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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' OMNIBUS REPLY BRIEF IN SUPPORT OF THEIR MOTION TO REQUIRE THE BERMUDA INSURERS' COMPLIANCE WITH NEW YORK INSURANCE LAW § 1213(c)

[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.

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PRELIMINARY STATEMENT

The MFG Parties' Opening Brief established three main points: (1) the Bermuda Insurers filed a "pleading" that triggered Section 1213(c)'s Bond Requirement when they filed their Motions to Compel Arbitration and Motions to Dismiss for Lack of Subject Matter Jurisdiction, (2) there are no additional prerequisites to this Bond Requirement, and (3) this Court should strike the Bermuda Insurers' pleadings and enter a default judgment against them until they are in full compliance with this legal mandate. In support of each of these points, the MFG Parties' Opening Brief cited well-established New York case law confirming that this is the precise situation in which the Bond Requirement applies. This clear precedent should begin and end this Court's analysis.

The Bermuda Insurers do not and cannot contest this settled case law. Instead, they attack the underlying rationale of this controlling precedent as purportedly inconsistent with the New York Legislature's intent, rely upon out of Circuit cases to argue that the Bond Requirement is preempted by the New York Convention, and, in some instances, ignore the governing cases cited by the MFG Parties altogether in favor of inapt analogies to unrelated areas of the law. At no point do the Bermuda Insurers identify any Second Circuit precedent supporting their position, let alone any precedent undercutting the directly on-point case law cited by the MFG Parties. Accordingly, the weight of the authority in this Circuit confirms that the Bermuda Insurers must post a $60 million bond to secure any potential judgment before proceeding with this litigation, and this Court should strike the Bermuda Insurers' pleadings until they do so.

ARGUMENT

I. NEW YORK LAW IS CLEAR THAT THE MOTIONS FILED BY THE BERMUDA INSURERS ARE PLEADINGS THAT TRIGGER THE BOND REQUIREMENT

The MFG Parties' Opening Brief established that in enacting New York Insurance Law § 1213(c), the New York Legislature sought to ensure that a foreign unauthorized insurer cannot "wage extensive, costly motion practice, and yet avoid the Bond Requirement by simply advancing a host of defenses *before* interposing a formal answer." Levin v. Intercontinental Cas. Ins. Co., 95 N.Y.2d 523, 528 (2000) (emphasis added). To effectuate this Legislative command, multiple New York courts, including this Court, have explicitly held that motions to compel arbitration and motions to dismiss for lack of subject matter jurisdiction are "pleadings" as that term is used in Section 1213(c), and no court in New York has held otherwise. Opening Br. at 6-9; see, e.g., In re Residential Capital, LLC, No. 12-12020 (MG), 2016 WL 6155925, at *16 (Bankr. S.D.N.Y. Oct. 21, 2016) ("Based upon the weight of the case law and the plain language of the statute, the Court . . . concludes that the Arbitration Motions and the motions to dismiss for lack of subject matter jurisdiction are pleadings under Section 1213."); see also Nw. Nat'l Ins. Co. v. Kansa Gen. Ins. Co., No. 92 Civ. 7433 (LJF), 1992 WL 367085, at *3 (S.D.N.Y. Nov. 25, 1992) (requiring a Finnish unauthorized insurance company to post a bond under Section 1213(c) when the petitioner filed a motion to compel arbitration); Marsh & McLennan Cos. v. GIO Ins. Ltd., No. 11 Civ. 8391(PAC), 2013 WL 4007555, at *5 (S.D.N.Y. Aug. 6, 2013) (denying an unauthorized foreign insurer's request to release its security bond posted pursuant to Section 1213(c) when the insurer had filed a motion to either dismiss or stay the action pending arbitration).

The Bermuda Insurers do not dispute that these cases are directly on point and adverse to them. Bermuda Insurers' Br. at 16-19. Instead, they claim that these cases are simply wrong

because they (A) are supposedly inconsistent with the Bermuda Insurers' reading of the legislative history underlying Section 1213, and (B) ignore the purported additional prerequisites that the Bermuda Insurers contend must be met before Section 1213(c)'s Bond Requirement is triggered. Both of these arguments are mistaken.

A. The Plain Text Of Section 1213 And The Policy Goals Underlying It Confirm That The Bermuda Insurers Have Filed "Pleadings" That Triggered The Bond Requirement

The MFG Parties' Opening Brief explained that the New York Legislature enacted Section 1213 out of concern that its residents could be forced to resort to "far-flung forums for satisfaction of their judgments" obtained against foreign insurance companies—the very circumstances that the MFG Parties face here. Curiale v. Ardra Ins. Co., 88 N.Y.2d 268, 277 (1996); see also N.Y. Ins. L. § 1213(a); Opening Br. at 4-6. To avoid such a situation, the New York Legislature gave foreign insurance companies, like the Bermuda Insurers, a choice: They can either obtain a license to do business in New York, thereby subjecting themselves to New York's regulatory requirements (including the maintenance of adequate reserves), or they must "deposit with the clerk of the court in which the proceeding is pending" a bond "sufficient to secure payment of any final judgment" before they are allowed to file a "pleading" and therefore participate in court proceedings in New York. Opening Br. at 4-5; N.Y. Ins. L. § 1213(c). Either way, the entity authorized to do business in New York can rest assured that there will be funds available in this State to satisfy any judgment rendered against the foreign insurance company. Opening Br. at 4-6.

The only question here, then, is whether motions to compel arbitration and motions to dismiss for lack of subject matter jurisdiction are "pleadings" pursuant to Section 1213(c), as courts have already held in Residential Capital, Kansa, and Marsh. The text of the statute itself,

its underlying legislative history, and New York case law interpreting these sources confirm that those decisions are correct.

1. The New York Court Of Appeals Has Confirmed That The Bond Requirement Does Not Apply Only To "Merits" Filings

There is no basis for the Bermuda Insurers' assertion that Section 1213(c)'s Bond Requirement applies only to filings on the "merits," and thus, motions to compel arbitration and motions to dismiss for lack of subject matter jurisdiction do not count as "pleadings." Bermuda Insurers' Br. at 6-7. As detailed in the MFG Parties' Opening Brief, consistent with the policy goals underlying Section 1213, courts in New York have interpreted the term "pleadings" in Section 1213(c) broadly to ensure that the Legislature's aims are fulfilled. Opening Br. at 6-7. Indeed, as the New York Court of Appeals explained, after an extensive consultation and discussion of Section 1213(c)'s legislative history, holding otherwise would permit an unauthorized foreign insurance company to "wage extensive, costly motion practice, and yet avoid the Bond Requirement by simply advancing a host of defenses *before* interposing a formal answer," and then to "simply ignore the remainder of the proceedings and relegate the plaintiff to a default judgment with no in-State collateral." Levin, 95 N.Y.2d at 528 (emphasis added). Such a result would "compromise Section 1213(c)'s goal of assuring that funds are available in New York to satisfy any judgment in plaintiff' favor," which is "what the Legislature sought to avoid by enacting section 1213(c)" in the first place. Id.

The Bermuda Insurers' suggestion that the Section 1213(c) applies "almost exclusively to answers or counterclaims," and therefore cannot apply to pre-answer motions such as a motion to compel arbitration or a motion to dismiss for lack of subject matter jurisdiction, Bermuda Insurers' Br. at 6-7, is contrary to this controlling precedent. Indeed, if it were true that Section 1213(c)'s Bond Requirement was triggered *only after* an answer was filed, the New York Court

of Appeals would not express concern over the absence of a bond when a foreign insurance company advanced "a host of defenses *before* interposing a formal answer." Levin, 95 N.Y.2d at 528 (emphasis added). Moreover, the legislative history that the Bermuda Insurers themselves cite confirms that motions on threshold non-merits grounds trigger the Bond Requirement: An unauthorized foreign insurer is "to provide security for any judgment that might be rendered against it *before* defending on the merits." Bermuda Insurers' Br. at 6 (citing Rep. of the Ass'n of the Bar of the City of N.Y., Comm. on State Legis. at 2, Bill Jacket, L. 1949, ch. 826 at 46 (Apr. 18, 1949) ("Bill Jacket") (emphasis added)). The Bermuda Insurers' argument is thus in direct conflict with long-standing New York Court of Appeals precedent, the statute, and legislative history.

Here, not only have the Bermuda Insurers filed papers in three separate courts, requiring the MFG Parties to engage in substantial and extensive motion practice, but the Bermuda Insurers have also warned that "the Supreme Court of Bermuda would not enforce any U.S. judgment against a Bermuda entity." Opening Br. at 3-4 (citing Nov. 8, 2016 Letters from Sedgwick Chudley on behalf of the Bermuda Insures to the MFG Parties). As a result of this costly motion practice, the Bermuda Insurers have yet to interpose a formal answer. Opening Br. at 4. Thus, the Bermuda Insurers have engaged in the exact litigation conduct that the New York Legislature sought to curtail when it enacted Section 1213(c) in the first place, as the New York Court of Appeals recognized in Levin.

2. The Bermuda Insurers' Citations To Cases That Were Dismissed Pursuant To An Arbitration Clause, *Forum Non Conveniens*, Or Lack Of Personal Jurisdiction Are Inapposite

The Bermuda Insurers' claim that Section 1213(c) requires the posting of a bond only upon the interposition of a formal answer is further belied by the New York Court of Appeals' instruction that courts should be "guided not by nomenclature but by the realities of litigation."

Levin, 95 N.Y.2d at 527. As the MFG Parties' Opening Brief explained, while Section 1213(c) does not define the term "pleading," it does carve out from the Bond Requirement "motion[s] to set aside service made in the manner provided" by Section 1213(b). Likewise, consistent with Levin's instruction that "[w]hether any particular motion to dismiss—other than the one carved out—falls within the category of a 'pleading' must be determined in accordance with the Legislature's objectives in enacting the statute," 95 N.Y.2d at 528, courts have also carved out from the Bond Requirement certain other motions. These include motions to dismiss for lack of personal jurisdiction, and motions to dismiss pursuant to the doctrine of *forum non conveniens*. See, e.g., McKenney v. Nat'l Rural Letter Carriers Ass'n, No. 07-CV-584A, 2009 WL 902506, at *6 (W.D.N.Y. Apr. 2, 2009) (Bermuda Insurers' Br. at 8) (imposition of bond "premature" when no ruling on service of process and personal jurisdiction); Ghose v. CAN Reins. Co., 43 A.D.3d 656, 659 (N.Y. App. Div. 2007) (Bermuda Insurers' Br. at 8-9) (bond not triggered when there was "insufficient justification for New York courts to be burdened with this matter" such that the court granted a motion to dismiss on grounds of *forum non conveniens*). Motions to *dismiss* pursuant to an arbitration clause were also exempt, though as explained in the Opening Brief and below, such dismissals are no longer an option. TIG Ins. Co. v. Water St. Ins. Co., No. CV 98-224 (JS) (VVP), 1999 U.S. Dist. LEXIS 22938, at *9 (E.D.N.Y. Feb. 26, 1999) (Bond Requirement not triggered when Magistrate Judge recommended that the Court dismiss an action in favor of arbitration). These carve outs make sense: If a court lacks jurisdiction over an insurance company because service was not effected properly or otherwise, such that it cannot adjudicate, consistently with due process, the claims against that insurer, that court also lacks the constitutional authority to impose a bond upon that foreign insurance company.[2]

[2] This approach is also in accord with Section 1213's legislative history. See, e.g., Bill

The MFG Parties' Opening Brief, however, explained that this concern is *not* present where, as here, the Court does have personal jurisdiction over an unauthorized foreign insurance company, and that insurer files a motion to compel arbitration. Opening Br. at 15-16. That is because pursuant to the Second Circuit's recent decision in Katz v. Cellco P'ship, 794 F.3d 341, 343 (2d Cir. 2015)—a case featured in the MFG Parties' Opening Brief, but ignored by the Bermuda Insurers—a court *must* retain jurisdiction over the dispute even if it grants the motion and compels arbitration. Opening Br. at 15-16 (the "Federal Arbitration Act ['FAA'] requires a stay of proceedings when all claims are referred to arbitration and a stay requested" (quoting Katz, 794 F.3d at 343)).

Because this Court must retain jurisdiction even if it ultimately compels arbitration here, the Bermuda Insurers' claim that there is "no principled basis for distinguishing a motion to compel arbitration from . . . *forum non conveniens* motions" is wrong. Bermuda Insurers' Br. at 12. As the First Department's decision in Ghose illustrates, unlike a motion to compel arbitration, a motion to dismiss for an inconvenient forum results in the dismissal of the complaint in full. 43 A.D. at 661. Thus, the Bermuda Insurers' excursion into case law on motions to dismiss on threshold grounds (Bermuda Insurers' Br. at 8-13), and their related claim that "a motion to compel arbitration seeks to move the dispute to another forum" (Bermuda Insurers' Br. at 9), as do *forum non conveniens* motions, are an irrelevant aside. The Bermuda Insurers' resort to analogies ignores case law directly on point regarding motions to compel arbitration.

Jacket at 49 ("Nothing in the [bond provision] would be construed to prevent an unlicensed foreign insurer from moving to set aside the service on the ground that it was not in compliance with the statute. It may be observed here that, strictly, this language is not broad enough to include a general challenge to the statute on constitutional grounds, but it is quite probably that . . . it would not be a condition precedent to any motion to vacate the service of process made on any ground.").

The Second Circuit's decision in Katz also renders inapposite earlier case law such as TIG Insurance Co. v. Water Street Insurance Co., No. CV 98-224 (JS) (VVP), 1999 U.S. Dist. LEXIS 22938 (E.D.N.Y. Feb. 26, 1999) (Magistrate Judge Report & Recommendation), which the Bermuda Insurers rely upon heavily. Bermuda Insurers' Br. at 4, 10-12, 23. In TIG Insurance, the Magistrate Judge—after acknowledging that it was "undisputed that the instant controversy is subject to the arbitration clause"—recommended that the District Court decline to impose a bond pursuant to Section 1213(c) because "[t]he dismissal of the plaintiff's complaint" pursuant to an order compelling arbitration "will eliminate the possibility that the plaintiff will obtain a judgment against the defendant in this court at this juncture." 1999 U.S. Dis. LEXIS 22938, at *5, *9. The MFG Parties here *do* dispute that they are bound by an arbitration provision in the insurance policies. Adv. D.I. 125 (Plaintiffs' Omnibus Opposition to the Bermuda Insurers' Motions to Compel Arbitration). Thus, the Bermuda Insurers' statement that the extensive motion practice in this Court is of Plaintiffs' own doing because all Plaintiffs had to do was to "honor[] the arbitration clauses they agreed to," Bermuda Insurers' Br. at 19, is particularly inapt. But even setting that dispute aside, under Katz, this Court cannot dismiss this action even if it ultimately disagrees with the MFG Parties and compels arbitration. See Katz, 794 F.3d at 343. Thus, the Magistrate Judge's rationale for not imposing a bond pursuant to Section 1213(c) in TIG Insurance no longer applies. See Marsh, No. 11 Civ. 8391(PAC), 2013 WL 4007555, at *5.

Accordingly, because the Section 1213(c) carve outs apply only when a court lacks jurisdiction over the foreign insurance company or otherwise *dismisses* the action in favor of a different forum, and because this Court (i) has already established it has personal jurisdiction over the Bermuda Insurers and (ii) must retain jurisdiction over this matter even if it ultimately

grants the Bermuda Insurers' Motions to Compel Arbitration, the plain text of Section 1213(c) and clear, recent New York precedent, including Residential Capital, Kansa, and Marsh, confirm that the Bermuda Insurers have filed a "pleading" that requires them to post a bond, regardless of the outcome of the Motions to Compel Arbitration.[3]

B. There Are No Additional Prerequisites To Section 1213(c)'s Bond Requirement

Equally unavailing is the Bermuda Insurers' argument that a "predicate act" of either mailing or issuing a policy physically in New York is required before Section 1213(c)'s Bond Requirement is triggered. Bermuda Insurers' Br. at 14-16. The MFG Parties' Opening Brief explained that courts in New York have uniformly held that Section 1213(c)'s Bond Requirement is independent of Section 1213(b), which serves as an extension of New York's long-arm statute for the purposes of conferring personal jurisdiction over unauthorized foreign insurance companies. Opening Br. at 9-12. Accordingly, as long as this Court possesses personal jurisdiction over the Bermuda Insurers (which it does), this Court also has the authority to impose a bond upon the Bermuda Insurers pursuant to Section 1213(c). Id. (citing Travelers Ins. Co. v. Underwriting Members of Lloyd's of London, 240 A.D.2d 278, 279 (N.Y. App. Div. 1997) ("whether defendants had engaged in any of the activities enumerated in Insurance Law § 1213(b)(1) . . . is *immaterial*" to whether the bond had been triggered "since the statute does not make the obligation to post security [under Section 1213(c)] contingent upon the manner of service . . . or the type of purposeful activity providing the basis for exercise of in personam jurisdiction" (emphasis added)) and TPK Constr. Corp. v. S. Am. Ins. Co., 739 F. Supp. 213, 215

[3] As discussed in the Opening Brief, the Bermuda Insurers have filed multiple pre-answer motions in this Court, including their Motions to Dismiss for Lack of Subject Matter Jurisdiction and Motions to Compel Arbitration on November 28, 2016, and have each docketed three separate appeals of this Court's orders with the United States District Court for the Southern District of New York. Opening Br. at 4.

(S.D.N.Y. 1990) (rejecting on the same grounds the argument that Section 1213(c) "only requires a security deposit when personal jurisdiction has been obtained through substituted service of process" provided by Section 1213(b)).

The Bermuda Insurers do not contest that this case law is directly on point here. Rather, they do not bother to cite TPK Construction, and argue only that the Court's decision in Travelers is unpersuasive and should be disregarded because it is at odds with Ghose, 43 A.D. 3d at 661. Ghose, however, makes no mention of Section 1213(b), let alone discusses whether these enumerated acts constitute prerequisites to Section 1213(c)'s Bond Requirement.[4] The Bermuda Insurers point to Residential Capital, in which the court concluded that a foreign insurance company was not required to post a bond when it issued policies that contained the insured's Michigan address, and those insurance policies were ultimately delivered to Michigan but never reached New York. Bermuda Insurers' Br. at 14-15; see also Residential Capital, No. 12-12020 (MG), 2016 WL 6155925, at *16 n.21. Unlike in Residential Capital, however, here the MFG Parties' New York address is the only address listed and thus the only possible delivery destination for the insurance policies. Thus, unlike in Residential Capital, this case involves an insured entity that is a New York resident at risk of being required to resort to far-flung jurisdictions to obtain an award against an unauthorized foreign insurance company that insures risks in New York. Because this is precisely the situation that the New York Legislature sought to avoid when it enacted Section 1213(c), the Bond Requirement applies here.

[4] Rather, that case involved an insurance policy governed by Bermuda law that was issued to a Bermudian Company which controlled two wholly-owned subsidiaries, one in Bermuda and another in Australia. Given that Ghose did not involve a policy issued to a United States entity, let alone one located in New York, it is unsurprising that the Court concluded that the policy there "was not issued or delivered in New York" and therefore that Section 1213(c) did not apply. Id. at 661.

In any event, even assuming (counter to the governing case law) that an unauthorized foreign insurer must deliver to or issue in New York an insurance policy pursuant to Section 1213(b) before the bond is triggered under Section 1213(c), that purported requirement is satisfied here. Section 1213 embodies the New York legislature's anticipation and specifically, preclusion, of attempts to "game" Section 1213(b) by, for example, using an intermediary to avoid direct contact with New York. See, e.g., N.Y. Ins. L. § 1213(b)(1) ("[a]ny of the following acts in this state, effected by mail *or otherwise* . . . ." (emphasis added); see also N.Y. Ins. L. § 1101(b)(1) ("any of the following acts in this state, effected by mail . . . shall constitute doing an insurance business in this state . . . (A) making . . . any insurance contract, including either issuance or delivery of a policy . . . to a resident of this state or to any firm . . . authorized to do business . . . (E) doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to *evade* the provisions of this chapter." (emphasis added)). That is exactly what the Bermuda Insurers allege happened here when they issued insurance policies to a New York entity through an intermediary. Bermuda Insurers' Br. at 14 n.7 (arguing that the "Bermuda Insurers' policies were issued and delivered in Bermuda to Plaintiffs' Bermudian insurance broker"). Thus, under any construction of Section 1213, the Bermuda Insurers are required to post a bond.

II. THE BERMUDA INSURERS' REQUEST TO REFER THE ISSUE OF THE BOND TO AN ARBITRATION PANEL IS CONTRARY TO ESTABLISHED NEW YORK PRECEDENT

The MFG Parties' Opening Brief explained that because Section 1213(c)'s Bond Requirement applies automatically, the New York Court of Appeals has recognized that the failure of an unauthorized foreign insurer to post this bond "justifies striking the answer of a foreign or alien insurer if that insurer fails to provide adequate preanswer security." Opening Br. at 13 (quoting Curiale, 88 N.Y.2d at 277). Consistent with this precedent, multiple courts in

New York have struck an unauthorized insurer's pleadings and entered a default judgment against them until they posted the requisite bond under Section 1213(c). Opening Br. at 14 (citing Am. Centennial Ins. Co. v. Aseguradora Interacciones, S.A., No. 96 Civ. 4062(JFK), 2000 WL 1425078, at *8 (S.D.N.Y. Sept. 26, 2000), Skandia Am. Reins. Corp. v. Caja Nacional de Ahorro y Segoro, No. 96 Civ. 2301(KMW), 1997 WL 278054, at *2 (S.D.N.Y. May 23, 1997), and Signal Capital Corp. v. E. Marine Mgmt., Inc., 899 F. Supp. 1167, 1171 (S.D.N.Y. 1995) (Sotomayor, J.)).

Once again, the Bermuda Insurers do not even attempt to grapple with this directly on-point case law, as they instead argue that the Court should rule first on the Bermuda Insurers' Motions to Compel Arbitration, and then allow the arbitration panel to decide whether a bond is required under Section 1213(c). Bermuda Insurers' Br. at 22-23. This proposed approach is wrong. *First*, it ignores the long line of case law cited by the MFG Parties holding that a pleading should be struck absent the posting of a bond. Opening Br. at 13-14. Because it is the filing of the pleading itself that triggers the Bond Requirement under Section 1213(c), and it is this same pleading that courts strike absent the posting of the bond, the Bermuda Insurers' suggestion that this Court can nonetheless rule on this pleading before the bond is posted vitiates the remedy of striking a pleading. *Second*, the Bermuda Insurers' proposed approach also ignores clear Second Circuit precedent requiring this Court to stay this action, rather than dismiss it, in the event it agrees to compel arbitration here. See Katz, 749 F.3d at 343. Indeed, the only reason that the court in TIG Insurance (Bermuda Insurers' Br. at 23) referred the bond issue to the arbitration panel was because the court dismissed the action. No. CV 98-224 (JS) (VVP), 1999 U.S. Dist. LEXIS 22938, at *10. Because dismissal is no longer an option here, there is no

basis for referring the bond question to an arbitration panel even if this Court ultimately grants the pending Motions to Compel Arbitration.

III. THE BOND REQUIREMENT IS NOT PREEMPTED BY THE NEW YORK CONVENTION

There also is no basis for the Bermuda Insurers' argument that Section 1213(c) is preempted by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Bermuda Insurers' Br. at 23-33. Once again, the Bermuda Insurers fail to identify any controlling case law that supports their position, and the case law that does exist in this Circuit directly undercuts their argument.

First, courts in the Second Circuit have already expressly determined that pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., Section 1213(c) is *not* preempted by either the Federal Arbitration Act ("FAA") *or* the New York Convention. See Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) (holding that the New York Convention is reverse preempted by the McCarran-Ferguson Act because "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation"); Skandia Am. Reins. Corp., No. 96 CIV. 2301, 1997 WL 278054, at *2-3 (noting that because "under the McCarran-Ferguson Act of 1946 . . . the power to regulate insurance is specifically granted to the states whose laws are not preempted by any act of Congress unless such act specifically relates to the business of insurance . . . a foreign or alien insurer[] is required to post security sufficient to secure payment of any final judgment" under Section 1213(c)).[5]

[5] Indeed, the New York Legislature stated in Section 1213 itself that it was exercising the powers reserved by McCarran-Ferguson. See N.Y. Ins. L. § 1213(a) ("The legislature . . . exercises powers and privileges available to the state by virtue of public law number fifteen, seventy-ninth congress of the United States, chapter twenty, first session, senate number three hundred forty, as amended, (15 U.S.C. § 1011) [the McCarran-Ferguson Act] which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.").

The Bermuda Insurers' approach to this issue is the same as with their other arguments—they do not dispute that the on-point case law adverse to their position exists; instead, they only argue that this precedent "is not good law today." Bermuda Insurers' Br. at 30 n.14. Yet, the Bermuda Insurers cite to no Second Circuit case law abrogating this controlling precedent, instead relying upon out-of-circuit case law that explicitly disagreed with the Second Circuit. Bermuda Insurers' Br. at 30 (citing Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 721-25 (5th Cir. 2009) (en banc), which expressly acknowledged that its "decision conflicts with that of the Second Circuit"). Nor could they, as no such Second Circuit case law exists; to the contrary, courts have required unauthorized foreign insurance companies to post a bond pursuant to Section 1213(c) upon filing a motion to compel arbitration, including after Stephens was decided. See, e.g., Marsh, No. 11 Civ. 8391(PAC), 2013 WL 4007555, at *5.

Second, the Bermuda Insurers' proposed interpretation of the New York Convention seeks to convert an international treaty designed to *help* prevailing parties recover judgments obtained in foreign arbitral proceedings into a shield that would allow losing parties to *evade* such judgments. As both its name and contents reflect, the New York Convention exists to ensure that foreign arbitration "awards" are both recognized and enforced. See, e.g., Goel v. Ramachandran, 823 F. Supp. 2d 206, 214 (S.D.N.Y. 2011) (explaining that the United States' implementing legislation of the Convention would "assist the uniform and efficient enforcement of arbitration agreements and awards in foreign commerce" (internal citations omitted)). Here, even if this matter is ultimately referred to arbitration, the only party that can obtain an "award" is the MFG Parties, as the Bermuda Insurers have not asserted any counter or cross claims in the present action. Accordingly, the Bermuda Insurers' attempt to rely upon the New York

Convention to avoid posting a bond specifically designed to ensure that judgments (such as one against them) are enforced turns the New York Convention on its head.

At bottom, the Bermuda Insurers' argument appears to be predicated on their claim that imposing the bond here would impede arbitration. Bermuda Insurers' Br. at 24-27; see also Bermuda Insurers' Br. at 27 (explaining that the case law cited by the Bermuda Insurers "confirm[s] that prejudgment attachments may not be used to impede arbitration by the party opposing arbitration under the Convention"). Despite devoting pages to this argument, at no point do the Bermuda Insurers explain how any arbitration proceeding that may occur here would be impeded by the posting of a security designed to ensure that any judgment that arbitration produces is then enforced. Nor could they, as the court rejected this argument explicitly in Atlas Chartering Services, Inc. v. World Trade Group, Inc.:

> Certainly, a London arbitration can proceed in an orderly fashion even though the defendant's assets have been attached in New York as security for any award rendered by the London panel. There is no merit to the argument that plaintiff, in seeking an attachment, is attempting to 'bypass' the arbitration procedure. See McCreary Tire & Rubber Co. v. CEAT, S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974). . . . The attachment, we believe, serves only as a security device in aid of the arbitration. . . . Thus, we doubt that a decision permitting attachment would discourage or hamper arbitration under the [New York] Convention.

453 F. Supp. 861, 863 (S.D.N.Y. 1978). Thus, because the bond here is intended to ensure that "funds will be available in this State to satisfy any potential judgment" against the Bermuda Insurers, Levin, 95 N.Y.2d at 527, and because such a bond "serves only as a security device in aid of the arbitration," Atlas Chartering Servs., 453 F. Supp. at 863, there is no conflict between Section 1213(c) and the New York Convention. To the contrary, the bond helps to effectuate the New York Convention's goals.

Finally, the Bermuda Insurers' New York Convention argument, like the Bermuda Insurers' "pleadings" argument, ignores the Second Circuit's clear mandate that this Court must

retain jurisdiction in this case even if it ultimately grants the motion to compel arbitration. Katz, 794 F.3d at 343. Because this Court would be the forum tasked with enforcing any award issued in an arbitration here, and the New York Convention expressly permits a "competent authority to order the respondent to post suitable security" in an enforcement action, Skandia, No. 96 Civ. 2301(KMW), 1997 WL 278054, at *5, the Bermuda Insurers' arguments on the New York Convention are also inconsistent with Katz.

IV. A BOND IN THE AMOUNT OF $60 MILLION IS NECESSARY TO ENSURE THAT THE MFG PARTIES CAN COLLECT UPON A JUDGMENT RENDERED IN THEIR FAVOR

The MFG Parties' Opening Brief and numerous other submissions make clear that a $60 million bond is necessary here to ensure that an amount "sufficient to secure payment of any final judgment" will be available in New York for the MFG Plaintiffs, which is what the plain language of Section 1213 requires. See also N.Y. Ins. L. § 1213(c)(1)(A). As the Complaint alleges, and the MFG Parties have articulated repeatedly elsewhere, the MFG Parties, to this day, have not yet been paid the $20 million they are owed under the Policies by the Bermuda Insurers, and statutory interest has been accruing on these amounts since the MFG Parties first made a demand in May 2014. Adv. D.I. 1, Complaint ¶¶ 10, 12, 116. Additionally, the Bermuda Insurers caused the MFG Parties to sustain consequential damages totaling at least $40 million when they refused to abide by their contractual obligations to provide coverage in response to MFGI's May 2014 demand, and then again in response to MF Global's October 2015 demand. See Adv. D.I. 1, Complaint ¶¶ 10, 12, 116; Adv. D.I. 125, at 39. Specifically, as a result of the Bermuda Insurers' bad faith refusal, the Individual Insureds were forced to incur tens of millions of dollars in defense costs that they would have otherwise been able to avoid but for the Bermuda Insurers' actions, which in turn eroded the MFG Parties' D&O and E&O insurance limits available for the MDL Settlement. Adv. D.I. 1, Complaint ¶¶ 34, 116. Moreover, in

addition to the defense costs incurred by the Individual Insureds, the MFG Parties were also forced to incur additional expenses in paying their own counsel during years of proceedings culminating in the MDL Settlement with an assignment of rights against the Dissenting Insurers, all as a result of the Bermuda Insurers' bad faith refusal to comply with their legal obligations. Adv. D.I. 1, Complaint ¶ 116.

To account for the unpaid amounts under the Policies and consequential damages, the MFG Parties brought suit for $65 million—the $25 million outstanding under the Policies,[6] and an additional $40 million in consequential damages.[7] Because this is the amount necessary to "secure payment of any final judgment which may be rendered in the proceeding," N.Y. Ins. L. § 1213(c)(1)(A), the Bermuda Insurers must post a $60 million bond here. See, e.g., Signal Capital Corp., 899 F. Supp. at 1171 (requiring an unauthorized foreign insurer to post a $1 million bond when that was the "amount in controversy").

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[6] As noted in the MFG Parties' Opening Brief, Opening Br. at 9 n.8, Defendant Federal Insurance Company ("Federal") is not a foreign insurer and therefore is not subject to Section 1213(c), and thus Federal's $5 million share of the policies is deducted from the total $65 million loss here. The Bermuda Insurers' argument that the damages suffered by the MFG Parties due to the Defendants' failure to settle are somehow "apportion[able]" is unsupported by case law and they cite none. Bermuda Insurers' Br. at 36. Due to the failure of each Defendant to settle, the MFG Parties suffered a total of at least $40 million in damages. If a full judgment is awarded to the MFG Parties, the Bermuda Insurers would have remedies at law to pursue claims of contribution against Federal.

[7] The Bermuda Insurers' argument that the bond should be reduced because the MFG Parties' claim includes claims brought by Individual Insureds who were not New York residents, Bermuda Insurers' Br. at 35-36, is also wrong. As alleged in the Complaint, there is no question that the Individual Insureds were insured in their capacity as executives and officers of MF Global, which itself is a New York entity. Indeed, as discussed supra, MF Global's New York address is the only address reflected on the policy. Where MF Global's executives chose to live during the course of their employment at a New York company authorized to do business in New York is irrelevant. See also Opening Br. at 5 n.3 (explaining that courts in New York have held that the Bond Requirement applies to suits brought both by residents and to those brought "by a non-resident corporation in New York as long as it is authorized to do business within the state." (quoting John Hancock Prop. & Cas. Ins. Co. v. Universale Reins Co., 147 F.R.D. 40, 50 (S.D.N.Y. 1993)).

In response, the Bermuda Insurers yet again can only point to case law that confirms the MFG Parties' position. Bermuda Insurers' Br. at 34. Indeed, the lone relevant case that the Bermuda Insurers cite here, Morgan v. American Risk Management, Inc., states that the foreign insurers must post a bond equal to "the amount that plaintiff would win as monetary damages, were this case decided in his favor." No. 89CIV2999(JSM)(KAR), 1990 WL 106837, at *8 (S.D.N.Y. July 20, 1990). In that case, the plaintiff requested a bond be posted for (1) paid losses, which consisted of claims that had been paid, (2) case reserves, which consisted of reported claims that had not been paid, and (3) losses that had been incurred, but not reported as claims. Id. at *3. The third category was based upon actuarial estimates. Id. The Morgan court refused to require that a bond be posted for the second and third categories, as those claims "remain estimates until [the plaintiffs'] ceding insurance companies have actually paid out the claims." Id. at *8. Indeed, the court allowed that the plaintiff could apply for a higher bond as the estimated paid claims converted into actual paid claims. Id. at *9 n.11.

Here, the MFG Parties' allegations regarding the $40 million in consequential damages sustained as a result of the Bermuda Insurers' conduct do not represent "estimates" of future losses.[8] To the contrary, this amount accounts for losses that the MFG Parties have *already*

[8] Nor are the MFG Parties' alleged consequential damages "attorney's fees," as the Bermuda Insurers assert. Bermuda Insurers' Br. at 37. As detailed supra and in the Complaint, the consequential damages sustained by the MFG Parties are the sustained defense costs, diminishment in the MFG Parties' E&O and D&O insurance limits, and additional expenses that the MFG Parties incurred as a result of the Bermuda Insurers' bad faith refusal to abide by its contractual obligations under the Polices.

As the Bermuda Insurers concede, however, New York law permits parties to recover attorney's fees for alleged bad faith denials up to 12.5 percent of the amount "the plaintiff is entitled to recover against the insurer." Bermuda Insurers' Br. at 37 (internal quotation marks omitted). Here, even setting aside the MFG Parties' claim for consequential damages (which this Court should not do), the Bermuda Insurers agree that the MFG Parties have a claim for at least $2.5 million *in addition to* the losses they have already alleged. Bermuda Insurers' Br. at 38.

sustained due to the Bermuda Insurers' bad faith failure to fund the MDL Settlement. As such, because $60 million is the minimum amount the MFG Parties will be entitled to as damages if this case is decided in their favor, this is the amount that must be posted to ensure that sufficient funds are available in this State.

CONCLUSION

For the foregoing reasons, the MFG Parties respectfully request that this Court strike the Bermuda Insurers' pleadings and enter a default judgment in the MFG Parties' favor until the Bermuda Insurers post a bond in the amount of $60 million pursuant to New York Insurance Law § 1213(c).

Thus, because the addition of these attorney's fees brings MFG Parties' total damages from the Bermuda Insurers to $62.5 million, the requested $60 million bond is more than appropriate here.

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Respectfully submitted,

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