I. 62) ("the claim being prosecuted by the Litigation Trustee, i.e., MFGH"). MFGH is not the Litigation Trustee, Nader Tavakoli is the Litigation Trustee. See Plan, Art. IX-2 (D.I. 1382) (establishing Litigation Trust). At this point, the Litigation Trustee has settled all claims against the Individual Insureds for the consideration provided in the MDL Settlement, which included the assignment of rights against the Dissenting Insurers. Any objections to this decision by the Individual Insureds and the MFG Parties to permit part of the Individual Insureds' consideration (defined as the Defendants' Financial Obligation in the MDL Settlement Agreement) to be satisfied by the irrevocable assignment of all of the Individual Insureds' rights against the Dissenting Insurers is exactly the kind of issue that was required to be raised, if ever, at the time of the MDL Settlement's approval. See D.I. 2271 (disclosing that Assignment was to all MFG Plaintiffs). As set forth in subsequent motions to allocate the settlement proceeds and to establish distribution protocols, now that the assets have all been marshaled in the MDL Settlement (except, of course, for any proceeds of actions against the Dissenting Insurers), MFGH takes the lead in acting for all MFG Parties, including recovering the Litigation Trustee's share of any recoveries obtained by virtue of the Assignment of rights against the Dissenting Insurers by the Individual Insureds.

against a Bermudan insurance company, and is pursuing those claims against the insurer in an adversary proceeding. Smith at *3; AWAC Opp. Br. at 6 n.13 (Adv. D.I. 62). Indeed, AWAC's Reply concedes that the trustee in Smith was "sued in its official capacity in the Bermuda action." AWAC Opp. Br. at 6 n.13 (Adv. D.I. 62). Accordingly, the Bermuda Defendants have clearly violated the Barton doctrine as to the rights assigned by the Individual Insureds.

As established in the MFG Parties' TRO Brief and by the ruling in Smith, a party that violates the Barton doctrine may be sanctioned. TRO Br. at 23. The Bermuda Defendants cite no case law for the proposition that a contempt finding is necessary before a Court may award damages for a Barton violation. Many courts have simply ordered a hearing on damages after finding a Barton violation. In re DeLorean Motor Co., 991 F.2d 1236, 1242 (6th Cir. 1993); In re National Century Financial Enterprises, Inc., 426 B.R. 282, 295 (Bankr. S.D. Ohio 2010) (concluding that the aggrieved party was entitled to a hearing on the issue of damages resulting from violation of Barton); In re Biebel, 2009 WL 1451637, at *6 (Bankr. D. Conn. May 20, 2009) (enjoining action commenced in violation of Barton and setting date for hearing on monetary sanctions); In re Byrd, 2007 WL 1485441, at *12 (Bankr. D. Md. May 18, 2007) (same). That is because the Barton doctrine operates as a stay designed to protect the bankruptcy court's jurisdiction over the estate and the trustee from inappropriate litigation.

Indeed, as noted by the Sixth Circuit, when Barton has been violated "the general rule regarding stays governs, and [the defendant] may be held in contempt of the stay." DeLorean, 991 F.2d at 1241 (citing In re Baptist Med. Ctr., 80 B.R. 637, 643 (Bankr. E.D.N.Y. 1987)). The DeLorean court awarded the trustee an opportunity to prove its claims for costs and damages ***without*** finding that the defendant was in contempt. Id. at 1242. A violation of a stay may be found when a party "takes a deliberate act . . . in violation of a stay, which the violator knows to be in existence . . . such an act need not be performed with specific intent to violate the stay." In re Salov,

510 B.R. 720, 733-34 (Bankr. S.D.N.Y. 2014) (quoting Sucre v. MIC Leasing Corp. (In re Sucre), 226 B.R. 340, 349 (Bankr. S.D.N.Y. 1998)).

Neither of the Bermuda Defendants claim that they were unaware of the Barton doctrine, and their sanction defenses are predicated on them misunderstanding whether the Barton doctrine applies. Nor do they contest that the Adversary Complaint clearly identified MFGH to be acting as Plan Administrator, or that MFGAA held rights against them on account of the Debtors. TRO Br. at 12–13. The Injunctions and the Mandatory Injunctions were all obtained without the consent of this Court, and the Bermuda Defendants refused to dismiss the Bermuda proceedings for months after having the applicability of Barton (and the Bar Order) brought to their attention. As such, the Bermuda Defendants have clearly willfully violated the Barton doctrine and the MFG Parties are entitled to an award of all actual costs and fees expended in contesting the Bermuda proceedings. In light of the Bermuda Defendants' ongoing conduct the final dollar amount remains to be determined; thus far, the MFG Parties have already incurred in excess of $500,000 in fees attributable directly to the prosecution of the anti-suit injunction proceedings.

CONCLUSION

The MFG Parties respectfully request that the Court enter an order directing the Bermuda Defendants to dismiss the Bermuda proceedings with prejudice, permanently enjoining the Bermuda Defendants from further pursuing the Bermuda proceedings, imposing monetary sanctions on the Bermuda Defendants in an amount to be determined by the Court, but in no event less than the actual costs and fees incurred by the MFG Parties in connection with the Bermuda proceedings, and declining consideration of the Bermuda Defendants' motions to compel arbitration and motions to dismiss for lack of subject matter jurisdiction until the Bermuda Defendants post a $60 million bond in escrow.

Dated: January 18, 2017
New York, New York

Respectfully submitted,

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