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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	**No. 1:17-cv-00933-RWS**
MF GLOBAL HOLDINGS LTD., et al.,	:	
	:	**Case No. 11-15059 (MG)**
Debtors.[1]	:	**Chapter 11 (Jointly Administered)**
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC,	:	**Adv. Proc. No. 16-01251 (MG)**
Plaintiffs,	:	
vs.	:	
ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANTS' APPEAL AS OF RIGHT AND MOTION FOR LEAVE TO APPEAL THE BANKRUPTCY COURT'S *BARTON* ORDER

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

PRELIMINARY STATEMENT

This is the third attempt by the Bermuda Insurers to appeal prematurely issues that have not yet been adjudicated in full by the Bankruptcy Court. As with their prior two attempts, the Bermuda Insurers are unable to point to any legal authority justifying an appeal at this stage either as a matter of right or discretion—nor does any such legal authority exist.

First, the Bermuda Insurers do not and cannot cite any authority establishing that the Bankruptcy Court's *Barton* Order is a final ruling appealable as of right under 28 U.S.C. § 158(a)(1). The only case law cited by the Bermuda Insurers confirms that an appeal of a *Barton* order (or of a similar automatic stay order issued in bankruptcy proceedings) is final only when (i) a party requests leave from the Bankruptcy Court to bring suit elsewhere, and (ii) the Bankruptcy Court issues a final ruling as to the request—neither of which occurred here. Indeed, the Bermuda Insurers neglect to mention that the Bankruptcy Court itself does not consider its ruling to be final, as evidenced by the Court's clarification that its order to dismiss the Bermuda proceedings is without prejudice, the Court's request for full briefing (and, if necessary, discovery) on the issue of damages, and the Court's intention to soon decide whether any of the parties are bound by an arbitration provision in the insurance policies. Accordingly, an appeal here would only generate piecemeal litigation and waste judicial resources, neither of which comports with 28 U.S.C. § 158(a)(1)'s finality requirement.

Nor is there any basis for the Bermuda Insurers' allegation that the Bankruptcy Court's *Barton* ruling will be "effectively unreviewable" absent an immediate appeal. Courts have repeatedly recognized that the applicability of the *Barton* doctrine to a given case is reviewable upon an appeal of a Bankruptcy Court order adjudicating a request for leave to bring suit in a foreign jurisdiction, as well as from a Bankruptcy Court order imposing sanctions upon a party

from a *Barton* violation. The Bermuda Insurers' failure to avail themselves of either of these options does not convert the Bankruptcy Court's interlocutory order into a final one.

Finally, there is no basis for granting the Bermuda Insurers leave to appeal under 28 U.S.C. § 158(a)(3), as the Bermuda Insurers appear to recognize. First, an appeal here is not ripe for adjudication for the same reasons that the Bankruptcy Court's Order is not "final" for purposes of 28 U.S.C. § 158(a)(1). Moreover, the Bermuda Insurers do not even bother arguing that the Bankruptcy Court's Order involves a "controlling question of law, an immediate appeal of which may materially advance the ultimate termination of the litigation," each of which is a prerequisite to a permissive appeal under 28 U.S.C. § 158(a)(3). In any event, the Bermuda Insurers have failed to identify a single case that is at odds with the Bankruptcy Court's *Barton* Order, let alone establish a "substantial difference of opinion" in this Circuit.

STATEMENT OF RELEVANT FACTS[2]

On October 27, 2016, the MFG Parties filed the adversary complaint against the Defendants. Adv. D.I. 1. In response to the adversary complaint, the Bermuda Insurers initiated an ex parte proceeding before the Supreme Court of Bermuda (the "Bermuda Court"), through which they sought and obtained anti-suit injunctions (the "Anti-Suit Injunctions") restraining the MFG Parties from proceeding with the complaint under the threat of penal sanctions against both the officers and directors of the MFG Parties and their counsel.

[2] Plaintiffs MF Global Holdings, Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA," together, with MFGH, the "MFG Parties"), incorporate by reference in full the Statement of Facts contained in their previous oppositions to the motions for leave to appeal filed by Allied World Assurance Company Ltd. ("AWAC"), and Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited ("Iron-Starr") (collectively with AWAC, the "Bermuda Insurers"). *See* Civ. Action No. 17-cv-00106-RWS, Dkt. No. 5; Civ. Action No. 17-cv-00113-RWS, Dkt. No. 4 (the "First Opposition Brief"); *see also* Civ. Action No. 1:17-cv-00742-RWS, Dkt. No. 7; Civ. Action No. 1:17-cv-00780-RWS, Dkt. No. 4 (the "Second Opposition Brief"). The MFG Parties further refer the Court to the MFG Parties' neutral chronology of events submitted to Chambers on February 21, 2017.

On November 21, 2016, the MFG Parties sent a letter to the Bankruptcy Court (copying counsel to the Bermuda Insurers) notifying it of the Anti-Suit Injunctions and that the Bermuda Insurers' commencement of the proceeding in Bermuda without first seeking leave from the Bankruptcy Court violated the *Barton* doctrine. Adv. D.I. 7. On November 28, 2016, after receipt of the letter, but without seeking leave of the Bankruptcy Court to bring suit against the MFG Parties in Bermuda, the Bermuda Insurers filed in the Bankruptcy Court their Motions to Compel Arbitration. Adv. D.I. 13, 19. The parties are currently briefing these Motions, and the Bankruptcy Court is scheduled to hear oral argument on April 18, 2017.

On December 21, 2016, the Bankruptcy Court issued a temporary restraining order (the "TRO") enjoining the Bermuda Insurers from enforcing the Anti-Suit Injunctions. Rather than comply with the TRO, the Bermuda Insurers returned to the Bermuda Court and again obtained ex parte injunctions (the "Mandatory Injunctions") directing the MFG Parties to dismiss the adversary complaint. On January 12, 2017, the Bankruptcy Court found the Bermuda Insurers in contempt of the TRO and directed the Bermuda Insurers to vacate the Anti-Suit Injunctions and the Mandatory Injunctions. Adv. D.I. 67.

After a hearing on January 23, 2017, the Bankruptcy Court issued an oral ruling finding that the Bermuda Insurers violated the *Barton* doctrine when they brought suit against the MFG Parties in Bermuda without first requesting leave to do so from the Bankruptcy Court, and issued a written order directing the Bermuda Insurers to dismiss the Bermuda proceedings. Adv. D.I. 78. In response to AWAC's motion for clarification as to whether the Bermuda proceedings must be dismissed with or without prejudice, Adv. D.I. 80, the Bankruptcy Court entered a clarifying order directing that the Bermuda proceedings be dismissed *without* prejudice. Adv. D.I. 82. On January 31, 2017, the Bankruptcy Court issued a written opinion explaining the

grounds of the Bermuda Insurers' violation of the *Barton* doctrine (together, with the January 23 Oral Ruling and the January 24 clarification, the "*Barton* Order"). Adv. D.I. 99. To date, the Bermuda Insurers have not sought leave of the Bankruptcy Court to proceed in Bermuda.

ARGUMENT

"[F]or this Court to consider the Appeal, the Order must either be considered 'final' under [28 U.S.C. § 158(a)(1)], or else must be of the nature that renders it appropriate for interlocutory review pursuant to [28 U.S.C. § 158(a)(3)]." *In re AMR Corp.*, 490 B.R. 470, 475 (S.D.N.Y. 2013) (Sweet, J.). The Bankruptcy Court's *Barton* Order meets neither of these statutory requirements, and therefore this Court lacks subject matter jurisdiction to consider the Bermuda Insurers' purported appeal here.

I. The Bermuda Insurers Are Not Entitled To An Appeal As Of Right Under 28 U.S.C. § 158(a)(1) Because The Court's *Barton* Ruling Is Not A "Final" Order

This Court has long recognized that "to be final and thus appealable as of right under 28 U.S.C. § 158(a)[1], the contested matter, if resolved on appeal, must *conclusively* determine the dispute." *In re Worldcom, Inc.*, No. M-47 (HB), 2003 WL 21498904, at *7 (S.D.N.Y. June 30, 2003). In the bankruptcy context, "finality" for the purposes of § 158(a)(1) "is viewed functionally, focusing on pragmatic considerations rather than on technicalities." *In re Lehman Bros. Holdings Inc.*, 697 F.3d 74, 77 (2d Cir. 2012) (a "finality determination in a bankruptcy appeal involves consideration of such factors as the impact of the matter on the assets of the bankruptcy estate, the preclusive effect of a decision on the merits, and whether the interests of judicial economy will be furthered" (internal quotation marks omitted)).

As the Second Circuit has emphasized repeatedly, "[t]his 'pragmatic approach to finality' does 'not overcome the general aversion to piecemeal appeals.'" *In re AroChem Corp.*, 176 F.3d 610, 619 (2d Cir. 1999) (quoting *In re Chateaugay Corp.*, 922 F.2d 86, 90 (2d Cir. 1990)). To

the contrary, this "pragmatic" approach "merely seek[s] to avoid a situation where an otherwise 'final' order—e.g., an order resolving all of the claims asserted within a discrete adversary proceeding—is rendered 'nonfinal' simply because it arises in the context of a bankruptcy proceeding." *Id.*; *see also In re Residential Capital, LLC*, No. 14-cv-9711 (RJS), 2015 WL 5729702, at *3 (S.D.N.Y. Sept. 30, 2015) ("In all other respects, district courts 'apply the same standards of finality in a bankruptcy case that apply to an appeal under 28 U.S.C. § 1291.'" (quoting *In re Fugazy Express, Inc.*, 982 F.2d 769, 775 (2d Cir. 1992) (alterations omitted))).

Consistent with this precedent, this Court has repeatedly concluded that an order is not "final" for the purposes of § 158(a)(1)—and therefore not appealable as of right—whenever a purported appeal raises "[t]raditional finality concerns." *In re Worldcom, Inc.*, 2003 WL 21498904, at *6. These concerns include the risk that an appeal would, "at best," yield "an interim decision, that would not conclusively dispose of the contested matter, and indeed, would likely waste judicial resources if the court were required to revisit" the issue based on a future order of the bankruptcy court. *Id*. Thus, this Court has concluded that an injunction issued by a bankruptcy court is not "final" under § 158(a)(1) unless "a party subject to the stay seeks relief from it in bankruptcy court and the court issues a final order granting or denying the motion for relief." *In re Quigley Co.*, 323 B.R. 70, 74 (S.D.N.Y. 2005). Likewise, a bankruptcy court order is not final until it "finally dispose[s] of discrete disputes within the larger bankruptcy case . . . including issues as to the proper relief." *In re Residential Capital, LLC*, 2015 WL 5729702, at *3 (alterations omitted).

The Bankruptcy Court's *Barton* Order lacks each of these hallmarks of finality. *First*, the Bermuda Insurers' assertion that the *Barton* Order is a "permanent injunction" is incorrect because the Bermuda Insurers have not even requested leave from the Bankruptcy Court to file

suit in Bermuda, as required by the *Barton* doctrine. *Second*, even assuming that a filing of a motion to compel arbitration *is* such a request for leave, the Bankruptcy Court has not yet "issue[d] a final order granting or denying the motion for relief." *In re Quigley Co.*, 323 B.R. at 754. *Third*, multiple "discrete disputes" relating to the Court's *Barton* ruling remain unadjudicated, including the amount of damages to which the MFG Parties are entitled as a result of the Bermuda Insurers' violation of the *Barton* doctrine, as well as whether any of the parties are bound by an arbitration provision in the applicable insurance policies purportedly requiring arbitration in Bermuda. Because the *Barton* ruling is not a "final order," neither formally nor pragmatically, this Court lacks subject matter jurisdiction over the Bermuda Insurers' purported appeal "as of right" under § 158(a)(1).

A. The Bankruptcy Court's *Barton* Ruling Is Not A "Permanent" Injunction Because The Bankruptcy Court Has Not Yet Issued A Final Order Granting Or Denying Any Motion Requesting Relief From The Stay

The Bermuda Insurers assert, without any support, that the Bankruptcy Court's Order, holding that the Bermuda Insurers violated the *Barton* doctrine when they brought an action against a Court-appointed officer in Bermuda without first obtaining leave from the Bankruptcy Court, is a "permanent injunction (or the equivalent)."[3] Bermuda Insurers' Opening Brief at 3 (hereinafter, "Br."). This fundamentally misunderstands both the mechanics of the *Barton* doctrine and this Court's precedents.

The *Barton* doctrine is based on a "well-recognized line of cases starting with *Barton v. Barbour*, 104 U.S. 126 (1881)," holding that because "the court that appointed the trustee has a

[3] The MFG Parties' counsel's statements at the March 2 hearing before this Court—which the Bermuda Insurers take out of context—cannot have any impact on whether this Court has jurisdiction to hear this appeal because "[t]he absence of subject matter jurisdiction is non-waivable." *United States v. Bond*, 762 F.3d 255, 263 (2d Cir. 2014) (internal quotation marks omitted). Moreover, the Bermuda Insurers' positions regarding the nature of the *Barton* doctrine at that hearing are directly contrary to the positions they take in their motion for leave to appeal. *See* March 2, 2017 Hr'g Tr. at 3 (Mr. Slifkin: "There is no permanent injunction that has been entered.").

strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties," a party is required to seek "leave of the appointing court before a suit may go forward in another court against the trustee." *In re Lehal Realty Assocs.*, 101 F.3d 272, 276 (2d Cir. 1996). This Court has since recognized that this doctrine's "requirements . . . apply equally to bankruptcy trustees and other court-appointed receivers," as well as in both "declaratory judgment actions, and suits seeking damages." *McIntire v. China MediaExpress Holdings, Inc.*, 113 F. Supp. 3d 769, 773 (S.D.N.Y. 2015) (citation omitted).

The *Barton* doctrine thus mandates that as a matter of "federal common law," a party must first request permission from the appointing Court before bringing suit in a foreign jurisdiction against a Court-appointed entity, such as the MFG Parties. *Id.* In doing so, the *Barton* doctrine functions like the "automatic stay" of "any judicial proceeding or other act against the property of the estate that was or could have been commenced before the filing of the [bankruptcy] petition" that is imposed by the Bankruptcy Code. *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 90 (2d Cir. 2003) (citing 11 U.S.C. § 362(a)); *see also, e.g.*, *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 347 n.2 (2d Cir. 1985) (explaining that once the automatic stay is in effect, a creditor is "required to seek the permission of the Bankruptcy Court before proceeding with their suit" in a foreign jurisdiction). Indeed, both of these protections operate as a matter of law: The *Barton* doctrine applies as soon as the officer is appointed by the Court, *see Barton*, 104 U.S. at 131, and "[t]he filing of a Chapter 11 bankruptcy petition triggers [the] automatic stay" under 11 U.S.C. § 362, *In re Dairy Mart*, 351 F.3d at 90.

Because both the *Barton* doctrine and the automatic stay require a party to first request leave from the Bankruptcy Court before filing suit elsewhere, this Court has repeatedly recognized that such an order is not "final" for the purposes of 28 U.S.C. § 158(a)(1) until (i) a

party requests such leave from the Bankruptcy Court, and (ii) the Bankruptcy Court definitively grants or denies that request, making clear that the Court does not intend to revisit the subject. *See, e.g.*, *In re Quigley Co.*, 323 B.R. at 75-76. Indeed, the Bermuda Insurers have not cited, nor have the MFG Parties uncovered in their own research, a single case where a *Barton* or automatic stay order was deemed "final" and thus appealable as of right under 28 U.S.C. § 158(a)(1), where, as here, the court had not yet ruled upon a party's request for leave to bring suit in another jurisdiction. To the contrary, courts have deemed orders regarding the *Barton* doctrine to be "final" under 28 U.S.C. § 158(a)(1) only when, *unlike* here, (i) a party sought leave to bring suit against a court-appointed officer in another jurisdiction, and (ii) the court definitively ruled on this request.[4] The Bermuda Insurers cite none of these cases, let alone attempt to distinguish them.

Instead, the Bermuda Insurers point to automatic stay cases, purportedly in support of their appealability argument. Br. at 4-5. These cases are indeed directly analogous, but contrary to the Bermuda Insurers' suggestion, the same principle for determining finality here also governs appeals from a variety of automatic stays, and establishes that there is no appeal as of

[4] *See, e.g.*, *In re USA Baby, Inc.*, 520 F. App'x 446, 447 (7th Cir. 2013) (*Barton* order final when the "bankruptcy court denied [movant's] motion for leave to sue [court-appointed officer]," and thus the movant was "foreclosed from pursuing his claims against [court-appointed officer] in another forum"); *In re Vistacare Grp., LLC*, 678 F.3d 218, 223 (3d Cir. 2012) (*Barton* order final when party "filed in the Bankruptcy Court a motion for leave to file suit against the Trustee" and the "Bankruptcy Court issued an order formally granting [the] motion for leave"); *In re Sedgwick*, 560 B.R. 786, 791 (C.D. Cal. 2016) (*Barton* order final when movant "filed a motion seeking retroactive permission from the bankruptcy court under *Barton* to maintain his arbitration" against a court-appointed officer, and the bankruptcy court denied the motion); *In re Day*, No. 14-01908 (SRC), 2014 WL 4271647, at *2 (D.N.J. Aug. 28, 2014) (*Barton* order final when movant "requested leave to file in state court a proposed . . . complaint against . . . the Trustee" and the court denied the request); *BCE West, L.P.*, No. 06-0325-PHX-JAT, 2006 WL 8422206, at *3 (D. Ariz. Sept. 20, 2006) (*Barton* order final when Bermuda insurance company "filed in the bankruptcy court a Motion to Compel Arbitration, or in the alternative, for Leave to Proceed in Bermuda," and the Bankruptcy Court denied the latter request).

right here. *Compare In re Quigley Co.*, 323 B.R. at 75-76 (finding no appeal as of right from the equivalent of an automatic stay order "where no party has yet sought the individualized relief that is explicitly provided for under [the stay's] terms"), *with In re Chateaugay Corp.*, 880 F.2d at 1513 (Br. at 4) (order final for purposes of § 158(a)(1) where the parties filed a motion for relief from the automatic stay, and the Bankruptcy Court denied that motion).[5]

This Court's decision in *In Re Enron Corp.*, 316 B.R. 767 (S.D.N.Y. 2004), is particularly instructive. There, a creditor moved to lift the automatic stay in order to commence arbitration against the debtors, and the debtors moved to bar the creditor from prosecuting the action pursuant to the automatic stay and the Bankruptcy Court's equitable powers. *Id.* at 769. The Bankruptcy Court agreed with the debtors and issued an order denying the request to lift the automatic stay to allow arbitration against the debtors, but made clear that it was "not deny[ing] the ultimate relief sought, that is, compelling arbitration." *Id.* at 770. When the creditor attempted to appeal this order, this Court determined that the order was not "final" for the purposes of § 158(a)(1) because while "the court below did not state explicitly that it would revisit the Stay Order," it did "make it absolutely clear that it intends to revisit the applicability

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[5] *See also In re Pegasus Agency, Inc.*, 101 F.3d 882, 885 (2d Cir. 1996) (Br. at 5-6) ("We have previously held that *a denial of relief from an automatic stay* pending reorganization proceedings that might or might not succeed is appealable." (emphasis added)); *In re Lomas Fin. Corp.*, 932 F.2d 147, 149, 151 (2d Cir. 1991) (Br. at 6) (order final for purposes of § 158(a)(1) when the court enjoined foreign proceedings pursuant to the automatic stay, and the record did "not suggest that the bankruptcy court contemplates further proceedings regarding whether the tort action is subject to the automatic stay or enjoinable").

The Bermuda Insurers also cite *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Secs.*, LLC, 474 B.R. 76 (S.D.N.Y. 2012), as an example of a case where this Court "accepted an as of right appeal under § 158(a)(1)." Br. at 5. But there is no discussion in that case whatsoever of 28 U.S.C. § 158(a)(1); indeed, the statute is not even cited. Moreover, the Bankruptcy Court there held, among other things, that an entity's initiation of a foreign lawsuit against the Trustee violated a previous Permanent Injunction entered by this Court in connection with a related SEC litigation. *See Secs. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs.*, LLC, 460 B.R. 106, 115-16 (Bankr. S.D.N.Y. 2011). Accordingly, unlike this case, that case involved a permanent injunction that would have been appealable as of right under § 158(a)(1).

of the automatic stay to arbitration against the Debtors" when it clarified that it was not yet ruling on whether arbitration was required. *Id*. This Court also clarified that the Second Circuit's previous recognition that "the denial of relief from an automatic stay in bankruptcy is equivalent to a permanent injunction and is thus a final order . . . does not cover a situation, like that discussed in *Lomas* and present here, in which the bankruptcy judge contemplates further proceedings with respect to the automatic stay." *Id.* at 771 (internal quotation marks omitted).

Under this well-established framework, the Bankruptcy Court's *Barton* order here is not a "final" appealable order for three reasons. *First*, and most obviously, the Bermuda Insurers have not, to date, ever requested leave from the Bankruptcy Court to file suit in Bermuda, as is required by the *Barton* doctrine. Thus, as in *In re Quigley*, having failed to seek "the individualized relief that is explicitly provided for under" the *Barton* doctrine, it would be "inappropriate for this Court to determine that the [Bankruptcy Court's order] itself is appealable" at this stage of the proceedings. 323 B.R. at 75-76.

Second, even if the Bermuda Insurers' Motions to Compel Arbitration could be construed as requests for leave to bring suit against a court-appointed officer in a foreign jurisdiction that accords with *Barton*, the Bankruptcy Court has not yet ruled on this request. Per the Case Management Order, the parties are currently briefing the Bermuda Insurers' Motions to Compel Arbitration, and the Bankruptcy Court has scheduled oral argument for April 18, 2017. Adv. D.I. 122. Thus, while the Bankruptcy Court will issue a decision on this pending motion in the near future, no such order has been yet issued, and therefore the Bankruptcy Court has not yet ruled on any "request for leave" filed by the Bermuda Insurers.

Third, the Bankruptcy Court's emphatic statement in the *Barton* Order itself that this Order is *not* its last pronouncement with respect to the current stay of proceedings in Bermuda confirms the lack of finality:

> 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.

Adv. D.I. 99, at 19. Indeed, this language is nearly identical to the language the Bankruptcy Court used in *In re Enron*, which this Court in turn deemed to be "absolutely clear" that the "bankruptcy judge contemplates further proceedings with respect to the . . . stay." 316 B.R. at 770-71. In addition, at the behest of the Bermuda Insurers, the Bankruptcy Court here clarified that "the proceedings in Bermuda are to be dismissed WITHOUT PREJUDICE" as a result of the *Barton* violation. Adv. D.I. 82.[6] Thus, as in *In re Enron*, the Bankruptcy Court clearly envisions revisiting the applicability of the *Barton* stay against the MFG Parties in this case.

Accordingly, no matter how the Bermuda Insurers attempt to spin the Bankruptcy Court's *Barton* Order, this Court's precedents make clear that it is not akin to a permanent injunction. As such, the *Barton* Order is not "final" and therefore not appealable as of right under 28 U.S.C. § 158(a)(1).

B. The Bankruptcy Court's Order Is Not Final Because Multiple Discrete Issues Remain Unadjudicated

The absence of an order denying a request for leave to bring suit against a court-appointed officer, let alone such a request by the Bermuda Insurers in the first instance, removes this appeal from the framework of 28 U.S.C. § 158(a)(1). But even if this Court were to set aside

[6] *Compare* with Br. at 4 ("The Barton Order . . . commands the Bermuda Insurers to 'dismiss the Bermuda proceedings . . . and to cease any further proceedings" *full stop*. (Adv. ECF No. 78 at 2.)." (emphasis added)). The Bermuda Insurers recognize that the "full stop" language is not part of the Order, nor can it be, given the dismissal "WITHOUT PREJUDICE." Adv. D.I. 82.

this jurisdictional defect (which it should not do), the Bankruptcy Court's Order is also not "final" under § 158(a)(1) because an appeal here would not "finally dispose of discrete disputes within the larger case." *In re Chateagugay Corp.*, 880 F.2d at 1511 (emphasis omitted).

First, an appeal is premature here because the *Barton* Order does not resolve the issue of damages and/or sanctions resulting from the Bermuda Insurers' *Barton* violation. This Court has repeatedly explained that "for a bankruptcy court order to satisfy § 158(a)(1)'s standard of finality, it need not resolve all of the issues raised by the bankruptcy, but it must completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief." *In re Residential Capital, LLC*, 2015 WL 5729702, at *3 (internal quotation marks omitted). The Second Circuit has further clarified that "issues as to the proper relief" which must be adjudicated before an appeal is "final" include the amount of damages to be awarded and the imposition of sanctions. *See In re Fugazy Exp., Inc.*, 982 F.2d 769, 776 (2d Cir. 1992) ("[W]ith respect to a meritorious claim for damages, the dispute is not completely resolved until the bankruptcy court determines the amount of damages to be awarded."); *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 17 (2d Cir. 1992) (reiterating that cases have established that "a finding of contempt unaccompanied by sanctions is not final and thus cannot support an appeal").[7]

Here, although the Bankruptcy Court's *Barton* Order notes that "contempt is the relief that may properly be granted upon a showing that a suitor impermissibly commenced the action

[7] *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988) (Br. at 9), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Eng'rs*, 134 S. Ct. 773, 782 (2014) (Br. at 9), are not at odds with this case law. Each of those cases dealt with requests for attorneys' fees authorized by either a statute or contractual agreement, and thus wholly separate from the underlying cause of action. Here, by contrast, any damages or sanctions ultimately awarded by the Bankruptcy Court are part of the "relief" afforded to the MFG Parties as a result of the Bermuda Insurers' violation of the *Barton* doctrine. Indeed, courts have repeatedly recognized that bankruptcy court orders finding a creditor liable for violating the automatic stay (which is akin to a *Barton* violation, *see supra* Part I.A), but which do not determine the requisite damages for that violation, are not final orders that are appealable as of right. *See, e.g.*, *In re Fugazy Exp., Inc.*, 982 F.2d at 776 (collecting cases).

against the trustee," Adv. D.I. 99, at 15 (quoting *In re Baptist Medical Center of New York*, 80 B.R. 637, 643 (Bankr. E.D.N.Y. 1987)), it does not itself award the MFG Parties any sanctions or damages for the Bermuda Insurers' *Barton* violation. Instead, the Bankruptcy Court ordered the parties to set a briefing schedule for "[a]ny *Barton* Doctrine and Contempt Order Remedies," at the conclusion of which the Bankruptcy Court will issue a final ruling as to the proper remedy for the Bermuda Insurers' *Barton* violation. Moreover, the Bermuda Insurers' claim that this "determination of damages will be mechanical and uncontroversial," Br. at 9, is belied by the Case Management Order: Not only are the parties permitted to file briefs in support of and in opposition to the MFG Parties' remedies application, but the Bermuda Insurers have the right to seek discovery regarding the MFG Parties' application if they so desire. Adv. D.I. 122. With the issue of remedies remaining unadjudicated, the Bankruptcy Court's *Barton* Order is not yet final for the purposes of appeal.

The Bermuda Insurers' affirmative statement that they "will not seek interlocutory appellate review as to any amount of damages the Bankruptcy Court orders as to *Barton*," Br. at 10, does not convert the Bankruptcy Court's *Barton* Order into a final order. Because 28 U.S.C. § 158(a)(1) grants this Court subject matter jurisdiction over only "final judgments, orders, and decrees," and because "[t]he absence of subject matter jurisdiction is non-waivable," *Bond*, 762 F.3d at 263 (internal quotation marks omitted); *see also supra* note 3, the Bermuda Insurers' waiver of appeal here cannot cure this jurisdictional defect.

Second, the Bankruptcy Court's *Barton* Order is also not final for the purposes of 28 U.S.C. § 158(a)(1) because even if this Court were to exercise jurisdiction over this appeal, it would not resolve the central issue in both the adversary proceeding and the Bermuda Insurers' desired Bermuda action: whether any of the parties are bound by an arbitration provision in the

policies that purportedly requires the arbitration of their dispute in Bermuda. Indeed, the Bermuda Insurers maintain that "[t]he purpose of the dismissed Bermuda action was to obtain a declaration that the underlying dispute is arbitrable," which is the very issue that the Bankruptcy Court is currently considering. Br. at 7. Accordingly, because the "contested matter" here—the applicability of the *Barton* doctrine—"if resolved on appeal" would not "conclusively determine the dispute," this Court lacks jurisdiction over this putative appeal under 28 U.S.C. § 158(a)(1). *In re Worldcom, Inc.*, 2003 WL 21498904, at *7.

C. The Collateral Order Doctrine Does Not Apply Here

The Bermuda Insurers' invocation of the collateral order doctrine also does not bring the Bankruptcy Court's *Barton* Order within the ambit of this Court's jurisdiction under 28 U.S.C. § 158(a)(1). The Supreme Court has recognized that a court can exercise appellate jurisdiction over "a narrow class of decisions that do not terminate the litigation," but are nonetheless "treated as final" because they meet the "stringent" requirements of being (i) "conclusive" orders which (ii) "resolve important questions completely separate from the merits" and (iii) "would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). As the Supreme Court has "repeatedly stressed," however, this is a "narrow exception" which "should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Id.* at 868.

For the reasons described in Parts I.A and I.B, *supra*, the Bankruptcy Court's *Barton* Order is neither "conclusive" nor one that fully resolves the many issues remaining in this adversary proceeding. But even looking beyond these threshold requirements, there is no colorable basis for the Bermuda Insurers' claim that absent an appeal here, "Allied World will

have undergone the 'very harm that it seeks to avoid,' namely being required to litigate in the United States, rather than arbitrate in Bermuda." Br. at 7 (alteration omitted). The parties are currently completing briefing on the Bermuda Insurers' Motions to Compel Arbitration, and the Bankruptcy Court will hear oral argument on that issue on April 18, one day before the parties appear before this Court on this motion for leave to appeal. The Bankruptcy Court may rule in the Bermuda Insurers' favor on that motion, thereby affording them the precise relief that they purportedly sought in the dismissed Bermuda Action. Thus, the Bermuda Insurers' blanket assertion that their due process rights have been impaired because their Motions to Compel Arbitration may be denied is speculative, at best, and further underscores why the Bankruptcy Court's *Barton* Order is not "final" here.

Nor is there any basis for the Bermuda Insurers' suggestion that absent an appeal here, the issues raised are "effectively unreviewable" from final judgment, because any defects in the current procedural posture of this case are due to the Bermuda Insurers' own actions. First, had the Bermuda Insurers comported with the *Barton* doctrine in the first instance by requesting leave from the Bankruptcy Court to bring suit in Bermuda, this Court would have been able to review on appeal the applicability of the *Barton* doctrine upon the issuance of a final order by the Bankruptcy Court granting or denying that request. *See, e.g.*, *In re Sedgwick*, 560 B.R. at 793-94 (considering on appeal pursuant to 28 U.S.C. § 158(a)(1) whether *Barton* applied in the first instance after the movant sought leave to bring suit against a court-appointed officer in a foreign jurisdiction, and the Bankruptcy Court definitively denied the motion); *see also supra* n. 4. This Court also would have been able to review this issue following the Bankruptcy Court's award of damages for the *Barton* violation had the Bermuda Insurers not voluntarily waived this right to appeal in their opening brief, Br. at 10. *See, e.g.*, *BCE West, L.P.*, 2006 WL 8422206, at *8

(considering on appeal pursuant to 28 U.S.C. § 158(a)(1) whether the *Barton* doctrine applied extraterritorially after the Bankruptcy Court had both denied a Bermuda insurance company's request for leave and awarded the court-appointed officer damages for the insurance company's *Barton* violation). Accordingly, because the applicability of *Barton* to the present action would have been reviewable *but* for the Bermuda Insurers' own actions, the collateral order doctrine does not apply here.

At bottom, the Bermuda Insurers' grievance here appears to be that they believe the Supreme Court of Bermuda, rather than the Bankruptcy Court, should decide whether the parties are bound by a valid arbitration agreement. Br. at 7. The Bermuda Insurers waived this argument the moment that they asked the Bankruptcy Court to decide this question by filing their Motions to Compel Arbitration.

D. The Bermuda Insurers' Policy Arguments Regarding Appeals Of Injunctive Orders Issued By Bankruptcy Courts Disregard The Statute And Well Established Precedent

Finally, the Bermuda Insurers' suggestion that this Court should "bypass" what they call "a jurisdictional quirk" in the laws passed by Congress, Br. at 10, is foreclosed by both the statutory framework and this Court's precedents. While it may be true that if this Court issued a preliminary injunction, that decision would be appealable as of right to the Second Circuit under 28 U.S.C. § 1292(a)(1), Congress did not choose in 28 U.S.C. § 158(a)(1) to grant this Court subject matter jurisdiction over such orders when they are issued by a Bankruptcy Court. For that reason, this Court has recognized that "[i]t would make little sense for the bankruptcy appeal statute to group preliminary injunctions with other interlocutory orders but intend for 'leave to appeal' these injunctions to be granted as of right simply because Section 1292 treats interlocutory injunctions differently from other interlocutory orders." *In re Quigley Co.*, 323 B.R. at 76-77. While the Bermuda Insurers may not like Congress's decision to treat orders

issued by the Bankruptcy Court and the District Court differently, the body responsible for altering this mandate is Congress, not this Court.

II. There Is No Basis For Granting The Bermuda Insurers Leave To Appeal The Bankruptcy Court's *Barton* Order Under 28 U.S.C. § 158(a)(3)

It is also clear that the Bankruptcy Court's *Barton* Order does not present the "exceptional circumstances" which "justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *E.g.*, *In re Nw. Airlines Corp.*, No. 05-17930 (ALG), 2008 WL 4755377, at *5 (S.D.N.Y. Oct. 28, 2008) (Sweet, J.) (alteration omitted). Indeed, the Bankruptcy Court's *Barton* Order is not yet ripe for appellate review, and the Bermuda Insurers do not even attempt to argue that the *Barton* Order, standing alone, meets the legislative criteria for a permissive interlocutory appeal under 28 U.S.C. § 1292(b) and 28 U.S.C. § 158(a)(3).

A. The Bankruptcy Court's *Barton* Order Is Not Yet Ripe For Appeal

This appeal is not yet ripe for appellate review under 28 U.S.C. § 158(a)(3) for many of the same reasons that the Bankruptcy Court's *Barton* Order is not a final order under 28 U.S.C. § 158(a)(1). As this Court has previously recognized in these proceedings, the Second Circuit has long held that "[i]nherent in the requirements of section 1292(b) is that the issue certified be ripe for judicial determination." *MF Global Holdings Ltd. v. Allied World Assurance Co. Ltd.*, No. 17 Civ. 106, 2017 WL 548219, at *3 (S.D.N.Y. Feb. 10, 2017) (Sweet, J.) (quoting *Oneida Indian Nation of N.Y. State v. Oneida Cnty.*, 622 F.2d 624, 628 (2d Cir. 1980)). Thus, whenever an appeal would require the court to "offer advisory opinions rendered on hypotheses," *Oneida*, 622 F.2d at 628 (internal quotation marks omitted), because the Bankruptcy Court "has not ruled on the issue," "has reserved judgment until further briefing and relevant facts are presented," or otherwise, a permissive interlocutory appeal is inappropriate. *In re Anderson*, 550 B.R. 228, 237

(S.D.N.Y. 2016).

First, even setting aside the Bermuda Insurers' failure to request leave to bring suit against the MFG Parties in accordance with *Barton* in the first instance, the Bankruptcy Court's *Barton* Order makes clear that it reserved judgment on the merits of the Bermuda Insurers' Motion to Compel Arbitration until this issue was fully briefed. Because the Bankruptcy Court will issue a ruling on this threshold issue in the near future, it is possible that the Bermuda Insurers will obtain shortly the very relief that they purportedly sought in Bermuda—a declaration that this dispute is arbitrable. Br. at 7. *Second*, as discussed *supra* in Part I.B, this appeal is also not yet ripe because pursuant to the Bankruptcy Court's request, the parties will soon brief the issue of damages resulting from the Bermuda Insurers' *Barton* violation and may even take discovery.

Thus, because the Bankruptcy Court envisions further proceedings on the *Barton* doctrine such that an appeal here would "at best" yield "an interim decision, that would not conclusively dispose of the contested matter, and indeed, would likely waste judicial resources if the court were required to revisit" these issues in the future, *In re Worldcom, Inc.*, 2003 WL 21498904, at *6, this appeal is not yet ripe for adjudication.

B. The Bermuda Insurers Do Not And Cannot Meet The Standard For A Permissive Interlocutory Appeal Here

Finally, even if the Bermuda Insurers' appeal here is ripe (which it is not), a permissive interlocutory appeal under 28 U.S.C. § 158(a)(3) is also inappropriate because the Bermuda Insurers cannot meet one, let alone all three, of the requisite prongs of 28 U.S.C. § 1292(b).

First, the Bankruptcy Court's *Barton* Order does not involve (1) a "controlling question of law," (2) "an immediate appeal from which may materially advance the ultimate termination of the litigation," each of which is a mandatory prerequisite to a permissive interlocutory appeal

under 28 U.S.C. § 158(a)(3). *In re Anderson*, 550 B.R. at 234. Indeed, the Bermuda Insurers do not even attempt to make such an argument regarding the *Barton* order, choosing instead to raise, for the third time, their argument that the Bankruptcy Court lacked personal jurisdiction over the Bermuda Insurers.[8] Nor could they make any such argument, because even if this Court were to grant the Bermuda Insurers' appeal here and reverse the Bankruptcy Court's *Barton* Order, the central issue at this stage in the case—whether "the underlying dispute is arbitrable"—would remain unadjudicated. Br. at 7.

Second, while the failure to even argue that the *Barton* Order meets two of the three jurisdictional requirements set forth in 28 U.S.C. § 1292(b) dooms this Motion for Leave to Appeal, the Bermuda Insurers also fail to establish that the Bankruptcy Court's ruling is an order "as to which there is a substantial ground for difference of opinion." 28 U.S.C. § 1292(b). This Court has explained that "for there to be a substantial ground for difference of opinion under the law, there must be 'substantial doubt' that the district court's order was correct." *In re Anderson*, 550 B.R. at 238. Such "substantial doubt" exists where "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *Id.* Neither is true here.

While the Bermuda Insurers' assert that there is a "substantial ground for difference of opinion" as to whether MFGH, as Plan Administrator, is a court-appointed officer, they do not cite to a single case suggesting that there is a split of authority on this issue in this Circuit. Instead, they can only point to a statement in a motion in limine filed in a separate litigation that MFGH "was not 'appointed by' nor is it a representative of the Bankruptcy Court" where the goal was to avoid confusing the jury as to whether the plaintiff was an extension of the court. Br.

[8] The MFG Parties have addressed this argument at length in both their First and Second Briefs in Opposition to Motion for Leave, and incorporate by reference those arguments as if they are set forth in full in this Brief.

at 16. This errant statement is directly contradicted by multiple orders issued by the Bankruptcy Court throughout the underlying Chapter 11 Bankruptcy, has no bearing on the correctness of Judge Glenn's determination that the Plan Administrator is the court-approved fiduciary of the estates, and therefore there is no "conflicting authority" on this issue.[9]

Moreover, the Bermuda Insurers have not identified a single case, in the Second Circuit or elsewhere, holding that the *Barton* doctrine does not apply extraterritorially. This is unsurprising: As counsel for Allied World previously admitted to the Bankruptcy Court, the only courts to have addressed this issue have uniformly held that the *Barton* doctrine does, in fact, apply extraterritorially.[10] Jan. 23, 2017 Hr'g Tr. at 72 (THE COURT: "So there are cases that say [the *Barton* doctrine] does apply [extraterritorially]. No cases that say it doesn't. You don't agree with the cases that say it does; is that correct?" MS. KERSTEIN: "That's correct."). Because, at most, the Bermuda Insurers believe the Bankruptcy Court's rulings are incorrect, and a "mere claim that a district court's decision was incorrect does not suffice to establish substantial ground for a difference of opinion," *In re Citigroup Pension Plan ERISA Litig.*, No. 05 Civ. 5296 (SAS), 2007 WL 1074912, at *2 (S.D.N.Y. Apr. 4, 2007), there are no grounds for granting a permissive interlocutory appeal here.

CONCLUSION

For the foregoing reasons, the MFG Parties respectfully request that this Court deny the Bermuda Insurers' Motion for Appeal as of Right or Leave to Appeal the Bankruptcy Court's Order on the *Barton* doctrine.

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[9] *See, e.g.*, Confirmation Order, Ch. 11 D.I. 1288 ("The Plan provides adequate and proper means for the Plan's implementation, including . . . (iii) *the appointment of [MFG] Holdings Ltd. as Plan Administrator* with the duties and responsibilities set forth in Section IV.C of the Plan to administer and maximize the value of the Debtors' Estates . . . . (emphasis added)).

[10] *See, e.g.*, *Secs. Investor Prot. Corp.*, 460 B.R. at 116 (applying the *Barton* doctrine extraterritorially); *BCE West, L.P.*, 2006 WL 8422206, at *10 (same).

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CERTIFICATE OF SERVICE

I, Jane Rue Wittstein, certify that on April 4, 2017, I caused the foregoing Memorandum of Law in Opposition to the Defendants' Motion for Leave to Appeal to be filed with the Clerk of the Court and served upon all counsel of record via the Court's CM/ECF system.

/s/ Jane Rue Wittstein
Jane Rue Wittstein