D'AMATO & LYNCH, LLP
Mary Jo Barry
Maryann Taylor
Two World Financial Center
225 Liberty Street
New York, New York 10281
(212) 269-0927

Attorneys for Defendants Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MF GLOBAL HOLDINGS LTD, et al., Debtors.	Case No. 11-15059 (MG) Chapter 11 Jointly Administered
MF GLOBAL HOLDINGS LTD., as Plan Administrator; and MF GLOBAL ASSIGNED ASSETS LLC, Plaintiffs, v. ALLIED WORLD ASSURANCE COMPANY LTD., et al., Defendants.	Adv. Case No. 16-01251 (MG) Related: S.D.N.Y. Civ. Action Nos. 1:17-cv-00106-RWS 1:17-cv-00113-RWS 1:17-cv-00742-UA 1:17-cv-00780-UA

NOTICE OF APPEAL

Defendants Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited (collectively "the Iron-Starr Insurers") appeal under 28 U.S.C. § 158(a)(1) and Federal Rule of Bankruptcy Procedure 8003 from the following orders and opinions: (1) the oral ruling of the United States Bankruptcy Court for the Southern District of New York (Hon. M. Glenn) (the "Bankruptcy Court") on January 23, 2017, finding that the Iron-

Starr Insurers violated the Barton doctrine and ordering the relief that the Iron-Starr Insurers dismiss "the Bermuda proceedings against the plaintiffs and to cease any further proceedings against the plaintiffs in any Court other than this Court" (Jan. 23, 2017 Hr'g Tr. 114:12-17) (attached hereto as Exhibit A); (2) the Bankruptcy Court's January 23, 2017 written Order Finding that the Bermuda Insurers Violated the Barton Doctrine and Ordering Relief (attached hereto as Exhibit B); and (3) the Bankruptcy Court's January 31, 2017 Memorandum Opinion and Order Finding that the Bermuda Insurers Violated the Barton Doctrine (attached hereto as Exhibit C).

The names of all parties to the Order Finding that the Bermuda Insurers Violated the Barton Doctrine and Ordering Relief and the Memorandum Opinion and Order Finding that the Bermuda Insurers Violated the Barton Doctrine appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

JONES DAY
Counsel for Plaintiffs, MF Global Holdings Ltd., As Plan Administrator, and MF Global Assigned Assets LLC
555 South Flower Street, 50th Floor
Los Angeles, CA 90071
Tel: (213) 243-2533
By: Bruce S. Bennett

JONES DAY
Counsel for Plaintiffs, MF Global Holdings Ltd., As Plan Administrator, and MF Global Assigned Assets LLC
250 Vesey Street
New York, New York 10281
(212) 326-3939
By: Jane Rue Wittstein
Edward Michael Joyce
Craig Hirsch
David William Steuber
James Matthew Gross

Jason B. Lissy

WHITE & WILLIAMS, LLP
Counsel for Defendant Allied World Assurance Co., Ltd.
7 Times Square, 29th Floor
New York, New York 10036
(212) 868-4837
By: Erica Kerstein
Steven E. Ostrow

CRAVATH, SV/AINE & MOORE LLI
Co-Counsel for Defendant Allied World Assurance Co., Ltd.
World Wide Plaza
829 Eight Avenue
New York, New York 10019
(212) 474-1000
By: Daniel Slifkin
Omid Nasab

HOGAN LOVELLS US LLP
Counsel for Defendant Federal Insurance Co.
1835 Market Street, 29th Floor
Philadelphia, Pennsylvania 19103
(267) 675-4600
By: Jessica Klarfeld Jacobs

HOGAN LOVELLS US LLP
Counsel for Defendant Federal Insurance Co.
875 Third Avenue
New York, New York 10022
(212) 918-3000
By: DeNae M. Thomas
Pieter Van Tol

Dated: New York, New York
February 6, 2017

D'AMATO & LYNCH, LLP

By: /s/ Maryann Taylor
Mary Jo Barry
Maryann Taylor
Two World Financial Center
225 Liberty Street
New York, New York 10281
(212) 269-0927

Attorneys for Defendants Iron-Starr Excess
Agency Ltd., Ironshore Insurance Ltd.,
and Starr Insurance & Reinsurance Limited

CERTIFICATE OF SERVICE

I, Maryann Taylor, do herby certify that on February 6, 2017, I caused a true and correct copy of the foregoing Notice of Appeal on behalf of Defendants Iron-Starr Excess Agency, Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited to be filed with the Court using the Electronic Filing System and served upon all counsel of record registered with the Court's ECF system.

/s/
Maryann Taylor

EXHIBIT A

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In re:	)	
	)	
4 MF GLOBAL HOLDINGS, LTD., et al.,	)	
	)	Chapter 11
5 Debtors,	)	
	)	
6 MF GLOBAL HOLDINGS, LTD., as Plan Administrator, and MF GLOBAL	)	
7 ASSIGNED ASSETS, LLC	)	
	)	
8 Plaintiffs,	)	
	)	
9 -vs-	)	Case No.
	)	11-15059 (MG)
10 ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY	)	
11 LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE	)	(Jointly Administered)
12 LIMITED., and FEDERAL INSURANCE COMPANY,	)	
13	)	Adv. Proc. No.
Defendants.	)	16-01251 (MG)

14
15 ADVERSARY PROCEEDING No. 16-01251
16
17 New York, New York
18 Monday, January 23, 2017
19
20
21
22
23 Reported by:
24 JESSICA WAACK, RDR, CRR, CCRR, CCR-NJ, NYACR, NYRCR
25 JOB NO. 118493

Monday, January 23, 2017
10:19 a.m.

The following adversary proceeding was held before the Honorable Martin Glenn, United States Bankruptcy Court, One Bowling Green, Courtroom 523, New York, New York, before Jessica R. Waack, Registered Professional Reporter, Registered Merit Reporter, Registered Diplomate Reporter, Certified Realtime Reporter, California Certified Realtime Reporter, Certified Court Reporter in New Jersey, New York Association Certified Reporter, New York Realtime Court Reporter and Notary Public of the State of New York.

APPEARANCES

FOR MF GLOBAL HOLDINGS LTD.:
JONES DAY
BY: EDWARD JOYCE, ESQ.
BY: BRUCE BENNETT, ESQ.
BY: JANE RUE WITTSTEIN, ESQ.
250 Vesey Street
New York, New York 10281

FOR ALLIED WORLD ASSURANCE COMPANY:
WHITE AND WILLIAMS
BY: STEVEN OSTROW, ESQ.
BY: ERICA KERSTEIN, ESQ.
250 West 34th Street
New York, New York 10119

///

APPEARANCES CONT'D

FOR ALLIED WORLD ASSURANCE COMPANY:
CRAVATH, SWAINE & MOORE
BY: DANIEL SLIFKIN, ESQ.
825 Eighth Avenue
New York, New York 10019

FOR IRON-STARR EXCESS AGENCY LTD.:
D'AMATO & LYNCH
BY: MARYANN TAYLOR, ESQ.
Two World Financial Center
New York, New York 10281

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INDEX TO PROCEEDINGS

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1 ADVERSARY PROCEEDING NO. 16-01251
2 January 23, 2017 10:19 a.m.
3 THE COURT: All right. We're
4 here in MF Global. The main case
5 number is 11-15059, and adversarial
6 proceeding No. 16-01251.
7 Before we begin, let me very
8 briefly address the issues raised by
9 the plaintiffs' emergency motion that
10 they sought to file last week.
11 There was a briefing with
12 respect to that, that was entered
13 with the Court, and I was out of town
14 last week. But the order by the
15 Court said it would be addressed
16 today.
17 And with respect to that
18 motion, that motion is denied. From
19 the review of all of the materials
20 related to the action taken by the
21 Bermuda insurers after the
22 preliminary injunction was entered, I
23 do not find that they acted contrary
24 to the preliminary injunction.
25 So I don't want to hear

1 ADVERSARY PROCEEDING NO. 16-01251
2 anything about that issue today.
3 What I want to proceed to hear
4 first from Plaintiffs' counsel is
5 with respect to the Bar Order and the
6 Barton doctrine.
7 And then I'll hear -- I read
8 the briefs filed by both sides and
9 the reply filed by the plaintiffs,
10 and that's what I want to focus on in
11 this hearing.
12 Mr. Bennett.
13 MR. BENNETT: Thank you, Your
14 Honor. And I think one of the points
15 that I'm sure Your Honor realizes is
16 that that whole action including the
17 relief just sought violates, in our
18 view, the Bar Order and the Barton
19 doctrine.
20 THE COURT: Well, just to be
21 clear, I think if you review what's
22 happened so far, the TRO that the
23 Court entered, the preliminary
24 injunction that the Court entered,
25 until the Bermuda court vacated the

1 ADVERSARY PROCEEDING NO. 16-01251
2 November 8 order and the December 22
3 orders, this Court wasn't -- you
4 weren't permitted and this Court was
5 not able to address the issues of
6 whether the Bar Order and the Barton
7 doctrine applied so as to preclude
8 the filing of the Bermuda actions.
9 And what I think should have
10 been clear from both the TRO and the
11 preliminary injunction, I think in
12 the preliminary injunction opinion I
13 referred to the effect of the
14 November 8 orders and the December 22
15 orders as an intolerable interference
16 with this Court's ability to
17 adjudicate the issue before it.
18 That's now been stripped away.
19 When I set the briefing schedule for
20 today's hearing, it was -- we put on
21 the agenda for today that -- the
22 issue of the Barton doctrine and the
23 Bar Order, and that's what I am going
24 to go and do.
25 And, certainly, I think from

1 ADVERSARY PROCEEDING NO. 16-01251
2 the prior opinions, if I conclude
3 that the filing of the Bermuda
4 actions were prohibited by either the
5 Bar Order or the Barton doctrine or
6 both, there are consequences that
7 flow from it.
8 One of the issues is -- and you
9 can address that -- if I, for
10 example, decide that the Barton
11 doctrine was violated, is the
12 appropriate remedy in order that the
13 Bermuda actions be dismissed?
14 Okay. Go ahead.
15 MR. BENNETT: We'd also take
16 the money.
17 THE COURT: I'm sorry?
18 MR. BENNETT: We'd also take a
19 judgement for the money, one way or
20 the other.
21 THE COURT: I'm sure you would.
22 And I guess the other thing --
23 let me -- I'll put that out right
24 now. I also entered a contempt
25 opinion.

1 ADVERSARY PROCEEDING NO. 16-01251
2 And it is not my intention or
3 plan to address today what, if any,
4 relief -- additional relief -- part
5 of the relief in the contempt was get
6 those orders vacated. Well, they
7 were.
8 But I -- I think I made clear
9 that there could be additional
10 monetary relief that's available.
11 I'm not going to address that today.
12 I want to make that -- so
13 everybody -- if you were planning to
14 address that, don't. There will be a
15 time to do that, Mr. Bennett.
16 MR. BENNETT: Okay. Thank you
17 very much, Your Honor. As Your Honor
18 noted, there is actually briefing on
19 the issues that are before you today.
20 And I'm going to rely heavily
21 on our response papers and try very
22 hard not to repeat them, because I
23 know Your Honor does read the papers
24 before the hearing.
25 I do want to point out some

1 ADVERSARY PROCEEDING NO. 16-01251
2 things kind of around the edges, and
3 that's how I'll use my opening
4 argument. And I'll deal with other
5 issues, I suppose, on reply.
6 First of all, I just want to
7 start with the -- to make sure that
8 everyone realizes that there's no
9 longer any doubt that Allied knew
10 about both the Bar Order and the
11 Barton doctrine before they went off
12 into Bermuda.
13 The declaration of Kerstein
14 said Allied World -- excuse me. This
15 is from the brief. The brief that
16 they filed that we responded to says
17 Allied World reasonably interpreted
18 the Bar Order and the Barton doctrine
19 not to preclude its Bermuda
20 arbitration or ASI proceedings.
21 They've just said in language
22 that is not ambiguous.
23 THE COURT: You just disagree
24 with the "reasonably" part?
25 MR. BENNETT: Your Honor, yes,

1 ADVERSARY PROCEEDING NO. 16-01251
2 of course I do.
3 This I'm just talking for the
4 moment about the very clear notice
5 points.
6 Also, in the Kerstein
7 affidavit, it is now admitted, we've
8 said this all along, that they
9 received a -- their first copy of the
10 Bar Order that include the relevant
11 provisions -- on May 3, 2016. And
12 that same declaration as well as this
13 Court's docket reveals that the Bar
14 Order was entered on August 10, 2016.
15 That's more than 90 days.
16 So we're not dealing with the
17 kinds of notice we've been seeing in
18 Bermuda. This was something that was
19 a 90-plus days, all kinds of
20 opportunities to be heard.
21 As to the Bar Order itself, I
22 don't need to repeat what I'm going
23 to repeat. The words aren't
24 ambiguous. There's been several
25 efforts to quote them selectively.

1 ADVERSARY PROCEEDING NO. 16-01251
2 There's been efforts to talk
3 about, well, you should really inform
4 them by a different purpose,
5 that "including but not limited" is
6 really limited.
7 I think we deal with all of
8 that in our brief. And, by the way,
9 it was remarkable the Allied brief
10 doesn't even quote the words. They
11 just start talking about all the
12 different other ways to interpret it.
13 We think it is crystal clear.
14 Where there seems to be more of a
15 fight is whether or not the Bermuda
16 action constituted the assertion of a
17 claim.
18 But I think, frankly, if you
19 break down the logic of the argument,
20 this is one that is very easy to
21 dispose of too.
22 So let's take the first
23 argument, which is if the bankruptcy
24 code definition of a claim doesn't
25 apply, all right? which is -- which

1 ADVERSARY PROCEEDING NO. 16-01251
2 is our point, but I'm going to show
3 you in a minute they don't really
4 care, then the more ordinary
5 dictionary definition of a claim does
6 apply. And even the request for the
7 order constitutes a claim.
8 In addition, we believe that
9 the demands for indemnity costs would
10 apply even in the context when you're
11 talking about the general meaning of
12 the word "claim."
13 They, of course, point to some
14 very specialized cases that point to
15 releases, which I don't think define
16 the general understanding of that
17 word.
18 Let's take their view of the
19 world. Their view of the world would
20 be Iron-Starr and Allied view is a
21 claim as defined using the bankruptcy
22 code definition.
23 Well, if you use the bankruptcy
24 definition, then it's crystal clear
25 from bankruptcy cases that the word

1 ADVERSARY PROCEEDING NO. 16-01251
2 "claim" does include the request for
3 indemnity costs. Indemnity costs, by
4 the way, were already incurred. They
5 already prepared all of the papers,
6 the initial summons and all of the
7 papers seeking ex parte relief.
8 So they already had money that
9 they were seeking at the very
10 beginning. And the cases that they
11 appealed to for the idea that the
12 word "claim" in an ordinary meaning
13 in the context of releases does not
14 include attorneys' fees clearly
15 doesn't apply. The bankruptcy code
16 definition clearly encompasses
17 attorneys' fees, and we cited cases.
18 So this whole idea that the
19 Bermuda action was somehow not the
20 assertion of a claim and was somehow
21 purely defensive just doesn't work,
22 whichever logical path you choose for
23 defining the word "claim" as used by
24 the court in the Bar Order.
25 Your Honor, this is kind of a

1 ADVERSARY PROCEEDING NO. 16-01251
2 side point, but we also point out
3 that -- we pointed out last time and
4 Your Honor elicited some useful
5 agreements from the other side
6 concerning that no one's trying to
7 undermine the settlement, but
8 everyone danced around another
9 provision of the settlement agreement
10 that we also think is crucial, and
11 that is the fact that the -- all of
12 the policy issuers ahead of Allied in
13 the stack also agreed and the Court
14 determined that the claims were
15 covered, the claims that they were
16 paying were covered claims.
17 That was actually a
18 determination that the insurers
19 wanted as much as the plaintiffs
20 wanted in the MDL litigation. And,
21 of course, in the papers that you
22 saw, there is a refusal to concede
23 that that part of -- that part of the
24 settlement approval is going to be
25 binding for all purposes going

1 ADVERSARY PROCEEDING NO. 16-01251
2 forward.
3 Okay. So that's all I really
4 want to say for the time being about
5 the Bar Order. I think the Bar Order
6 is perfectly clear that it covers
7 claims; that it's not informed or
8 limited by any other provisions; and
9 it makes a lot of sense, of course,
10 because it also parallels the Barton
11 doctrine.
12 So in the Barton doctrine, we
13 have a whole bunch of other arguments
14 that are advanced.
15 First of all, there's this
16 general contention that the Bermuda
17 proceedings do not interfere with
18 creditor's claims or the
19 administration of the estate, and
20 this, of course, slightly misstates
21 the test.
22 We believe that the Barton
23 doctrine is supposed to apply
24 whenever the plaintiff suit is
25 related to the bankruptcy proceeding

1 ADVERSARY PROCEEDING NO. 16-01251
2 using the conceivable effects test.
3 And we've noted that, cited to a
4 number of cases in other circuits.
5 Since we filed the papers, I
6 noticed that another case that's
7 cited in the papers -- and this is
8 the Lehal Realty Associates case.
9 It's a Second Circuit case.
10 It's about mostly something
11 else, but if you take a look at the
12 opinion at page 277, it too applies,
13 the conceivable effects test, in
14 determining the scope of the Barton
15 doctrine.
16 And in that case, there were --
17 THE COURT: What's the cite
18 again?
19 MR. BENNETT: It's at 277 --
20 hold on one second.
21 The actual -- let me get back
22 to the microphone. The actual cite
23 is 101 Fed 3rd 272, and the jump is
24 277.
25 THE COURT: Okay.

1 ADVERSARY PROCEEDING NO. 16-01251
2 MR. BENNETT: Okay. So with
3 that general background, which I
4 think informs everything that
5 follows, there are, in fact, claims
6 that are asserted that are owned by
7 MFGH; the one entity that everyone
8 concedes is a Court-appointed actor.
9 Because, of course, MFGH is the
10 plan administrator for the purpose of
11 conducting the entire wind-down
12 process that was contemplated and,
13 frankly, dictated by Plaintiff
14 reorganization.
15 So, first of all, I don't know
16 if Your Honor remembers, but MFGH
17 also submitted its own claim against
18 the insurers for its losses as
19 evidenced by, among other things, the
20 massive customer claims that were
21 filed against MFGH.
22 And if Your Honor will
23 remember, the insurers never
24 responded. They never said, "We're
25 going to accept that claim" or "we're

1 ADVERSARY PROCEEDING NO. 16-01251
2 not going to accept that claim," and
3 there was some discussion about when
4 that litigation would get started.
5 Well, if you take a look at the
6 complaint in this case from
7 paragraph 6 to 8, those claims are
8 involved too.
9 So they were asserted through a
10 demand of coverage they never
11 accepted or rejected.
12 And, by the way, there was no
13 statement anywhere in the record,
14 because it wouldn't have been true,
15 that MFGH ever disclaimed E&O
16 coverage for these claims.
17 They disclaimed E&O coverage
18 for claims being asserted against the
19 officers. And the language quoted by
20 Allied relates only to the claims
21 asserted in litigation against the
22 individuals.
23 So that's one. Hold that
24 thought.
25 Secondly, the settlement

1 ADVERSARY PROCEEDING NO. 16-01251
2 agreement, which was the actual
3 agreement that assigned the claims
4 from the officers, assigned them to
5 MFGH as plan administrator, MFGAA and
6 the litigation trustee.
7 The settlement agreement, of
8 course, post-dates the agreement
9 pursuant to which the MFGI trustee
10 and MFGH settled the claims of MFGH
11 and its affiliates, again, MFGI by
12 transferring the litigation and other
13 assets.
14 So when people wrote the
15 settlement agreement, they wanted to
16 figure out who could sue on the
17 claims. They put them in all three
18 places for purposes of enforcement.
19 And third point in terms of
20 what's at MFGH, the acknowledge --
21 the acknowledged Court-appointed
22 officer, this Court, of course,
23 determined that the policies
24 themselves are property estate.
25 Now, let's take the next step,

1 ADVERSARY PROCEEDING NO. 16-01251
2 though. Whoever holds them, the MFGI
3 claim and the claims against the
4 officers, are property of the estate,
5 because they are proceeds of property
6 from the estate.
7 This is not a case where a
8 trustee, getting a whole bunch of
9 assets, decides to go out and invest
10 in a new business and then say, "That
11 new business is all of a sudden going
12 to be protected by the Barton
13 doctrine subject to only the 959."
14 This, as everybody that has
15 been in this case for any period of
16 time knows, the entire MFGH complex,
17 so it's MFGH and the affiliates that
18 were not in the SIPA case, many of
19 them were in the Chapter 11 cases
20 here, had claims against MFGI. They
21 turned out to be MFGI's largest
22 creditors.
23 And the only reason why MFGH
24 has the property that it is enforcing
25 in the cases today is because they

1 ADVERSARY PROCEEDING NO. 16-01251
2 got them on a distribution of the
3 claim that they had against the SIPA
4 estate. That's it.
5 And so, again, going back to
6 the conceivable effects test which
7 applies, the fact that they are even
8 arguably MFGAA, they're still there
9 for the benefit of creditors, it
10 should make no difference.
11 But the plan itself covers the
12 idea that property of the estate
13 includes all of the proceeds. There
14 is a footnote, I believe it is 17 of
15 the brief, where we take Your Honor
16 through the language and give Your
17 Honor all the appropriate references.
18 By the way, this too was no
19 mystery to Allied or by -- I don't
20 think either to Iron-Starr.
21 If you take a look at the
22 affidavit of Erica J. Kerstein --
23 again, I don't think I gave you the
24 reference, Document 63,
25 paragraph 6 -- shows knowledge of the

1 ADVERSARY PROCEEDING NO. 16-01251
2 assignment; exactly why it is that
3 MFGAA, if it is only MFGAA, has the
4 claims against -- against the
5 officers and the rights to the
6 insurance.
7 So, for these reasons, MFGAA is
8 within the protection of the Barton
9 doctrine.
10 What does the law say about
11 this? You know, we demonstrated in
12 our case, in our papers that the
13 cases are not confined to
14 Court-appointed officers. The
15 protection of the Barton doctrine
16 extends further. I would commend to
17 Your Honor to read two of the cases.
18 And I think one is the Weitzman
19 case and Delorean. And Your Honor
20 was talking about how in your past
21 you represented -- it involved the
22 Boston Chicken; Herman Glad
23 represented Mr. Delorean years ago.
24 But, in any event, that case
25 shows very clearly the intent of the

1 ADVERSARY PROCEEDING NO. 16-01251
2 Barton doctrine as interpreted by --
3 I think it was the Ninth Circuit --
4 that it is going to extend to all
5 things --
6 THE COURT: I think Delorean is
7 actually a Sixth Circuit case.
8 MR. BENNETT: I'm sorry, that
9 was the other. Right.
10 And then the Lawrence case is
11 the second case I would commend to
12 Your Honor. The Lawrence case --
13 Lawrence vs. Goldberg, I think, has
14 very extreme facts, of course.
15 But there the protection of the
16 Barton doctrine was extended to a
17 group of creditors who had financed
18 the trustee's efforts.
19 So if the creditors who had
20 financed the trustees' efforts was
21 viewed as an instrumentality toward
22 achieving the result of a greater
23 distribution for creditors, that's a
24 lot like the function that MFGAA
25 forms; it is a vehicle in order to

1 ADVERSARY PROCEEDING NO. 16-01251
2 maximize the valuing for creditors of
3 the main case. There really is no
4 difference.
5 So there is a general theme,
6 and, frankly, it's the only way the
7 Barton doctrine is going to work;
8 that indirect claims that affect
9 Court-appointed officers are within
10 the doctrine. They have to be.
11 Otherwise creative people are just
12 going to find other ways.
13 Now, we have to ask ourselves a
14 question. When they commenced the
15 review to action, did the Bermuda
16 insurers fully understand that their
17 action was effectively directed at
18 MFGH?
19 Again, clearly a
20 Court-appointed officer, no matter
21 how one looks at it, of course they
22 did. The entities sued in Bermuda
23 were MFGAA and MFGH from the very
24 beginning.
25 And if that were not enough,

1 ADVERSARY PROCEEDING NO. 16-01251
2 the forms of the injunction submitted
3 to the Court every time -- I'm just
4 quoting the first one. I didn't
5 check the second set, so I could be
6 wrong about the second set -- they
7 were directed to MFGH and MFGAA,
8 quote, whether by themselves or
9 through their employees, servants,
10 agents, representatives, attorneys or
11 otherwise.
12 So what was this? This was a
13 broad attack on the ability to
14 recover value for the benefit of
15 creditors of the MFGH estate. It was
16 known to be that. There isn't any
17 confusion on the point.
18 So now we get to the issue of
19 sanctions. And here, Your Honor, I
20 think we have to split it between two
21 different standards, because two
22 different standards apply for
23 violating the Barton doctrine versus
24 for violating the Bar Order.
25 And what we say, again, in our

1 ADVERSARY PROCEEDING NO. 16-01251
2 reply papers, I'm not going to repeat
3 this part, that when you violate the
4 Barton doctrine, it's just like
5 violating the automatic stay.
6 We don't have a special showing
7 of the clearness of the Barton
8 doctrine that is required or
9 willfulness, for that matter.
10 Right at the beginning of my
11 remarks, it was pretty important.
12 But here is where it starts to have
13 real bite. We demonstrated that
14 Allied admits knowing about the
15 Barton doctrine.
16 And this fact was also
17 demonstrated as to Iron-Starr as well
18 as AWAC by the fact that -- by they
19 cited and discussed the Drennan case
20 as part of the initial application
21 for ex parte suit relief -- ex parte
22 antisuit relief in Bermuda.
23 Right up front. Talked about
24 that case. There were parts of it
25 that they liked. But you could not

1 ADVERSARY PROCEEDING NO. 16-01251
2 read the Drennan case without finding
3 the Barton doctrine. As I just
4 indicated, we've shown it was
5 violated.
6 If knowing and willfulness were
7 required, and it is not, the fact
8 that MFGH, which everyone agrees is a
9 Court-appointed officer, and its
10 employees, servants, agents,
11 representatives, attorneys or
12 otherwise were targets of the
13 antisuit injunction demonstrates
14 willfulness. There was no
15 interpretive issues with respect to
16 MFGH.
17 Contempt for violation of the
18 Bar Order. I know we disagree with
19 Your Honor about the clearness and
20 ambiguousness of the order.
21 Frankly, as time went on, the
22 excuse that it wasn't -- that the
23 language wasn't clear rings hollower
24 and hollower. And now, of course,
25 I'm focussing on the new relief

1 ADVERSARY PROCEEDING NO. 16-01251
2 sought on the 17th; first in the form
3 of a letter, and then I guess in a
4 skeleton that was filed on the 19th
5 of January, last week.
6 So, frankly, we've now focused
7 on the language over and over again.
8 By the way they deal with the
9 language, they're admitting that the
10 language is clear and unambiguous.
11 They won't confront the language.
12 I think that we've gotten over
13 that hump with respect to the Bar
14 Order at least with respect to later
15 activities.
16 And willful, as I pointed out
17 before, they had really -- really the
18 same point; that there's been ample
19 notice of it. There's been ample
20 notice of the MFGH parties' position
21 with respect to it.
22 And so we believe that to
23 requirements for a contempt sanction,
24 even if elevated in the context of
25 the Bar Order versus the Barton

1 ADVERSARY PROCEEDING NO. 16-01251
2 doctrine, are certainly met here.
3 THE COURT: Let me ask you
4 this: Do you believe that you would
5 be entitled to a greater amount --
6 we're talking about monetary
7 relief -- a greater amount of
8 recovery for violation of the Bar
9 Order than you would be for violation
10 of the Barton doctrine?
11 MR. BENNETT: No, Your Honor.
12 THE COURT: So if the Court,
13 for example, reached the Barton
14 doctrine, found that it was violated,
15 it would be unnecessary to go on and
16 address whether the Bar Order was
17 violated?
18 Because whatever relief -- I'm
19 going to put aside the contempt from
20 the preliminary injunction. But
21 whatever relief you would be entitled
22 to on your theory under -- for
23 violation of the Barton doctrine
24 would cover anything that you might
25 also seek to recover for the Bar

1 ADVERSARY PROCEEDING NO. 16-01251
2 Order?
3 MR. BENNETT: Your Honor, I
4 suppose that's right. And putting
5 aside my personal desire to win on
6 all points as opposed to just a
7 few -- this may go on appeal -- if
8 there are multiple alternative
9 grounds to get to the same place, I
10 think Your Honor should find all of
11 them --
12 THE COURT: Okay.
13 MR. BENNETT: -- as to the
14 relief. I intimated my position on
15 this before.
16 I mean, clearly we believe that
17 everything about the action in
18 Bermuda is inappropriate; that it
19 should be dismissed; it should be
20 dismissed with prejudice; it should
21 never come back again.
22 And that will lessen the
23 damages that we -- that we have
24 suffered. I don't know that we can
25 really expect that that will happen.

1 ADVERSARY PROCEEDING NO. 16-01251
2 It seems we have a little bit
3 of a Whac-A-Mole problem here in that
4 every single time Your Honor enters
5 an order or something is done, that
6 at least violates the spirit if not
7 the letter of it.
8 So a complete relief can be
9 found in compelling the Iron-Starr
10 and which -- it may be Iron-Starr
11 except for their reservation of
12 rights, which is a continuing
13 problem. I don't quite understand
14 what it means.
15 But certainly Allied hasn't
16 fully eliminated that lawsuit, and
17 that lawsuit should be completely
18 eliminated.
19 And our damages are every penny
20 of fees and costs incurred in Bermuda
21 and incurred here based upon arising
22 out of or related to the antisuit
23 injunctions and the other relief
24 sought in Bermuda.
25 There's also, of course, a time

1 ADVERSARY PROCEEDING NO. 16-01251
2 element. It also has delayed the
3 current adversary proceeding.
4 And, by the way, you know, in
5 connection with -- I know Your Honor
6 doesn't want to hear a contempt case,
7 but in the context of the damages and
8 showing that we really suffered
9 damages by reason of that case, they
10 now, on two days' notice, maybe one
11 day notice, go to Bermuda and seek to
12 have determined by the Bermuda court
13 the very same issue that they asked
14 you to determine in their motion to
15 compel arbitration.
16 And then they stopped us from
17 responding to it so that we were
18 frozen, you were frozen, delay
19 occurred here.
20 And clearly what is going on in
21 Bermuda, Your Honor, is they're
22 trying to have a race.
23 THE COURT: I assume you would
24 agree that in light of the Bermuda
25 court vacating the orders, that you

1 ADVERSARY PROCEEDING NO. 16-01251
2 are now able to respond here to the
3 motion to compel arbitration?
4 MR. BENNETT: We definitely
5 are, Your Honor. And I have to think
6 about this court and other courts.
7 There's a slight measure of
8 speculation in what I'm about to say,
9 but I don't think it's very much.
10 Which is the game that they are
11 playing now -- and I'm sorry. The
12 game that Allied is playing now. I
13 should differentiate -- is that they
14 are trying very hard to get a
15 judgement from another jurisdiction
16 that they're going to contend is
17 first in time and that constitutes
18 res judicata.
19 Now, of course the law is
20 pretty clear that Your Honor doesn't
21 have to get a res judicata effect.
22 And there's all kinds of reasons that
23 it shouldn't get res judicata effect
24 that is not before you today.
25 But I will have to deal with

1 ADVERSARY PROCEEDING NO. 16-01251
2 appellate courts, I'm sure, with
3 respect to that as well.
4 And so, Your Honor, everything
5 that's been going on there is -- even
6 this latest step is impeding and
7 interfering.
8 By the way, it's exactly how
9 the judge in the lower court in the
10 Madoff case interpreted the filing of
11 foreign proceedings to come to
12 contrary judgements on a preference
13 in fraudulent transfer cases.
14 But, in any event, losses,
15 coming back to losses, there's been a
16 time element too.
17 In addition to the actual fees,
18 we've been set back. It would be far
19 simpler and, frankly, deserved in
20 this context of serial abuse of this
21 Court's patience and authority by
22 Allied and by Iron-Starr for this
23 Court just to enter the relief that
24 was sought in the adversary
25 proceeding and require them to pay

1 ADVERSARY PROCEEDING NO. 16-01251
2 the claims.
3 If you have any questions, I'll
4 save some time for reply.
5 THE COURT: All right.
6 MR. BENNETT: Thank you, Your
7 Honor.
8 THE COURT: Thank you.
9 MS. KERSTEIN: Good morning,
10 Your Honor. Erica Kerstein for
11 Allied World.
12 THE COURT: Good morning.
13 MS. KERSTEIN: I'll first take
14 why the Bermuda defendants did not
15 violate the Bar Order, and then we'll
16 talk about why they didn't violate
17 the Barton doctrine.
18 As you know, to find a
19 violation of the Bar Order, Your
20 Honor must find that there was an
21 order that clearly and unambiguously
22 prohibited the Bermuda proceedings.
23 THE COURT: No, that's not --
24 with all due respect, I don't believe
25 that's correct. That's the standard

1 ADVERSARY PROCEEDING NO. 16-01251
2 if I was going to hold them in
3 contempt. And I thought in a prior
4 opinion I made this point clear.
5 Maybe not.
6 But I can't hold a party in
7 contempt for violating an order
8 unless the order was clear and
9 unambiguous and the evidence was
10 clear and convincing of a violation,
11 was clear and convincing.
12 That's different, Ms. Kerstein,
13 than the normal function of a Court
14 in interpreting a prior order that it
15 entered.
16 If I were to interpret the Bar
17 Order today and conclude that it
18 prohibited the filing of the Bermuda
19 actions, and I entered an order to
20 that effect, and the Bermuda insurers
21 violated an order that I entered
22 today, I can hold them in contempt
23 for that.
24 But that's, I think -- I don't
25 think anything I've said or written

1 ADVERSARY PROCEEDING NO. 16-01251
2 so far supports the statement you
3 made.
4 A Court in -- there are various
5 principles for interpreted contracts.
6 There are principles for interpreting
7 court orders. What you are mixing
8 up, in my view, is the standard for
9 contempt.
10 And I declined to hold the
11 Bermuda insurers in contempt for
12 violating the Bar Order, because I
13 didn't believe that the four corners
14 of that order, which is what I would
15 have to look at, were sufficiently
16 clear and unambiguous to do so.
17 Do you agree or disagree with
18 what I've just said?
19 MS. KERSTEIN: I agree that
20 that is the standard for contempt.
21 THE COURT: Okay. Do you agree
22 that what I am being asked to do
23 today is interpret the Bar Order, the
24 plaintiffs and the Bermuda insurers
25 disagree about what the proper

1 ADVERSARY PROCEEDING NO. 16-01251
2 interpretation of the Bar Order is,
3 but that is a standard Court
4 function; the Court has authority to
5 interpret its own prior orders?
6 Which way I come out on it, I
7 don't know. But that's different
8 than the standard that you repeated,
9 and that I articulated, is the
10 standard for contempt.
11 I concluded on the record
12 before me I couldn't hold the Bermuda
13 insurers in contempt, but that's
14 different than what I'm asked to do
15 today, which is to interpret the Bar
16 Order.
17 If it is interpreted such that
18 it precluded you from doing -- your
19 clients from doing what they did,
20 well, I'll enter that order.
21 And if the remedy is to dismiss
22 and -- in a direction to dismiss the
23 Bermuda proceedings, if you don't,
24 then I hold you in contempt for
25 that --

1 ADVERSARY PROCEEDING NO. 16-01251
2 MS. KERSTEIN: I can address
3 that as well, Your Honor.
4 THE COURT: I want to come back
5 to this point. I want to make sure.
6 Do you agree that the standard
7 that the Court is to apply in
8 interpreting its order is not a clear
9 and unambiguous standard; it's
10 interpret the order?
11 Apply principles for
12 interpretation of orders and reach
13 your decision, reach my decision
14 about what it means?
15 Do you agree with that?
16 MS. KERSTEIN: I agree that you
17 have the authority to interpret your
18 own order. I would assert that the
19 order has to clearly prohibit a party
20 from doing something before a party
21 can violate it.
22 THE COURT: And so if I entered
23 an order today that the Bar Order,
24 properly interpreted, precluded the
25 Bermuda insurers from filing the

1 ADVERSARY PROCEEDING NO. 16-01251
2 Bermuda actions and ordered, as the
3 relief for that violation, dismiss
4 the Bermuda actions, that's something
5 that the Court can do, and that's not
6 something that the standard for
7 contempt applies in doing?
8 If the order I would enter
9 today is clear and unambiguous that
10 you've got X days to dismiss the
11 Bermuda action, and then you didn't
12 do it, I would decide whether: Was
13 the order I entered today clear and
14 unambiguous? Was the evidence of
15 violation clear and convincing? And
16 I can hold the Bermuda insurers in
17 contempt for that.
18 But the issue before me, with
19 all due respect, is not whether -- I
20 already ruled on the contempt. I
21 said I couldn't hold them in
22 contempt. I'm not revisiting that
23 today.
24 But what I am being asked to do
25 is to interpret the Bar Order. And

1 ADVERSARY PROCEEDING NO. 16-01251
2 do you agree that the standard for
3 interpreting the Bar Order is not:
4 Was the order clear and unambiguous?
5 If it was clear and unambiguous, I
6 would have resolved it already.
7 Go ahead.
8 MS. KERSTEIN: The Bar Order
9 does not permit -- prohibit the
10 filing of the Bermuda action, because
11 it prohibits only non-settling
12 parties from contesting the
13 reasonableness of the settlement or
14 commencing actions against settling
15 parties for further liability for
16 settled matters.
17 THE COURT: I want your answer.
18 We have this problem every time you
19 appear before me. When I ask a
20 question, I want a clear answer to my
21 question.
22 Okay. You dispute what the
23 order means, and I may have to decide
24 that, okay?
25 But do you agree that in

1 ADVERSARY PROCEEDING NO. 16-01251
2 interpreting the order there is no
3 such thing as this clear and
4 unambiguous standard that applies to
5 judging contempt? Do you agree with
6 that? Yes or no.
7 MS. KERSTEIN: No.
8 THE COURT: Give me a case
9 citation that supports your position
10 that I can only interpret the order
11 if it's clear and unambiguous.
12 MS. KERSTEIN: I think we're
13 talking about different things here.
14 THE COURT: Maybe you're not
15 listening to my question then.
16 MS. KERSTEIN: Your question is
17 may you interpret your order? My
18 answer is yes.
19 THE COURT: Okay. And the
20 clear and unambiguous standard for
21 contempt doesn't apply to my
22 interpretation of the order; do you
23 agree?
24 MS. KERSTEIN: That's not what
25 I'm sure I can agree to.

1 ADVERSARY PROCEEDING NO. 16-01251
2 THE COURT: Then give me a case
3 that supports your position.
4 MS. KERSTEIN: I don't have a
5 case that supports my position.
6 THE COURT: We've been through
7 this exercise with each appearance
8 you've made.
9 When you argue a position, and
10 I ask you for any legal authority
11 that supports it and then you tell me
12 you don't have any, I find that a
13 very untenable position for you to be
14 taking, okay?
15 If your argument is that I can
16 only interpret this order if it's
17 clear and unambiguous, I can't
18 interpret it against your clients
19 unless it's clear and unambiguous --
20 MS. KERSTEIN: That's not my
21 position, Your Honor.
22 THE COURT: -- you have to be
23 able to ply me with authority.
24 I want answers to my questions.
25 If you don't have authority, just

1 ADVERSARY PROCEEDING NO. 16-01251
2 tell me you don't have any authority
3 to take the position you're taking.
4 MS. KERSTEIN: I don't think
5 that's what I'm saying, Your Honor.
6 I'm telling you, you do have
7 authority to interpret your own
8 order.
9 My position is that it doesn't
10 clearly prohibit the actions the
11 Bermuda insurers took in Bermuda,
12 and, therefore, you shouldn't find a
13 violation of the order. And if I may
14 proceed to tell you why.
15 THE COURT: Go ahead.
16 MS. KERSTEIN: We've already
17 gone through what the face of the Bar
18 Order says. And it actually
19 anticipates that the Bermuda insurers
20 are not going to pay, and it
21 anticipates that there would be
22 litigations or arbitrations filed by
23 or against the Bermuda insurers to
24 proceed to get the proceeds of the
25 policy to the extent any are

1 ADVERSARY PROCEEDING NO. 16-01251
2 available.
3 The plaintiffs at no time took
4 the position that the Bar Order was
5 going to prohibit the Bermuda
6 proceedings, prohibit the pending
7 arbitration.
8 THE COURT: They've sure taken
9 that position in this court, so don't
10 tell me that they never had.
11 MS. KERSTEIN: They haven't in
12 their complaint. It wasn't even
13 mentioned in their complaint. So
14 this is a new argument that was never
15 something that the Bar Order was
16 meant to prohibit.
17 And specifically the Bermuda
18 insurers can't be found to have
19 violated the order, because they're
20 not attacking the reasonableness of
21 the settlement.
22 The reasonableness of the
23 settlement is defined to mean that
24 there was proper exhaustion, and
25 although plaintiffs continue to harp

1 ADVERSARY PROCEEDING NO. 16-01251
2 on that, we have clearly told Your
3 Honor that we're not disputing
4 underlying exhaustion.
5 When -- we took that position
6 early on; now that the underlying
7 insurers have paid, we're not
8 disputing exhaustion.
9 At the time that the settlement
10 was entered, it was also clearly
11 anticipated that litigation would
12 follow. And it clearly carved out
13 from any prohibitions the ability to
14 litigate the insurance coverage
15 issues against the Bermuda insurers.
16 And not just that the
17 plaintiffs could sue the Bermuda
18 insurers, but also that the Bermuda
19 insurers could sue or arbitrate
20 against the plaintiffs.
21 THE COURT: Where does it say
22 that the Bermuda insurers could
23 commence litigation in the Bermuda
24 courts to achieve the result that
25 they desire? Where does it say that?

1 ADVERSARY PROCEEDING NO. 16-01251
2 MS. KERSTEIN: What the Bar
3 Order says is that the Bermuda
4 insurers could arbitrate by or
5 against the plaintiffs.
6 THE COURT: Where does it say
7 that? Quote the language.
8 MS. KERSTEIN: That's
9 Section 1(c)(8) of the settlement
10 agreement.
11 THE COURT: What does it say?
12 MS. KERSTEIN: "If any
13 dissenting insurer receives a savings
14 on its limits of liability before
15 commencement of any litigation,
16 including any adversary proceeding or
17 arbitration brought by or against
18 such dissenting insurer," and then it
19 goes on to make provisions for what
20 would happen.
21 So my position is that at the
22 time of the settlement, it was known
23 that the, quote, dissenting insurers
24 were not going to pay.
25 And it was anticipated that

1 ADVERSARY PROCEEDING NO. 16-01251
2 there would be arbitration or
3 litigation following either brought
4 by the insurers or against the
5 insurers.
6 THE COURT: Go ahead.
7 MS. KERSTEIN: The Bar Order
8 also prohibits non-paying insurers
9 from going after parties that settled
10 and asking them for more liability.
11 That is also not what the Bermuda
12 insurance action is doing.
13 The Bar Order did not prohibit
14 the non-paying insurers from raising
15 coverage defenses, which is what the
16 Bermuda insurers tend to do in an
17 Bermuda arbitration per the terms of
18 the policy. Under the circumstances,
19 the Bermuda insurers did not violate
20 the Bar Order.
21 If I may move on to address why
22 the Bermuda insurers did not violate
23 the Barton doctrine.
24 THE COURT: Please go ahead.
25 MS. KERSTEIN: The Barton

1 ADVERSARY PROCEEDING NO.
2 doctrine protects Court-appointed
3 officers from certain suits outside
4 the bankruptcy court.
5 As plaintiffs made clear, that
6 suit has to be in the Court-appointed
7 officer's official capacity.
8 Plaintiffs make a confusing string of
9 arguments about why we have sued the
10 Court-appointed officer in his
11 official capacity.
12 As you know, we don't dispute
13 that MFGH is a party to the Bermuda
14 proceedings. What we dispute is that
15 the plan administrator is a party in
16 his official capacity.
17 THE COURT: Stop. MFGH was a
18 party to the bankruptcy proceedings,
19 correct?
20 MS. KERSTEIN: Yes, sir.
21 THE COURT: And the plan
22 assigns certain roles to MFGH
23 post-confirmation, correct?
24 MS. KERSTEIN: Correct.
25 THE COURT: What do I care what

1 ADVERSARY PROCEEDING NO. 16-01251
2 capacity -- well, withdrawn. Go
3 ahead.
4 MS. KERSTEIN: Well, the
5 capacity issue matters a whole lot,
6 because the Barton doctrine only
7 applies when the trustee is sued in
8 their capacity.
9 THE COURT: Do you think
10 they're doing this litigation as a
11 detour and frolic that they didn't
12 warrant, assigned a specific role and
13 function under the plan?
14 You think that they're taking
15 their action unrelated to the rights
16 that they were specifically assigned
17 under the plan and agreements
18 subsequently that implemented the
19 plan?
20 MS. KERSTEIN: Your Honor, my
21 position is that the estate and the
22 plan administrator on behalf of the
23 estate does not hold title to
24 proceeds of the insurance policy as
25 an estate right. And I'll explain

1 ADVERSARY PROCEEDING NO. 16-01251
2 why.
3 THE COURT: Go ahead.
4 MS. KERSTEIN: There are only
5 three potential claims that the
6 plaintiffs urge you to review as
7 potential claims under the insurance
8 policy.
9 One is a claim by MFGH
10 directly, the second is a claim by
11 MFGI, and a third is by the
12 individual insurers.
13 And if I can take you through
14 each one of them. MFGH, the
15 plaintiffs assert, has its own direct
16 claim for insurance coverage, but
17 that's not correct.
18 THE COURT: Show me why that is
19 not correct.
20 MS. KERSTEIN: Yes, sir. They
21 are correct in the complaint they
22 allege, and the evidence shows, that
23 the customers did originally file a
24 proof of claim against MFGH as well
25 as MFGI.

1 ADVERSARY PROCEEDING NO. 16-01251
2 THE COURT: Do you agree that
3 MFGH submitted its own claim to the
4 insurers which the insurers never
5 responded to?
6 MS. KERSTEIN: No, I don't
7 agree.
8 THE COURT: You're saying that
9 your client never received a notice
10 of claim by MFGH?
11 MS. KERSTEIN: That's correct,
12 Your Honor. The only notice -- the
13 only claims --
14 THE COURT: So Mr. Bennett is
15 just flat out wrong when he told
16 me -- it's actually consistent with
17 my recollection. The reason being
18 it's consistent with my recollection
19 is that I was somewhat frustrated
20 during the course of the Chapter 11
21 case when the subject of D&O and E&O
22 insurance came up, and I asked the
23 question multiple times whether MFGH
24 had submitted its own claim.
25 And I kept being told, well,

1 ADVERSARY PROCEEDING NO. 16-01251
2 not yet, not yet, not yet, and then I
3 was told yes. So that is --
4 Mr. Bennett is reiterating something
5 that I was told many moons ago during
6 the course of the Chapter 11 case.
7 And you're saying that is flat
8 out wrong?
9 MS. KERSTEIN: We received an
10 entity claim on behalf of MFGI. It
11 was not an MFGH direct claim for
12 coverage.
13 THE COURT: Okay.
14 MS. KERSTEIN: MFGI doesn't
15 have a direct claim for coverage,
16 because by the stipulation resolving
17 the customer proofs claim, there had
18 been two customer proofs of claim;
19 one against MFGI, and one against
20 MFGH.
21 But after that stipulation,
22 which is at DI 1911, what happened is
23 going forward there was a single
24 claim. And the MFGH claim, the
25 customer's claim against MFGH was

1 ADVERSARY PROCEEDING NO. 16-01251
2 expunged and valued at zero.
3 And the only claim going
4 forward was the customer's claim
5 against MFGI. So it makes sense why
6 MFGI is -- paid the customers back,
7 and when the demand for the E&O
8 policy limits was --
9 THE COURT: They got it back by
10 borrowing money from MFGH? Do you
11 agree with that? And MFGH succeeded
12 to the rights that the MFGI had? Do
13 you agree with that?
14 MS. KERSTEIN: I agree that
15 post-plan confirmation they were
16 assigned MFGI's rights.
17 THE COURT: They were assigned
18 those rights, because they -- they
19 advanced funds to MFGI that enabled
20 MFGI to pay the commodity customer
21 claims in full, 100 percent.
22 MFGI didn't have the funds to
23 do that on its own, and MFGH advanced
24 funds to do that and received in
25 return an assignment of rights of

1 ADVERSARY PROCEEDING NO. 16-01251
2 MFGI, correct?
3 MS. KERSTEIN: Well, I --
4 THE COURT: Yes or no.
5 MS. KERSTEIN: I understand
6 they received --
7 THE COURT: Yes or no.
8 MS. KERSTEIN: I understand
9 they may have advanced assets --
10 THE COURT: Can you answer my
11 question yes or no?
12 MS. KERSTEIN: I can't, because
13 it requires an explanation.
14 THE COURT: I'll let you --
15 okay. Give your explanation.
16 MS. KERSTEIN: There could only
17 be a claim -- the customers only had
18 one $1.6 billion claim. It could
19 have only have been against MFGI or
20 against MFGH.
21 THE COURT: Well, it was
22 actually against both. The customers
23 filed claims against MFGH as well.
24 MS. KERSTEIN: But the MFGH was
25 expunged and valued at zero, and only

1 ADVERSARY PROCEEDING NO. 16-01251
2 the MFGI one proceeded. So they
3 couldn't have each had a claim.
4 There was only one claim.
5 THE COURT: Where did MFGI
6 obtain sufficient funds to satisfy
7 the customer commodity claims in
8 full?
9 Did it have enough funds to be
10 able to do that, without an
11 assignment, without MFGH advancing
12 funds to do that? Do you know? Do
13 you know?
14 MS. KERSTEIN: I know what I've
15 seen in documents, and it appears it
16 may be the case that MFGH --
17 THE COURT: It may be the case?
18 MS. KERSTEIN: It may be. But
19 if MFGH advanced funds, then MFGI
20 doesn't have a claim under the
21 insurance policy. It's one or the
22 other.
23 THE COURT: No, no. MFGH, in
24 turn for advancing the funds,
25 received back an assignment of the

1 ADVERSARY PROCEEDING NO. 16-01251
2 rights to proceed on MFGI's claim?
3 Correct? Yes or no.
4 MS. KERSTEIN: Yes, they
5 received the policy. But I think
6 there's a fundamental --
7 THE COURT: Okay.
8 MS. KERSTEIN: -- misconception
9 that we're speaking over --
10 THE COURT: By someone --
11 MS. KERSTEIN: -- and it's not
12 the policy that matters. It's not
13 who holds the policy that matters.
14 It's who has the claim to the
15 insurance proceeds that matters.
16 So when Your Honor found that
17 the estate owns a policy, that's
18 valueless unless they have a claim to
19 the proceeds.
20 And it's a very different
21 question. So that's why I'm trying
22 to take you through the three
23 potential entities that had a claim
24 under the policy.
25 And I mean a direct claim, and

1 ADVERSARY PROCEEDING NO. 16-01251
2 where those claims wound up. My
3 position is that MFGH does not have
4 and never made a direct claim for
5 MFGH coverage as an insured under the
6 policy.
7 The claim was made by MFGI, so
8 MFGH does not have a direct claim.
9 And the plan administrator on behalf
10 of MFGH does not have an estate claim
11 for coverage.
12 Now we go to MFGI which did
13 make a claim for coverage under the
14 policy.
15 But as the plaintiffs admit,
16 MFGI's coverage was assigned to
17 MFGAA. So MFGI, even though it
18 purports to have an entity claim,
19 which we dispute, its claim is not
20 held by MFGH or the plan
21 administrator. It's held by MFGAA.
22 And even if MFGH now holds that
23 claim, that claim was assigned to
24 MFGH, if it was, post-plan
25 confirmation, and, therefore, is not

1 ADVERSARY PROCEEDING NO. 16-01251
2 an asset of the estate, which the
3 plan administrator could have
4 inherited. Very different concept
5 where there's a post-confirmation
6 assignment. It's not an asset of the
7 estate.
8 And it's the same thing for the
9 individuals' claims. The individual
10 insurers assigned their rights to the
11 E&O policies post-plan confirmation.
12 And, again, I would assert that
13 MFGAA is the relevant party in
14 interest, because that's what the
15 plaintiffs publicly reported and
16 reported to the Court.
17 But even if MFGH holds the
18 individual insurers' rights to the
19 policies, it is the same analysis.
20 It is not an estate asset.
21 It is a post-petition
22 assignment of a claim, which does not
23 carry the same weight. If you look
24 at the case law, every single case
25 that they've cited and that we've

1 ADVERSARY PROCEEDING NO. 16-01251
2 cited on when can a party be in
3 trouble for violation of the Barton
4 doctrine, it doesn't come up in the
5 context of a post- --
6 post-confirmation assignment of
7 rights.
8 It comes up in the context of a
9 plan administrator or any other
10 Court-appointed officer or their
11 representative trying to get estate
12 assets.
13 THE COURT: I thought I
14 addressed this issue precisely in the
15 preliminary injunction -- I don't
16 know if preliminary injunction or
17 contempt. They were issued the same
18 day -- specifically relating to
19 Boston Chicken, because Chief Justice
20 Kawaley relied on his prior opinion
21 in Boston Chicken.
22 And the district court in
23 Boston Chicken affirmed, in part, and
24 reversed in part. And it affirmed
25 with respect to the violation of the

1 ADVERSARY PROCEEDING NO. 16-01251
2 Barton doctrine where the claims for
3 coverage were being pursued by Jerry
4 Smith, the plan trustee, in the
5 capacity the same essentially as the
6 plan administrator here.
7 He received -- he, Smith,
8 received an assignment of the
9 individuals' insurance claims
10 post-confirmation in a settlement
11 that was reached by Smith and
12 officers and directors, because
13 they're the D&O -- some of the D&O
14 insurers refused to contribute to the
15 settlement.
16 You say there are no cases at
17 all. Well, the District Court in
18 Arizona with respect to affirming the
19 bankruptcy court for the violation of
20 the Barton doctrine dealt with
21 exactly the circumstance that exists
22 here; isn't that correct?
23 MS. KERSTEIN: No, Your Honor.
24 THE COURT: Tell me why not.
25 MS. KERSTEIN: Because in

1 ADVERSARY PROCEEDING NO. 16-01251
2 Boston Chicken, the estate itself had
3 a claim against the directors and
4 officers, a direct estate claim that
5 it owned and that was worth
6 something.
7 THE COURT: That is true here
8 too. The estate filed an action, an
9 adversary proceeding in the
10 bankruptcy court against John Corzine
11 and others.
12 And the reference to that case
13 was withdrawn, and it was transferred
14 to Judge Marrero in the district
15 court. And Judge Marrero proceeded
16 both with the estate's claim against
17 the officers and directors and the
18 customer claims and the other claims
19 in the MDL.
20 But it was -- that claim was
21 asserted here before me. And the
22 reference to that specific adversary
23 proceeding was withdrawn to the
24 district court, which made perfect
25 sense, because the district court was

1 ADVERSARY PROCEEDING NO. 16-01251
2 adjudicating essentially the same
3 claims in customer claims and other
4 claims that it had before it.
5 MS. KERSTEIN: That's not what
6 the plaintiffs alleged to be seeking
7 coverage for here.
8 In the complaint, the
9 plaintiffs specifically --
10 THE COURT: Let's go back to
11 this point: Do you agree that the
12 circumstance in the district court --
13 described in the district court
14 opinion of Boston Chicken are the
15 same as those here: A plan trustee
16 with assigned claims of officers and
17 directors proceeded with a coverage
18 dispute, and the ultimate result was,
19 yes, the coverage dispute was
20 determined to be arguable, but the
21 Court found and affirmed the damage
22 award for violation of the Barton
23 doctrine?
24 And you're talking -- this part
25 of your discussion you were talking

1 ADVERSARY PROCEEDING NO. 16-01251
2 about the Barton doctrine. Isn't it
3 the same? If not, why not?
4 MS. KERSTEIN: Because the only
5 claim for coverage here is under the
6 E&O policies.
7 And the only claim that
8 Plaintiffs allege that MFGH has as
9 its own direct claim is a customer
10 proof of loss that was filed against
11 MFGH, which was valued at zero.
12 The only other claims that
13 MFGI -- MFGH, excuse me, potentially
14 holds now are other parties' claims
15 that were assigned --
16 THE COURT: How is that not --
17 why -- I read the district court's
18 opinion in Boston Chicken as exactly
19 the same. The district judge talked
20 about Smith proceeded, he settled
21 with officers and directors having
22 got assignment of their claim.
23 And he was seeking coverage --
24 he was seeking to recover. That's
25 precisely what's happened here.

1 ADVERSARY PROCEEDING NO. 16-01251
2 MS. KERSTEIN: But the key
3 difference is that in Boston Chicken,
4 the trustee had an active valuable
5 claim.
6 THE COURT: Where does it say
7 that? Where does it say that in the
8 district court's opinion affirming
9 the violation of the Barton doctrine?
10 Show me.
11 MS. KERSTEIN: It's in the
12 facts.
13 THE COURT: No. Show me -- do
14 you have the opinion with you?
15 MS. KERSTEIN: Yes, sir. Well,
16 it talks about how as part of the
17 plan the trustee was charged with the
18 collection and administration of the
19 retained assets which included
20 claims, and it goes on to talk about
21 how the trustee had claims against
22 the directors and officers.
23 THE COURT: He did. He sued my
24 client.
25 MS. KERSTEIN: And that's very

1 ADVERSARY PROCEEDING NO. 16-01251
2 different.
3 THE COURT: Are we clear --
4 that's not at all different.
5 MS. KERSTEIN: Where MFGH has a
6 claim valued at zero --
7 THE COURT: Ms. Kerstein,
8 MF Global Holdings sued Jon Corzine,
9 Henri Steenkamp and other officers
10 and directors quite analogous to what
11 happened in Boston Chicken, okay? So
12 that part's the same.
13 Here the estates believe that
14 it had claims against the officers
15 and directors for which they were
16 insured.
17 And just like happened in
18 Boston Chicken, when the insurers
19 refused to pony up, the trustee in
20 Boston Chicken, the plan trustee,
21 settled with the officers and
22 directors and got an assignment of
23 their rights.
24 MS. KERSTEIN: With all due
25 respect, like in Boston Chicken, that

1 ADVERSARY PROCEEDING NO. 16-01251
2 claim was covered by the D&O
3 policies.
4 What we're talking about now is
5 how they are seeking coverage under
6 the E&O policies. And that is not a
7 claim that they have made under the
8 E&O policies.
9 THE COURT: All right. We'll
10 move on. Mr. Bennett will address
11 his rebuttal of those issues.
12 MS. KERSTEIN: I would also
13 like to point out that it is not
14 clear that the Barton doctrine should
15 be applied extraterritorially.
16 Although a couple of courts have
17 addressed --
18 THE COURT: Excluding Boston
19 Chicken specifically addressed this
20 issue of extraterritorially effect,
21 the very decision that Chief Justice
22 Kawaley relies on.
23 When I say -- it is not the
24 same decision, because he only talks
25 about his own decision; not what

1 ADVERSARY PROCEEDING NO. 16-01251
2 happened in the district -- in the
3 bankruptcy court and the other
4 district court subsequently.
5 You agree that the district
6 court decision in Boston Chicken
7 specifically addressed and concluded
8 that the Barton doctrine applies in
9 cross-border cases, correct?
10 MS. KERSTEIN: I agree there
11 was a conclusion. I don't agree it
12 was addressed --
13 THE COURT: Well, don't tell me
14 there is no decision that doesn't
15 when the very case that Justice
16 Kawaley relies on specifically
17 addressed the issue.
18 MS. KERSTEIN: If I may, I
19 don't think I said there was no case.
20 I started to say there are a couple
21 of cases that applied
22 extraterritorially, but there was no
23 analysis --
24 THE COURT: Tell me, do you
25 have any case that said the Barton

1 ADVERSARY PROCEEDING NO. 16-01251
2 doctrine does not apply?
3 MS. KERSTEIN: I think it is an
4 issue that has certainly not been
5 addressed by any circuit court.
6 THE COURT: Stop. Do you have
7 any authority, bankruptcy court,
8 district court, other court, that
9 concludes that the Barton doctrine
10 does not or should not apply in
11 cross-border circumstances?
12 MS. KERSTEIN: I don't think a
13 court has addressed that.
14 THE COURT: Okay. Next point.
15 So the only cases that exist
16 say it does apply; you disagree with
17 it, but you have no case authority to
18 support your position? Is that a
19 fair statement?
20 MS. KERSTEIN: I think those
21 cases are wrongly decided, and I
22 didn't analyze the issue --
23 THE COURT: Ms. Kerstein, I
24 asked you a specific question. I
25 expect --

1 ADVERSARY PROCEEDING NO. 16-01251
2 MS. KERSTEIN: I give you a
3 specific --
4 THE COURT: No, you didn't.
5 Okay?
6 You'll agree that there are
7 several cases that conclude the
8 Barton doctrine applies in
9 cross-border cases, correct?
10 MS. KERSTEIN: I agree that
11 those cases found cross-border
12 liability. But in Boston Chicken,
13 actually they said it is irrelevant
14 whether it applies
15 extraterritorially, because they
16 found that an automatic stay applied.
17 So it wasn't applied on Barton
18 applying extraterritorially.
19 THE COURT: So there are cases
20 that say it does apply. No cases
21 that say it doesn't. You don't agree
22 with the cases that say it does; is
23 that correct?
24 MS. KERSTEIN: That's correct.
25 THE COURT: Okay. Next point.

1 ADVERSARY PROCEEDING NO. 16-01251
2 MS. KERSTEIN: I will leave you
3 the Bermuda insurers should not be
4 sanctioned or held in contempt,
5 because there is no clear evidence
6 that they violated the Bar Order or
7 the Barton doctrine. In these
8 circumstances --
9 THE COURT: I don't have an
10 application for contempt today,
11 Ms. Kerstein. I have an issue of
12 whether your -- whether the Bermuda
13 insurers violated the Barton
14 doctrine, if so, what the remedy
15 should be at this point.
16 I did hold your client in
17 contempt. It purged the contempt, in
18 part. And as I said at the outset,
19 in a subsequent proceeding we'll deal
20 with what, if any, additional
21 remedies should apply. But contempt
22 is not on the table for today.
23 MS. KERSTEIN: Well, if I may
24 just make one other point to address
25 the delay and the cost point that

1 ADVERSARY PROCEEDING NO. 16-01251
2 Mr. Bennett made.
3 THE COURT: We'll get to that.
4 When I have an application, supported
5 application for relief, you'll have a
6 full opportunity to address the issue
7 about why you don't think any further
8 relief should be ordered.
9 MS. KERSTEIN: Okay. Your
10 Honor, I'll let my co-counsel talk.
11 THE COURT: All right.
12 MR. SLIFKIN: Your Honor,
13 Daniel Slifkin of Cravath, Swaine &
14 Moore making a first appearance for
15 Allied World.
16 THE COURT: Did you file an
17 appearance on the docket?
18 MR. SLIFKIN: We did on Friday.
19 THE COURT: All right.
20 MR. SLIFKIN: Yes, Your Honor.
21 Friday evening. So I'm kind of new
22 to this. And I don't even purport --
23 this is an unusual situation.
24 I don't even purport to be
25 qualified to address the questions

1 ADVERSARY PROCEEDING NO. 16-01251
2 that are in front of the Court right
3 now.
4 I just want to --
5 THE COURT: Why would I want to
6 hear about anything other than the
7 questions that are before the Court
8 right now?
9 MR. SLIFKIN: Well, I have
10 something that is related to that for
11 which it may simplify the proceedings
12 going forward.
13 I've been asked to come in to
14 deal going forward with questions of
15 personal jurisdiction and to try to
16 keep my client out of trouble,
17 frankly, the trouble that they've
18 gotten themself into here because
19 there's a genuine desire on their
20 part not to get cross-wise with the
21 Court any further.
22 THE COURT: I'm glad you added
23 "any further."
24 MR. SLIFKIN: Any further. I
25 understand, Your Honor. I've spent

1 ADVERSARY PROCEEDING NO. 16-01251
2 the weekend reading some of the
3 record here.
4 As I said, it's not a situation
5 I've come across. And I'm going to
6 try to make this better going forward
7 for my client and for the Court,
8 because in conversation with them,
9 they recognize the situation they're
10 in is, I will say, suboptimal, to say
11 the least, and there should be a path
12 forward to at least hopefully fix
13 this.
14 So my job is to deal with the
15 personal jurisdiction issues, which
16 are now up on appeal.
17 THE COURT: You've sought leave
18 to appeal?
19 MR. SLIFKIN: That's correct.
20 THE COURT: The district court
21 hasn't yet ruled on the motion for
22 leave to appeal?
23 MR. SLIFKIN: That is correct,
24 Your Honor. So to the extent that we
25 deal with those issues going forward,

1 ADVERSARY PROCEEDING NO. 16-01251
2 either in this court or in the
3 district court, I'll be addressing
4 those issues.
5 And they're sort of very
6 important, obviously, to Bermuda
7 insurance companies, because they
8 organize their affairs in such a way
9 as to limit their jurisdiction in the
10 United States. I will also deal with
11 the arbitratability questions.
12 But there is one issue that I
13 want to raise right now, which is
14 there is a hearing in Bermuda this
15 afternoon.
16 Having reviewed Your Honor's
17 prior orders over the weekend, you
18 were very clear that the injunctive
19 relief had to be lifted. The
20 injunctive relief was lifted.
21 You also said that you were not
22 saying at that stage that the Bermuda
23 proceeding could not continue.
24 THE COURT: And that's because
25 at that stage, is what I said in my

1 ADVERSARY PROCEEDING NO. 16-01251
2 preliminary remarks today, at that
3 stage, I had not concluded and didn't
4 feel I could conclude whether the
5 Bermuda proceedings violated the Bar
6 Order or the Barton doctrine.
7 MR. SLIFKIN: Yes. I
8 understand that, Your Honor.
9 THE COURT: And the situation
10 may well change if I conclude that it
11 did.
12 MR. SLIFKIN: Yes. I
13 understand from the comments you made
14 earlier that that would be a
15 prospective ruling, right?
16 You are not saying that the
17 original Bar Order was clear and
18 convincing for content purposes --
19 clear and unambiguous, but you will
20 make a new order, which --
21 THE COURT: Maybe.
22 MR. SLIFKIN: Hopefully, yeah.
23 Or you will make a pronouncement
24 which is sufficiently clear and
25 unambiguous that my client can

1 ADVERSARY PROCEEDING NO. 16-01251
2 follow.
3 Now, there is the interstices,
4 which is the hearing I believe is at
5 1:30 this afternoon, right? I don't
6 know if you plan to issue an order by
7 1:30 this afternoon. I don't want my
8 client to do something that is
9 inappropriate.
10 They took this action and
11 converted it to a declaratory action,
12 right? If it's not going to be
13 injunctive, and it's not going to be
14 dismissed, it kind of has to be
15 declaratory.
16 And the issue is
17 arbitratability, right? whether this
18 should go to arbitration or not.
19 As I think Your Honor pointed
20 out, your order, that's sort of an
21 issue that's going to come up at some
22 point anyway, because if you conclude
23 no, issue -- issue a judgement in
24 this court, and then there's an
25 important proceeding in Bermuda, I

1 ADVERSARY PROCEEDING NO. 16-01251
2 mean, that issue of whether that's
3 recognized under Bermuda law, I
4 think, will come up.
5 So, you know, we don't think
6 that this should offend the Court
7 that this is being done, but what we
8 don't want to do is proceed in such a
9 manner that would offend the Court
10 while we're waiting for the order.
11 THE COURT: Mr. Slifkin, my
12 preliminary remarks today with
13 respect to the plaintiffs' emergency
14 motion where they argued that the
15 relief that the insurers were now
16 seeking violated the preliminary
17 injunction, I concluded that it does
18 not.
19 MR. SLIFKIN: Okay. So we're
20 not really asking for -- I know
21 you're not going to give me an
22 advisory opinion --
23 THE COURT: No, I'm not.
24 MR. SLIFKIN: -- but there is
25 an order already, and you're going to

1 ADVERSARY PROCEEDING NO. 16-01251
2 interpret that order, and we're sort
3 of caught in the interstices.
4 THE COURT: Can I ask you this,
5 Mr. Slifkin.
6 MR. SLIFKIN: Yes, Your Honor.
7 THE COURT: Do you have
8 anything that you want to add on the
9 two issues that are before me today;
10 namely, whether the Bar Order or the
11 Barton doctrine barred the filing of
12 the Bermuda proceedings?
13 MR. SLIFKIN: No, I have
14 nothing to add on that question, Your
15 Honor.
16 THE COURT: Okay. Thank you.
17 MR. SLIFKIN: I simply wanted
18 to alert Your Honor that we are
19 conscious of the -- you know, not
20 falling foul, but there's a timing
21 issue that was beyond my control.
22 THE COURT: All right. Thank
23 you very much, Mr. Slifkin.
24 Does anyone wish to argue for
25 the Bermuda insures that is before

1 ADVERSARY PROCEEDING NO. 16-01251
2 the Court today?
3 Ms. Taylor, do you want to be
4 heard?
5 MS. TAYLOR: Thank you. Good
6 morning, Your Honor. Maryann Taylor
7 on behalf of the Iron-Starr
8 defendants.
9 The only point that I want to
10 address, which is something that no
11 one has spoke about today, however,
12 it did appear in the MF Global's
13 brief, and that is regarding the bond
14 requirement.
15 And during the January 1
16 hearing when Your Honor gave
17 permission to file additional briefs,
18 it was limited to the Bar Order and
19 Barton.
20 So I just want to make sure
21 that the record is clear and that
22 1213, even though they've addressed
23 that, the MF Global have addressed
24 that in their brief, that we haven't
25 had an opportunity.

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2 We didn't respond to that,
3 because we followed Your Honor's
4 direction just to deal with Barton --
5 THE COURT: No.
6 MS. TAYLOR: -- and the Bar
7 Order.
8 THE COURT: But you did file.
9 I issued a TRO. You did file, and we
10 had a preliminary injunction hearing.
11 And I heard not a word about a bond
12 in opposition to the preliminary
13 injunction.
14 Do you agree with that,
15 Ms. Taylor?
16 MS. TAYLOR: Yes, Your Honor, I
17 do.
18 THE COURT: Okay. Anything
19 else that you want to add?
20 MS. TAYLOR: No, just that. If
21 the Court would consider a bond
22 order, that we would be given an
23 opportunity to brief that.
24 THE COURT: Okay. Thank you,
25 Ms. Taylor.

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2 Mr. Bennett.
3 MR. OSTROW: Your Honor, this
4 is Steve Ostrow for Allied World. If
5 I may --
6 THE COURT: I have a third
7 attorney arguing for Allied?
8 MR. OSTROW: Well, yeah --
9 THE COURT: Yeah, you have to
10 come up to the microphone,
11 Mr. Ostrow. I'll decide whether --
12 MR. OSTROW: Three is the
13 charm, Your Honor.
14 Thank you. Steven Ostrow for
15 Allied World.
16 THE COURT: Mr. Slifkin at
17 least said he was coming in on
18 certain issues that I'm not dealing
19 with today. What are you standing
20 on?
21 MR. OSTROW: I want to argue a
22 particular point about the Barton
23 doctrine.
24 THE COURT: I'm not going to
25 permit it. Ms. Kerstein argued the

1 ADVERSARY PROCEEDING NO. 16-01251
2 Barton doctrine. I will not permit
3 two lawyers from the same firm to
4 address the same issue.
5 If I had been asked at the
6 start of hearing, I would have wanted
7 to know what it is Ms. Kerstein was
8 going to argue, that you were -- what
9 you were going to argue.
10 But I will only permit one
11 lawyer from one firm to argue the
12 same issue. So I'm not going to hear
13 you.
14 MR. OSTROW: Very well, Your
15 Honor.
16 THE COURT: You should have
17 coordinated further with Ms. Kerstein
18 either to prompt her as to what you
19 wanted to argue or made it clear at
20 the outset how you were dividing your
21 argument.
22 Mr. Bennett.
23 MR. BENNETT: Okay. I'm going
24 to skip over the Bar Order, because I
25 think there aren't any unanswered

1 questions that I need to address.
2 With respect to the Barton
3 doctrine, Your Honor asked for some
4 reply.
5 First of all, let's get one
6 thing clear. MFGH has no capacity
7 other than as plan administrator
8 under the plan. There isn't some
9 other capacity that it could act in.
10 I think that's one thing that is
11 clear.
12 So as to MFGH, no questions at
13 all, all right?
14 So now that -- the question is:
15 How do you deal with or how should
16 you deal with the contention that,
17 well, yeah, we did sue MFGH, and we
18 know we sued MFGH, but it turns out
19 MFGH doesn't have the right asset,
20 and the right asset is MFGAA?
21 And, Your Honor, there are two
22 responses to that. They are
23 separate, independent, either one
24 does away with that argument in its
25

1 entirety.
2 Number one, it also has two
3 alternatives. First point is that
4 MFGH still has stuff, claims that are
5 being asserted against Allied, and --
6 it's more important for Allied, but
7 Allied and Iron-Starr.
8 Alternative 1, it has the
9 original MFGH claim that it asserted
10 by itself.
11 THE COURT: Can you address
12 that? Because Ms. Kerstein seems to
13 disagree with you, Mr. Bennett.
14 MR. BENNETT: My recollection
15 is that there were multiple letters,
16 and I think this might be the first
17 one. And we didn't come with all of
18 them.
19 But it's May 30, 2012. It's
20 from Covington & Burling, so it was
21 when they were still responsible for
22 the case, signed by Benjamin Duke,
23 and it's to MFG Assurance Company,
24 Limited, which was the first layer
25

1 carrier.
2 THE COURT: That was the
3 captive insurer?
4 MR. BENNETT: The captive
5 insurer. There are multiple letters,
6 but it started no later than May 30,
7 2012.
8 THE COURT: And what was the
9 claim it asserted?
10 MR. BENNETT: This one is
11 actually -- this is why I think this
12 is not actually the last one. This
13 is an advice. This is noting that
14 the SIPA trustee has asserted a
15 claim. They are alerting them to
16 circumstances that MFGH is going to
17 have claims as well.
18 THE COURT: My recollection,
19 and, again, it would be nice if
20 somebody -- if you had something to
21 point me to, is I recited this
22 history. I was frustrated that MFGH
23 kept talking about it but didn't
24 assert a claim, and then at some
25

1 point it did.
2 MR. BENNETT: My recollection
3 is that your frustration was slightly
4 different. I think you knew we had
5 asserted the claim, but we hadn't
6 sued on it yet.
7 But, in any event, it is in the
8 record of this case.
9 THE COURT: Your
10 representation --
11 MR. BENNETT: Not --
12 THE COURT: Your representation
13 to the Court.
14 MR. BENNETT: Yes.
15 THE COURT: MFGH asserted a
16 claim on the E&O policies?
17 MR. BENNETT: On the E&O
18 policies. That's -- the captive is
19 only on the E&O side.
20 THE COURT: Okay.
21 MR. BENNETT: So that's No. 1.
22 That's one thing that's still for
23 MFGH.
24 And, secondly, as I said
25

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2 before, the settlement agreement
3 where lots of claims are being
4 settled directs not only to MFGAA,
5 which was previously formed and
6 previously existed, but to MFGH, the
7 litigation trustee, and to MFGAA.
8 So there are two separate
9 reasons to say inside MFGH, if it's
10 only MFGH, which is entitled to the
11 benefit of the Barton doctrine, there
12 are claims against the insurers
13 but --
14 THE COURT: Tell me why MFGAA
15 can benefit from the Barton doctrine.
16 MR. BENNETT: Okay. That's the
17 point. It's also protected.
18 I think the cases I would point
19 the Court to is the Delorean case and
20 the Lawrence vs. Goldberg case, the
21 Lawrence vs. Goldberg case being
22 most -- frankly, being on all fours
23 on point where it goes on to protect
24 creditors who are assisting the
25 trustee in making a recovery, which

1 ADVERSARY PROCEEDING NO. 16-01251
2 is exactly what MFGAA's role is.
3 I would point out that MFGAA is
4 a member-managed company, and it is
5 owned by debtors, the former debtors.
6 Those are the only members. There
7 are no other members.
8 And as I pointed out before, it
9 is dealing with proceeds of estate
10 claims, the estate claims being the
11 actual general unsecured claims
12 against MFGI that -- and the whole
13 reason why this came up is because
14 of -- is because it's a distribution.
15 THE COURT: Do you have the
16 cite to Lawrence vs. Goldberg?
17 MR. BENNETT: Yes, I do, Your
18 Honor. Hold on one second.
19 573 Fed 3rd, 1265.
20 THE COURT: Okay.
21 MR. BENNETT: And in many other
22 places.
23 THE COURT: Okay.
24 MR. BENNETT: Okay. So that's
25 one.

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2 And then I would make the other
3 point that it is perfectly clear that
4 the case commenced against MFGAA in
5 Bermuda was a case intended to
6 deprive MFGH and creditors of MFGH of
7 the value that they're entitled to on
8 account of the distributions that
9 would come from these insurance
10 companies, that -- moneys that will
11 be paid by these insurance companies.
12 That's what this case is all
13 about. So it is well within the
14 appropriate purpose of the Barton
15 doctrine.
16 Now, permit a very, very short
17 response to the comments by the
18 gentleman from Cravath concerning the
19 timing.
20 We, of course, are aware of the
21 timing. If Your Honor can rule
22 before that hearing, we would
23 appreciate it. It would probably
24 prevent a lot of confusion.
25 But I'm not confused about the

1 ADVERSARY PROCEEDING NO. 16-01251
2 purpose -- for the presentation made
3 to you, Your Honor.
4 If you did over your weekend or
5 early this morning have a chance to
6 read the transcript of the hearing
7 that took place in Bermuda on
8 Thursday, you will find that one of
9 the -- one of the arguments made to
10 the Court was that it had to be okay
11 to proceed, because they had sent a
12 lawyer to you, Your Honor, Judge
13 Glenn, explaining that they were
14 going to proceed in the way that they
15 were going to proceed, and you hadn't
16 reacted, which, of course, represents
17 a fundamental misunderstanding of how
18 the U.S. judicial system in this
19 court works. And there were several:
20 Go back to that, you didn't react,
21 you didn't react, you didn't react.
22 There was the additional
23 suggestion that you would have the
24 opportunity to react today, and the
25 argument is going to be made this

1 ADVERSARY PROCEEDING NO. 16-01251
2 afternoon that if Your Honor does not
3 react, that it is acquiescence.
4 THE COURT: Strange concept,
5 but nonetheless --
6 MR. BENNETT: But it is there,
7 and I'm absolutely sure that that's
8 what our colleagues in Bermuda will
9 confront among all of the other
10 aggravation that they have to
11 confront there.
12 I will point out, Your Honor,
13 that, in fact, the gentleman probably
14 admitted that that whole thing,
15 that was a violation of your
16 preliminary injunction, because he
17 said it was converted to
18 declaratory --
19 THE COURT: Yeah, I don't want
20 to hear --
21 MR. BENNETT: -- which is one
22 of our point --
23 THE COURT: Mr. Bennett, I
24 don't want to hear about that.
25 MR. BENNETT: Okay. We'll be

1 ADVERSARY PROCEEDING NO. 16-01251
2 back.
3 THE COURT: Thank you.
4 MR. BENNETT: Thank you.
5 THE COURT: All right. Court
6 is going to take a brief recess, and
7 I'll see whether I come back and give
8 a ruling on the record or not.
9 MR. BENNETT: Thank you, Your
10 Honor.
11 THE COURT: Everybody stand by.
12 (Brief recess is taken.)
13 THE COURT: All right. After
14 hearing argument this morning on the
15 issues of the Bar Order and the
16 Barton doctrine and recognizing that
17 there is a hearing scheduled for this
18 afternoon in Bermuda, I'm going to
19 read into the record a ruling on
20 those pending issues.
21 And an order will be entered
22 granting certain relief, which in my
23 ruling I do intend to issue a written
24 opinion that will further elaborate
25 on what I'm explaining.

1 ADVERSARY PROCEEDING NO. 16-01251
2 Although, particularly because
3 there is a hearing before the Bermuda
4 court, I am going to be fairly
5 thorough in explaining my reasoning.
6 Pending before the Court is the
7 determination of two threshold issues
8 in this adversary proceeding.
9 First, the Court must decide
10 whether the Bermuda insurers violated
11 the Barton doctrine by initiating
12 proceedings against the plaintiffs in
13 Bermuda without leave of this Court.
14 Additionally, the Court is
15 faced with the issue whether the
16 Bermuda insurers violated the Bar
17 Order in the Global settlement by
18 filing the Bermuda action.
19 The parties to this adversary
20 proceeding have now fully briefed
21 these issues.
22 Allied World Assurance Company,
23 Limited, which will be referred to as
24 Allied, and Iron-Starr Excess Agency,
25 Limited; Ironshore Insurance, Limited

1 ADVERSARY PROCEEDING NO. 16-01251
2 and Starr Insurance and Reinsurance,
3 Limited, which collectively will be
4 referred to as the Iron-Starr
5 insurers and together with Allied
6 will be referred to as the Bermuda
7 insurers, each filed briefs in
8 support of their positions that the
9 filing of the proceedings in Bermuda
10 did not violate the Bar Order or the
11 Barton doctrine.
12 These pleadings and the
13 declarations and exhibits in support
14 are located on the adversary document
15 at ECF Docket Nos. 28, 32, 62, 63, 64
16 and 65.
17 The plaintiffs filed a brief on
18 the adversary document at ECF Docket
19 No. 68 and submitted a brief under
20 seal to the Court in support of their
21 position that the filing of the
22 Bermuda proceedings violated both the
23 Bar Order and the Barton doctrine.
24 The Court will first address
25 the alleged violation of the Barton

1 ADVERSARY PROCEEDING NO. 16-01251
2 doctrine.
3 (I), background.
4 The following facts are taken
5 from orders and opinions previously
6 issued by this Court from the
7 pleadings filed by the parties in
8 connection with these issues and from
9 the complaint that initiated this
10 adversary proceeding found on the
11 docket at ECF Docket No. 1 and filed
12 on October 27, 2016, by MF Global
13 Holdings, Limited, referred to as
14 MFGH as plan administrator and
15 MF Global Assigned Assets, LLC (MFGAA
16 and together with MFGH, the
17 plaintiffs).
18 The amended and restated joint
19 plan of liquidation pursuant to
20 Chapter 11 of the bankruptcy code,
21 I'll refer to that as "the plan," was
22 confirmed on April 5, 2013. See the
23 confirmation at ECF Docket No. 1288
24 in the main case.
25 Under the terms of the plan,

1 ADVERSARY PROCEEDING NO. 16-01251
2 MFGH, as plan administrator, is
3 responsible for liquidating all
4 property under the plan and making
5 distributions to creditors (after
6 confirmation of this plan, several
7 further amendments to the confirmed
8 plan were made and approved by the
9 Bankruptcy Court, but those changes
10 did not materially alter the
11 provisions relating to liquidation
12 and distribution of assets.)
13 Following plan confirmation, a
14 sale and assumption agreement found
15 on the main bankruptcy docket at
16 ECF Docket No. 2114, (Exhibit B) was
17 approved on August 19, 2015.
18 The order approving the sale
19 and assumption agreement can be found
20 on the main bankruptcy docket at
21 ECF Docket No. 2123.
22 The sale and assumption
23 agreement provides at Section 1.1
24 that MF Global, Inc., which we'll
25 refer to as MFGI, agrees to assign

1 ADVERSARY PROCEEDING NO. 16-01251
2 certain rights to MFGH as plan
3 administrator or to MFGH as designee.
4 Specifically at Sections 1.1
5 (b)(c), the sale and assumption
6 agreement provides that MFGI
7 transfers to MFGH its rights,
8 remedies, title and interest arising
9 out of or related to any and all
10 existing claims or recoveries arising
11 from certain E&O and D&E policies.
12 The order approving the sale
13 and assumption agreement provided
14 that following certain other
15 distributions, "all remaining
16 assigned rights and their proceeds
17 shall be allocated among the
18 Chapter 11 debtors by the plan
19 administrator...)" [as read]
20 MFGAA was formed under Delaware
21 law on August 26, 2015, as a limited
22 liability company to retain the
23 assets assigned in satisfaction of
24 the debtor's claims.
25 MFGH is the managing member of

1 ADVERSARY PROCEEDING NO. 16-01251
2 MFGAA. MFGAA was assigned all
3 claims, rights, title and benefits of
4 MFGI with respect to certain assets
5 including with respect to certain E&O
6 and D&O policies and maintains the
7 right to recover on all claims
8 previously held by MFGI's estates.
9 On August 10, 2016, this Court
10 entered an order approving a Global
11 settlement in these Chapter 11 cases.
12 The Global settlement can be found at
13 Docket No. 2282 in the main
14 bankruptcy case.
15 The Global settlement in which
16 all insurers other than the
17 defendants in this adversary
18 proceeding paid their policy limits
19 included a borrower, which provides
20 in part that no party can contest the
21 reasonableness of the Global
22 settlement.
23 The plaintiffs, pursuant to the
24 mechanisms laid out by this Court in
25 the plan, the sale and assumption

1 ADVERSARY PROCEEDING NO. 16-01251
2 agreement and the Global settlement,
3 filed a complaint in this adversary
4 proceeding to recover the $25 million
5 proceeds -- policy proceeds and
6 certain other identities under the
7 defendants' E&O insurance policies.
8 Allied had indicated as early
9 as February 11, 2016, months before
10 the filing of the complaint, that
11 Allied had notified the plaintiffs of
12 its desire to arbitrate pursuant to
13 the arbitration clause in the policy
14 issued by Allied.
15 Allied further maintains that
16 over the next eight months, the
17 plaintiffs' counsel under a
18 reservation of rights worked with
19 Allied to impanel arbitrators for
20 arbitration under the rule.
21 The plaintiffs disagree about
22 the status of the alleged Bermuda
23 arbitration.
24 On November 8, 2016, less than
25 two weeks after the plaintiffs filed

1 ADVERSARY PROCEEDING NO. 16-01251
2 a complaint in this adversary
3 proceeding, the Bermuda insurers
4 filed proceedings against MFGH and
5 MFGAA in Supreme Court of Bermuda,
6 Civil Division -- excuse me, Civil
7 Jurisdiction (commercial court) --
8 I'll refer to that as the Bermuda
9 court -- and obtained ex parte
10 injunctive orders that effectively
11 prohibited the plaintiffs from
12 pursuing the litigation commenced in
13 this court through the filing of the
14 complaint.
15 (II), the legal standards.
16 "The Barton doctrine developed
17 by common law from the Supreme Court
18 provides that a suit may not be
19 brought against a receiver without
20 leave of such receiver's appointing
21 court." See McIntyre,
22 M-C-I-N-T-Y-R-E V. China Media
23 Express Holding, Inc., 113 F Sup 3rd
24 769 at 772 (SDNY 2015); Barton vs.
25 Barbour, B-A-R-B-O-U-R, 104 U.S. 126

1 ADVERSARY PROCEEDING NO. 16-01251
2 at 136 and 37 (1881) ("When the court
3 of one state has...property in its
4 possession for administration as
5 trust assets, it has appointed a
6 receiver to aid in the performance of
7 its duty by carrying on the business
8 to which the properties adapted...a
9 court in another state has not
10 jurisdiction without leave of the
11 court by which the receiver was
12 appointed to entertain a suit against
13 him... ."). [As read]
14 In addition to protecting
15 court- -- a Court-appointed receiver
16 for personal liability, the Barton
17 doctrine is intended to protect the
18 receivership court's "overriding
19 interest in the administration of the
20 estate." McIntyre, 113 F Sup 3rd at
21 773.
22 "The Second Circuit has
23 recognized that the Barton doctrine
24 extends to bankruptcy as well as
25 receivership, and lower courts have

1 ADVERSARY PROCEEDING NO. 16-01251
2 applied it to declaratory judgement
3 actions as well as suits seeking
4 damages." McIntyre 113 F Sup 3rd at
5 772 (internal citations omitted).
6 Additionally, the Barton
7 doctrine "has been observed in the
8 post-receivership context and has
9 been extended to bankruptcy
10 trustees." Securities Investor
11 Protection Corp. V. Bernard L. Madoff
12 Investment Securities, LLC, 460 BR
13 106, 116 (bankruptcy SDNY 2011),
14 affirmed, 474 BR 76 (SDNY 2012)
15 ("Madoff") citing Lebobits
16 L-E-B-O-B-I-T-S, vs. Scheffel,
17 S-C-H-E-F-F-E-L (in re Lehal,
18 L-E-H-A-L, Realty Associates), 101 F
19 3rd 272, 276 (Second Circuit 1996)
20 (describing the "well-recognized line
21 of cases" extending the Barton
22 doctrine to bankruptcy trustees).
23 The Court in the McIntyre case
24 noted that "The rationale underlying
25 Barton extends to arbitrations" in

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MF GLOBAL HOLDINGS LTD., *et al.*, Debtors.	Chapter 11 Case No. 11-15059 (MG) (Jointly Administered)
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC, Plaintiffs, vs. 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)

ORDER FINDING THAT THE BERMUDA INSURERS VIOLATED THE BARTON DOCTRINE AND ORDERING RELIEF

On January 23, 2017, the Court held a hearing to address whether Allied World Assurance Company Ltd., Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited (together, the "Bermuda Insurers") violated the *Barton* doctrine or the Bar Order in the Global Settlement by initiating proceedings in Bermuda against MF Global Holdings, Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA" and together with MFGH, the "Plaintiffs") without leave of this Court.[1]

For the reasons stated on the record at the January 23, 2017 hearing, and as will be explained in more detail in a forthcoming written opinion, the following relief is granted.

[1] Capitalized terms not otherwise defined herein shall have the definitions ascribed to them in the *Memorandum Opinion and Temporary Restraining Order* (ECF Doc. # 35).

By this Order, within one day after the date of this Order, the Bermuda Insurers are ordered to dismiss the Bermuda proceedings against the Plaintiffs, and to cease any further proceedings against the Plaintiffs in any court other than this Court.

IT IS SO ORDERED.

Dated: January 23, 2017
New York, New York

/s/Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	X	**FOR PUBLICATION**
MF GLOBAL HOLDINGS LTD., *et al.*,	:	
Debtors.	:	Chapter 11 Case No. 11-15059 (MG) (Jointly Administered)
	X	
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC,	:	
Plaintiffs,	:	
v.	:	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.	:	
	X	

MEMORANDUM OPINION AND ORDER FINDING THAT THE BERMUDA INSURERS VIOLATED THE BARTON DOCTRINE

APPEARANCES:

WHITE AND WILLIAMS, LLP
Counsel to Allied World Assurance Company, Ltd
7 Times Square
New York, New York 10036
By: Erica Kerstein, Esq.

D'AMATO & LYNCH, LLP
Counsel to Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited
Two World Financial Center
225 Liberty Street
New York, New York 10281
By: Mary Jo Barry, Esq.
Maryann Taylor, Esq.

JONES DAY
Attorneys for MF Global Holdings Ltd., as Plan Administrator, and MF Global Assigned Assets LLC
555 South Flower Street, 50th Floor
Los Angeles, California 90071
By: Bruce Bennett, Esq.

-and-

JONES DAY
250 Vesey Street
New York, New York 10281
By: Edward M. Joyce, Esq.
Jane Rue Wittstein, Esq.

MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

This is the fourth written opinion in this adversary proceeding since it was filed on October 27, 2016, with each of the opinions addressing whether this Court or a court in Bermuda can and will address the claims and defenses arising in this case, including whether the underlying disputes must be arbitrated in Bermuda.[1] The complaint names as defendants five insurers that provided excess errors and omissions ("E&O") insurance coverage to MF Global Holdings Ltd. and its subsidiaries and affiliates, and their officers and directors. The plaintiffs here are MF Global Holdings Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA" and together with MFGH, the "Plaintiffs"). The complaint seeks to recover the full policy limits plus additional damages resulting from these insurers refusal to pay policy proceeds in connection with a global settlement of MDL litigation pending in the United States District Court for the Southern District of New York (the "Global Settlement"). The MDL

[1] The first three opinions can be found at *In re MF Global Holdings Ltd.*, 561 B.R. 608 (Bankr. S.D.N.Y. 2016) (order issuing temporary restraining order) [hereinafter "*TRO Opinion*"]; *In re MF Global Holdings Ltd.*, __ B.R. __, 2017 WL 119338 (Bankr. S.D.N.Y. Jan. 12, 2017) (order granting preliminary injunction) [hereinafter "*Preliminary Injunction Opinion*"]; *In re MF Global Holdings Ltd.*, __ B.R. __, 2017 WL 113606 (Bankr. S.D.N.Y. Jan. 12, 2017) (order holding Bermuda-based insurers in contempt) [hereinafter "*Contempt Opinion*"] (collectively, the "Prior Opinions"). Familiarity with those opinions is assumed. Those opinions describe the background and circumstances of the issues arising in this adversary proceeding. Capitalized terms not defined herein shall have the definitions ascribed to them in the TRO Opinion.

cases asserted claims against the officers and directors of MFGH and its affiliates (and other defendants) for claims arising from the collapse of MF Global in October 2011. On August 10, 2016, this Court entered an order approving the Global Settlement, which included a bar order ("Bar Order") and an assignment of the settling officers' and directors' rights to coverage under these defendants' E&O policies. (D.I. 2282.)[2]

Four of the five insurer defendants in this case are based in Bermuda (the "Bermuda Insurers").[3] The Bermuda Insurers responded to the filing of the adversary proceeding by filing cases in the Supreme Court of Bermuda, Civil Jurisdiction (Commercial Court) (the "Bermuda Court") and obtaining *ex parte* anti-suit injunctions (the "Bermuda anti-suit injunctions") prohibiting the Plaintiffs from prosecuting this adversary proceeding. The Bermuda Insurers contend and sought orders from the Bermuda Court requiring the Plaintiffs to arbitrate their disputes in Bermuda based on arbitration clauses contained in their E&O policies. The Plaintiffs contend that this Court, rather than arbitration in Bermuda, is the proper forum to resolve the coverage disputes. The Bermuda Insurers filed motions in this Court to compel arbitration but the Bermuda anti-suit injunctions prevented the Plaintiffs from opposing the motions in this Court.

In the three earlier opinions in this case, the Court first issued a temporarily restraining order ("TRO") barring the Bermuda Insurers from enforcing the Bermuda anti-suit injunctions, then issued a preliminary injunction extending the relief granted in the TRO, and issued an opinion holding the Bermuda Insurers in contempt for violating the TRO. The Plaintiffs have contended since the Bermuda Insurers filed the Bermuda proceedings that the commencement of

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[2] References to the docket in the main chapter 11 case will be denoted as "D.I."

[3] The Bermuda Insurers are Allied World Assurance Company Ltd., Iron–Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited.

those proceedings and the obtaining of the anti-suit injunctions violated the *Barton* Doctrine (explained below) and the Bar Order contained in the August 10, 2016 order approving the Global Settlement. The anti-suit injunctions prevented the Plaintiffs from briefing and arguing the issues under the *Barton* Doctrine and the Bar Order. After the Court issued the TRO and preliminary injunction, the Court set a briefing and argument schedule specifically focused on those two issues. The Court heard argument during the morning of January 23, 2017, and announced a ruling from the bench concluding that the Bermuda Insurers violated the *Barton* Doctrine by filing the Bermuda proceedings.[4] The Court explained the basis for its ruling from the bench, but also indicated that a written opinion would follow. A written order was entered requiring the Bermuda Insurers to dismiss their Bermuda actions (ECF Doc. # 78), followed the next day by another order clarifying that the Court required that the Bermuda actions must be dismissed without prejudice. (ECF Doc. # 82.) This Opinion elaborates on the reasons for the relief ordered by the Court. After the entry of the two orders, the Bermuda Insurers complied with the orders and discontinued the Bermuda actions. The Court has scheduled a case management conference for February 23, 2017, and directed the parties to confer on a schedule for briefing and hearing argument of the Bermuda Insurers' motions to compel arbitration, and other matters.

This Opinion addresses one of the central issues in this adversary proceeding—namely, whether the Bermuda Insurers violated the *Barton* Doctrine by initiating proceedings against the Plaintiffs in Bermuda without leave of this Court. In light of the decision on the *Barton*

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[4] The Court announced its decision from the bench, and promptly entered a written order granting relief, because a hearing was scheduled for the Bermuda Court that same afternoon in which the Bermuda Insurers were seeking additional relief.

Doctrine, the Court concludes that it is unnecessary at this time to decide whether the Bermuda Insurers violated the Bar Order in the Global Settlement by filing the Bermuda proceedings.

After the entry of the TRO Opinion, which enjoined the Bermuda Insurers from taking any action to enforce certain provisions of the injunctive orders issued by the Bermuda court, Allied World Assurance Company Ltd. ("Allied") filed the *Memorandum of Law in Support of Defendant Allied World Assurance Company, Ltd's Opposition to Application of the Bar Order and* Barton *Doctrine* (the "Allied Opposition," ECF Doc. # 62), and Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited ("the Iron-Starr Insurers") filed the *Iron-Starr Defendants' Memorandum of Law in Opposition to the Application of the Bar Order and* Barton *Doctrine* (the "Iron-Starr Opposition," ECF Doc. # 64). Allied also filed the *Affidavit of Erica Kerstein* (the "Kerstein Affidavit," ECF Doc. # 63) and several exhibits; the Iron-Starr Insurers filed the *Declaration of Mary Jo Barry* (ECF Doc. # 65) and several exhibits.[5]

The Plaintiffs filed the *Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order* (the "Plaintiffs' Opening Brief," ECF Doc. # [--], filed under seal on December 28, 2016) along with certain exhibits, and the *Omnibus Response Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order* (the "Plaintiffs' Response," ECF Doc. # 68), along with the affidavit of Edward Joyce (the "Joyce Affidavit," ECF Doc. # 69) and several exhibits.

[5] Earlier in the case, on December 7, 2016, Allied filed a brief addressing the Bar Order and *Barton* Doctrine issues (the "Allied Response," ECF Doc. # 28), as did the Iron-Starr Insurers (the "Iron-Starr Response," ECF Doc. # 32.)

I. BACKGROUND

The Prior Opinions describe the background of the MF Global Chapter 11 and SIPA cases, the confirmed Chapter 11 Plan, and the Global Settlement. Additional relevant facts are set forth below.

The *Amended and Restated Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") was confirmed on April 5, 2013. (D.I. 1288.) Under the terms of the Plan, MFGH, as Plan Administrator, is responsible for liquidating all property under the Plan and making distributions to creditors.[6] After the Plan was confirmed, a "Sale and Assumption Agreement" (D.I. 2114, Ex. B) was approved on August 19, 2015. (D.I. 2123.) The Sale and Assumption Agreement provides at section 1.1 that MF Global Inc. (or "MFGI") agrees to assign certain rights to MFGH, as Plan Administrator, or MFGH's designee. Specifically, at sections 1.1 (b) and (c), the Sale and Assumption Agreement provides for MFGI to transfer to MFGH its rights, remedies, title, and interests arising out of, or related to any and all existing claims or recoveries arising from certain E&O and D&O policies. (Sale and Assumption Agreement § 1.1.) The order approving the Sale and Assumption Agreement provides that, following certain other distributions, "[a]ll remaining Assigned Rights and their proceeds shall be allocated among the Chapter 11 Debtors by the Plan Administrator . . . ." (D.I. 2123 at 8.)

MFGAA was formed under Delaware law on August 26, 2015 as a limited liability company to retain the assets assigned in satisfaction of the Debtors' claims. MFGH is the managing member of MFGAA. MFGAA was assigned all claims, rights, title, and benefits of MFGI with respect to certain assets, including with respect to certain E&O and D&O policies,

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[6] After confirmation of this Plan, several further amendments to the confirmed plan were made and approved by this Court, but those changes did not materially alter the provisions relating to liquidation and distributions of assets.

and maintains the right to recover on all claims previously held by MFGI's estates. (*See* Plaintiffs' Response at 10–11.)

The E&O insurance policies issued by the Bermuda Insurers each contain a mandatory arbitration provision. (Allied Response at 3; Iron-Starr Response at 4.) These arbitration clauses[7] provide that all disputes arising under or relating to these policies shall be fully and finally resolved by arbitration in Bermuda. (*Id.*) But where arbitration law and bankruptcy law clash, the analysis whether particular disputes must be arbitrated is more nuanced. As explained in the TRO Opinion and the Preliminary Injunction Opinion,

> *Under U.S. law*, the answer to the question whether particular disputes must be arbitrated depends on the application of both arbitration law *and* U.S. bankruptcy law. It is a nuanced analysis. . . . .
>
> Courts in this district have recognized that when a Bankruptcy Court is presented with a motion to compel arbitration . . . the Court must apply a four-part test:
>
>> [F]irst, it must determine whether the parties agree to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.
>>
>> Naturally, [w]hen arbitration law meets bankruptcy law head on, clashes inevitably develop.

---

[7] For example, the Allied Policy's arbitration clause reads in relevant part:

> 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 under the provisions of The Bermuda International Conciliation and Arbitration Act of 1993 (exclusive of the Conciliation Part of such Act), as may be amended and supplemented, by a board composed of three arbitrators to be selected for each controversy . . . .

(Complaint, Ex. B at 7.)

> Specifically, [t]he issue of waiver predominates arbitration disputes involving bankruptcy claims, and the first indication of waiver is whether a claim is core or non-core. Despite what the Bermuda Insurers may have attested to before the Bermuda Court, the determination of whether a claim is core or non-core can be complex, including in insurance coverage disputes.

TRO Opinion, 561 B.R. at 627 (internal quotation marks and citations omitted); *Preliminary Injunction Opinion*, 2017 WL 119338, at *4 (internal quotation marks and citations omitted); see also *In re U.S. Lines, Inc.*, 197 F.3d 631, 636–37 (2d Cir. 1999).

II. THE PARTIES' ARGUMENTS

A. The Plaintiffs' Arguments

1. The Bar Order

The Plaintiffs argue that by demanding costs and attorneys' fees in connection with the Bermuda proceedings, the Bermuda Insurers have plainly brought a "claim" against the Plaintiffs in clear violation of the Bar Order.[8] (Plaintiffs' Response at 3–4.) Additionally, the Plaintiffs

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[8] The Bar Order provides in relevant part:

> 3. [T]he plan injunction ("Plan Injunction") as to the Debtors and their respective property established pursuant to paragraph 75 in the *Order Confirming Amended and Restated Joint Plan of Liquidation* . . . shall be modified solely to the extent necessary, and without further order of the Bankruptcy Court, to authorize any and all actions reasonably necessary to consummate the Global Settlement, including without limitation, any payments under certain insurance policies required under the Settlement . . . . Furthermore, any person or entity that is not a Party to the Settlement Agreement is permanently barred, enjoined, and restrained from commencing, prosecuting, or asserting any claims arising out of payments made under certain insurance policies in accordance with the Settlement Agreement or any other agreement referenced therein or associated therewith.
>
> . . . .
>
> 7. Upon entry of this Order, any person or entity that is not a Party to the Settlement Agreement, including any Dissenting Insurer, is permanently barred, enjoined, and restrained from contesting or disputing the Reasonableness of Settlement, or commencing, prosecuting, or asserting any claims, including, without limitation, claims for contribution, indemnity, or comparative fault (however denominated an on whatsoever theory), arising out of or related to the MF Global Actions . . . .
>
> 8. For the avoidance of doubt, nothing in this Order shall preclude:

argue that the Bermuda Insurers are seeking to "collaterally attack" the reasonableness of the MDL settlement. (Plaintiffs' Opening Brief at 3–5.) Specifically, the Plaintiffs note that the Bermuda Insurers have taken the position that the claims under the Global Settlement are uninsurable claims for "disgorgement and/or restitution," and the Bar Order expressly precludes any insurer not a party to the Global Settlement from challenging the insurability of claims covered under the Global Settlement. (Plaintiffs' Opening Brief at 4.) Therefore, the Plaintiffs reason, this is a challenge to whether the E&O tower was "properly" and "fairly" exhausted. (*Id.* at 5; Plaintiffs' Response at 6.) Relatedly, the Plaintiffs argue that, contrary to Allied's representations, MFGH *does* have rights under the Global Settlement to prosecute the assigned claims under the E&O policies at issue here, and that Allied is incorrect in asserting that MFGAA is the only entity entitled to pursue the disputed policy proceeds. (Plaintiffs' Response at 6–7.)

2. *The* Barton *Doctrine*

The Plaintiffs argue that the Bermuda Insurers have violated the *Barton* Doctrine because MFGH and MFGAA were assigned the rights of the individual insureds against the Bermuda Insurers under the Plan, and the Plaintiffs are entitled to the protections of the *Barton* Doctrine in pursuing those rights in an effort to marshal and liquidate estate assets. (Plaintiffs' Response at 11–12.) The Plaintiffs emphasize that MFGAA "is merely the vehicle created by MFGH under the Plan to hold the assets assigned by MFGI," and together with MFGH, is tasked with

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> . . . (iii) any claims by the Insurance Assignees to enforce the Assigned Rights; (iv) any claim or right asserted by an MFG Plaintiff against any Dissenting Insurer on its own behalf (as distinct from the Assigned Rights) . . . .

(Global Settlement ¶¶ 3, 7, 8.)

marshaling and liquidating estate assets. (Plaintiffs' Response at 10–11.)[9] As such, the Plaintiffs maintain that both MFGH, as Plan Administrator, and MFGAA are entitled to protection under the *Barton* Doctrine. Also, the Plaintiffs note that the Bermuda Insurers do not claim to have been unaware of the *Barton* Doctrine, as the Bermuda Insurers cited to case law in their submissions to the Bermuda Court that extensively discusses the Doctrine. (Plaintiffs' Response at 9 n. 16.)

B. The Bermuda Insurers' Arguments

1. The Bar Order

The Bermuda Insurers maintain that the plain text of the Bar Order does not prohibit the Bermuda anti-suit injunctions. (Allied Response at 7–9; Iron-Starr Response at 9–11). The Bermuda Insurers also argue that the intent behind the Bar Order was primarily to prevent collateral attacks against the Global Settlement, and that the filing of proceedings in Bermuda did not violate the spirit of the Bar Order because the Bermuda Insurers do not seek to upend any portion of the Global Settlement. (Allied Response at 10–12; Iron-Starr Response at 11–14.)

2. The Barton *Doctrine*

The Bermuda Insurers argue that the Bermuda proceedings are not a suit against a court-appointed officer in his/her official capacity, and thus does not constitute a *Barton* violation because the Bermuda proceedings were only filed to defend a pre-existing arbitration clause. The Bermuda Insurers maintain that MFGH, though a court-appointed officer, does not directly hold the right to pursue any recovery of the underlying insurance policy proceeds, rendering the *Barton* Doctrine inapplicable. (Allied Opposition at 6.)

---

[9] The Plaintiffs also point out that "the three remaining Debtors are the only members of MFGAA, the [Allied and Iron-Starr policy] 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 [these policies]." (Plaintiffs' Response at 11.)

Additionally, the Bermuda Insurers contend that the *Barton* Doctrine is typically applied in suits against court officers in entirely different circumstances, such as where a trustee commits malpractice, breaches a fiduciary duty, or violates an individual's constitutional rights. (Allied Response at 13–19; Iron-Starr Response at 15–20.) The Bermuda Insurers also suggest that the Bermuda proceedings do not "interfere with creditors' claims or the administration of the estate," a scenario the *Barton* Doctrine is designed to prevent, because MFGH is the only relevant "estate," and the MFGH does not hold title to proceeds of the underlying policies. (Allied Opp. at 5.)

III. LEGAL STANDARD

A. The Bar Order

It is well settled that a bankruptcy court retains jurisdiction post-confirmation to interpret and enforce its own orders. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009) ("[A]s the Second Circuit recognized . . . the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders."); *see also In re Lyondell Chem. Co.,* 445 B.R. 277, 287 (Bankr. S.D.N.Y. 2011) ("The Second Circuit and other bankruptcy courts in this district have ruled that a bankruptcy court retains core jurisdiction to interpret and enforce its own prior orders, including and especially confirmation orders."); *In re Charter Communications*, 2010 WL 502764, at *4 (Bankr. S.D.N.Y. 2010) ("All courts retain the jurisdiction to interpret and enforce their own orders."). Judge Peck, in *Charter Communications*, discussed how following plan confirmation, a bankruptcy court's jurisdiction "does begin to diminish in importance," but that when a dispute involving the interpretation of prior orders is "sufficiently close in time to confirmation of the [p]lan and sufficiently critical to the integrity of the [p]lan's structure," it

may well be appropriate for a court to "take firm control of and decide" an issue. *Charter Communications*, 2010 WL 502764, at *4.

B. The *Barton* Doctrine

"The *Barton* Doctrine, developed from common law by the Supreme Court, provides that a suit may not be brought against a receiver without leave of such receiver's appointing court." *McIntire v. China MediaExpress Holdings, Inc.*, 113 F. Supp. 3d 769, 772 (S.D.N.Y. 2015); *Barton v. Barbour*, 104 U.S. 126, 136–37 (1881) ("[W]hen the court of one State has . . . property in its possession for administration as trust assets, and has appointed a receiver to aid in the performance of its duty by carrying on the business to which the property is adapted . . . a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him . . . .").

"The Second Circuit has recognized that the *Barton* Doctrine extends to bankruptcy as well as receivership, and lower courts have applied it to declaratory judgment actions, as well as suits seeking damages." *McIntire*, 113 F. Supp. 3d at 772 (internal citations omitted); *see also Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 460 B.R. 106, 116 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 76 (S.D.N.Y. 2012) [hereinafter "*Madoff*"] (citing *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir.1996)) (describing the "well-recognized line of cases" extending the *Barton* Doctrine to bankruptcy trustees, and its application in the post-receivership context). The court in *McIntire* noted that "the rationale underlying *Barton* extends to arbitrations" in holding that non-party insurers were required to seek leave from the court to name a receiver as a party to an arbitration proceeding. *McIntire*, 113 F. Supp. 3d at 774.

"In addition to protecting a court-appointed receiver from personal liability, the *Barton* Doctrine is intended to protect the receivership court's 'overriding interest in [the] administration of the estate.'" *McIntire*, 113 F. Supp. 3d. at 773 (citation omitted); *see also In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (explaining that the *Barton* Doctrine "enables the Bankruptcy Court to maintain better control over the administration of the estate"). Other courts have noted that the *Barton* Doctrine can also serve to "centralize bankruptcy litigation" and "keep a watchful eye" on court-appointed officers. *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1094 (9th Cir. 2016) (quoting *In re Yellowstone Mountain Club, LLC*, 2013 WL 1099155, at *3 (Bankr. D. Mont. 2013)).

While there is a limited statutory exception to the Doctrine not applicable here,[10] as this Court recently concluded, the *Barton* Doctrine is not restricted to legal actions brought within the United States, and requires that "a party who seeks to file suit in an international forum" obtain leave of the appointing court. *Preliminary Injunction Opinion*, 2017 WL 119338, at *6 (quoting *ACE Insurance Co., Ltd. v. Smith (In re BCE West, L.P.)*, 2006 WL 8422206, at *8 (D. Ariz. Sept. 20, 2006)).

Recently, the Ninth Circuit applied the *Barton* Doctrine to bar claims brought against a member of a committee of unsecured creditors. *Yellowstone*, 841 F.3d at 1095 ("Because creditors have interests that are closely aligned with those of a bankruptcy trustee, there's good

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[10] The limited exception to the *Barton* Doctrine set forth in 28 U.S.C. § 959(a) provides in relevant part that "[t]rustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. § 959(a). Given that there is no current business being carried out in connection with this case, this statutory exception is inapplicable. *See Lehal Realty*, 101 F.3d at 276 (finding that the exception in section 959 was inapplicable where "a trustee acting in his official capacity conducts no business connected with the property other than to perform administrative tasks necessarily incident to the consolidation, preservation, and liquidation of assets in the debtor's estate") (citations omitted).

reason to treat the two the same for purposes of the *Barton* [D]octrine."). The *Yellowstone* court explained that because a creditors' committee is tasked with certain statutory obligations including, among other things, examining the debtor and participating in the formation of a reorganization plan, a lawsuit against the committee or its members would interfere with the bankruptcy proceedings and could cause committee members "to be timid in discharging their duties." *Id.*

Similarly, in applying the *Barton* Doctrine, the Sixth Circuit looks to whether an entity is the "functional equivalent of a trustee." *DeLorean*, 991 F.2d at 1241. In *DeLorean*, the Sixth Circuit held that counsel for a trustee is the "functional equivalent" of the trustee for purposes of estate administration, and is thus protected by the *Barton* Doctrine. *Id.* ("We hold, as a matter of law, counsel for trustee, court appointed officers who represent the estate, are the functional equivalent of a trustee, where as here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets."). The *DeLorean* court reasoned that "[t]he protection that the leave requirement affords the [t]rustee and the estate would be meaningless if it could be avoided by simply suing the [t]rustee's attorneys." *Id.*

The Eleventh Circuit adopted the "functional equivalent" test articulated by the Sixth Circuit in finding that officers appointed by the trustee and approved by the bankruptcy court to sell estate property warranted the protection of the *Barton* Doctrine. *See Carter v. Rodgers*, 220 F.3d 1249, 1252 n.4 (11th Cir. 2000); *see also Lawrence v. Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009) (extending the protections of the *Barton* Doctrine to a trustee's hired professionals assisting to "discharge" the trustee's duties, and to creditors who "financed the [t]rustee's efforts," because these entities "functioned as the equivalent of court appointed officers").

Additionally, as this Court discussed in detail in the Preliminary Injunction Opinion, the District Court of Arizona upheld a bankruptcy court's finding that a Bermuda-based insurer violated the *Barton* Doctrine by filing an action in Bermuda against the plan trustee of the confirmed Boston Chicken chapter 11 plan. *BCE West*, 2006 WL 8422206, at *1. While many courts have applied the *Barton* Doctrine broadly, the Second Circuit has not articulated a test for determining the application of the *Barton* Doctrine to parties other than a receiver or trustee. But at least one district court within this Circuit has affirmed a bankruptcy court's determination that the Doctrine's protection extended to both the trustee and counsel for the trustee. *See Peia v. Coan*, 2006 WL 798873, at *2 (D. Conn. Mar. 23, 2006).

When a court determines that the *Barton* Doctrine has been violated, "[t]he only appropriate remedy . . . is to order cessation of the improper action." *Madoff*, 460 B.R. at 116 (quoting *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 970 (9th Cir. 2005)); *see also In re Baptist Medical Center of New York*, 80 B.R. 637, 643 (Bankr. E.D.N.Y. 1987) (discussing the *Barton* Doctrine, and noting that "'[c]ontempt' is the relief that may properly be granted upon a showing that [a] suitor impermissibly commenced the action against the trustee")

IV. DISCUSSION

A. The Bar Order

As set forth above, any "entity that is not a [p]arty to the Settlement Agreement is permanently barred, enjoined, and restrained from commencing, prosecuting, or asserting any claims arising out of payments made under certain insurance policies in accordance with the [Global Settlement] . . . ." (Bar Order ¶ 3.) Whether or not the Bermuda Insurers violated the Bar Order, then, may hinge on whether by filing proceedings in Bermuda, the Bermuda Insurers

asserted a "claim" against the Plaintiffs. Similarly, if the Court were to conclude that the Bermuda Insurers are attacking the reasonableness of the Global Settlement, the Bermuda Insurers would be in violation of the Bar Order. (*See* Bar Order ¶ 7.)

The Bermuda Insurers maintain that because the Bermuda proceedings were filed as a "defensive action," and because they do not seek to directly upend the Global Settlement, they have not violated the Bar Order. Though the Bermuda Insurers originally requested indemnity costs and fees in connection with the Bermuda proceedings, at this stage in the case, the Bermuda anti-suit injunctions have all been vacated. In any event, the Court may resolve the pending issues by first addressing whether the Bermuda Insurers violated the *Barton* Doctrine.

Because the Court concludes that the Bermuda Insurers violated the *Barton* Doctrine by filing the Bermuda actions without first obtaining leave of this Court, it is unnecessary to resolve whether the Bermuda filings also violated the Bar Order.

B. The *Barton* Doctrine

MFGH, as Plan Administrator, is a court-appointed entity tasked with marshaling and liquidating assets, and by initiating this adversary proceeding against the Bermuda Insurers to pursue funds for the benefit of creditors, MFGH was acting in its official capacity.[11] Likewise, MFGAA was created pursuant to the terms and mechanisms of the Plan and the Sale and Assumption Agreement, both of which were approved by this Court. MFGAA, as holder of the rights to the underlying policies issued by the Bermuda Insurers, together with MFGH, initiated this adversary proceeding in furtherance of the goals laid out in the Plan and Sale and Assumption Agreement with the express authorization of this Court. The proceedings brought by the Bermuda Insurers against the Plaintiffs in Bermuda were initiated following the filing of

[11] The Bermuda Insurers concede that MFGH is a court-appointed officer. (Allied Response at 14; Iron-Starr Opposition at 11.)

the Complaint in an attempt to circumvent the adjudication of issues properly before this Court, and abruptly halted the Plaintiffs' efforts to carry out their official responsibilities.

The Bermuda Insurers have undermined this Court's and the Plaintiffs' "overriding interest in [the] administration of the estate" by filing suit against MFGH and MFGAA without leave of this Court. *McIntire*, 113 F. Supp. 3d. at 773. The Bermuda proceedings have resulted in disjointed and decentralized actions in multiple jurisdictions, and have delayed the administration of this case, and ultimately, distributions to creditors. The *Barton* Doctrine seeks to prevent this very type of interference. The injunctive relief originally sought by the Bermuda Insurers in the Bermuda Court (which has now been vacated) underscores the impermissible intrusion that the Bermuda proceedings had on the Plaintiffs' ability to carry out its obligations, and this Court's ability to adjudicate the issues properly before it.

Courts have consistently applied the *Barton* Doctrine broadly to prevent suits against court-appointed officers in a wide variety of circumstances, and the *Barton* Doctrine is directly applicable to the facts and circumstances of this case.

For example, as noted above, the Eleventh Circuit has held that court-appointed officers assisting a trustee in carrying out official duties are protected by the *Barton* Doctrine. *See Lawrence*, 573 F.3d at 1270 (broadly applying the *Barton* Doctrine in determining that the trustee, counsel to the trustee, and certain others who assisted the trustee to recover property of the estate were protected under the *Barton* Doctrine). Here, MFGAA, as the holder of the rights to collect on the policies issued by the Bermuda Insurers, is functionally advancing the efforts of MFGH, as Plan Administrator, in carrying out its official duties. Just as the court in *Lawrence* found that the *Barton* Doctrine protects parties assisting a trustee in pursuing its objectives, so

too does this Court find that the *Barton* Doctrine protects both MFGH and MFGAA in undertaking their official obligations, including the filing of the Complaint.

The facts and circumstances of this case are similar in many ways to those in the *Boston Chicken* case. In *Boston Chicken*, as is the case here, a Bermuda-based insurance company obtained *ex parte* injunction orders prohibiting a plan administrator, charged with the collection of certain retained assets (including causes of action relating to insurance policies), from pursuing litigation to collect on the insurance policies issued by the Bermuda insurance company. *See BCE* West, 2006 WL 8422206, at *2. There, the bankruptcy court found that the Bermuda-based insurance company, by filing suit against the Boston Chicken plan trustee without first seeking leave of the bankruptcy court, violated the *Barton* Doctrine, and the district court affirmed the bankruptcy court's decision. *Id.* at *8. Similarly, MFGH, together with MFGAA, is charged with administering certain assets, including the rights to collect on the policies issued by the Bermuda Insurers. The Complaint reflects an effort to collect on these policies, as was the case in *Boston Chicken.*

By marshaling and liquidating assets for the benefit of creditors, MFGH, together with MFGAA, were pursuing goals substantially similar to those of a bankruptcy trustee. The Bermuda proceedings were initiated to handcuff the Plaintiffs following the filing of the Complaint, which the Plaintiffs filed in accordance with their mandate. But the *Barton* Doctrine protects the Plaintiffs in their pursuit of court-sanctioned actions. Parties like the Plaintiffs should not be impeded from carrying out their duties or sidetracked with vexing litigation by frustrated litigants. *Carter*, 220 F.3d at 1252–53 ("If [the trustee] is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded. . . . Without the requirement [of leave], trusteeship will become a

more irksome duty . . . .") (quoting *Matter of Linton*, 136 F.3d 544, 545 (7th Cir. 1998)). In order to bring arbitration proceedings against MFGH and MFGAA, the Bermuda Insurers were required, under the *Barton* Doctrine, to obtain leave of this Court.

The proceedings initiated by the Bermuda Insurers were brought outside the United States, but the *Barton* Doctrine requires "a party who seeks to file suit in an international forum" to obtain leave of the appointing court. *See Preliminary Injunction Opinion*, 2017 WL 119338, at *6.

V. CONCLUSION

The Court finds and concludes that by filing proceedings against MFGH and MFGAA in Bermuda, the Bermuda Insurers violated the *Barton* Doctrine. Therefore, the appropriate remedy was for this Court to order the Bermuda Insurers to terminate proceedings in Bermuda against MFGH and MFGAA without prejudice, as they have already done. Accordingly, the Court need not address whether the filing of proceedings in Bermuda violated the Bar Order in the Global Settlement.

The conclusion that the Bermuda Insurers violated the *Barton* Doctrine does not mean that arbitration in Bermuda may not be required. But this Court, rather than the Bermuda Court, must resolve the arbitration issue. Once briefing is complete, the Court will hear and decide whether the Bermuda Insurers' motions to compel arbitration must be granted.

IT IS SO ORDERED.

Dated: January 31, 2017
New York, New York

Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge