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MF Global Holdings Ltd., as Plan Administrator, and MF Global Assigned Assets LLC v. Allied World Assurance Company, Ltd et al.,
Adv. Pro. No. 16-01251 (MG)

May 4, 2017

Dear Judge Glenn:

We write on behalf of Allied World Assurance Company, Ltd, Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd. and Starr Insurance & Reinsurance Company (collectively, the "Bermuda Insurers") in the above-captioned proceeding pursuant to the Court's instruction to submit "a supplemental filing specifically addressing whether the Bermuda [I]nsurers are asserting any defense regarding the interpretation, applicability or enforcement of the five orders" identified by Plaintiffs at oral argument on the motion to compel arbitration (Apr. 18 Hr'g Tr. 112:1-4).[1]

As explained in Bermuda Insurers' reply brief, Plaintiffs' arguments that the parties' arbitration agreement should be overridden fail because the parties' dispute would be

[1] Plaintiffs have identified as relevant the following five orders of this Court:

(1) the Order Authorizing the Trustee to Enter the Final Consent Order of Restitution, Civil Monetary Penalty and Ancillary Relief Against MF Global Inc. (Adv. Dkt. 126-3) ("CFTC-MFGI Trustee Authorizing Order") (the consent order itself, the "CFTC-MFGI Consent Order");

(2) the Order Granting Motion Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure for Entry of an Order Approving the Settlement Agreement (Bankr. Dkt. 2282) ("9019 Order") (the settlement agreement itself, the "MDL Settlement Agreement");

(3) the Order Granting the Trustee's Motion (I) to Approve the Trustee's Allocation of Property and (II) to Approve an Advance of General Estate Property for the Purpose of Making a Final 100% Distribution to Former Commodities Futures Customers of MF Global Inc. (Adv. Dkt. 126-4) ("NES Approval Order");

(4) the Order Approving (I) the Sale and Assumption Agreement, (II) the Transfer and Abandonment of Specified Systems and Documents and the SIPA Trustee's Corresponding Limitation of Discovery and Retention Obligations, (III) a Final Distribution on Allowed General Unsecured Claims Not Held by the MFGH Entities, and (IV) Related Relief (Adv. Dkt. 126-6) ("SAA Approval Order") (the Sale and Assumption Agreement itself, "SAA"); and

(5) the Order Confirming Amended and Restated Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (Bankr. Dkt. 1288) ("Plan Confirmation Order").

"non-core" even if it were to implicate the interpretation of this Court's orders (Reply 24-31) and because allowing arbitration here would not jeopardize the objectives of the Bankruptcy Code (Reply 33-35). Plaintiffs' arguments that the Court should override the agreement to arbitrate also fail for the independent reason that Bermuda Insurers' coverage defenses will not require interpretation, application or enforcement of the five orders of this Court cited by Plaintiffs.

I. Introduction—The Coverage Defenses.

Bermuda Insurers' coverage defenses can be grouped into two categories, neither of which requires interpretation of any of the five orders of this Court.

First, Bermuda Insurers have coverage defenses because under numerous policy provisions there was no loss covered under the policy. Bermuda Insurers take the position that MFGI and Individual Insureds are not permitted to return money from customer accounts to those customers and then obtain reimbursement for the return. Such a return is not a covered loss for numerous reasons, including that the policy and New York law do not extend insurance to mere restitution, that Plaintiffs' claim was not derived from a "failure to provide services" as required by the policy (Adv. Dkt. 1-5 at § 2.32) and that the return of customer money eliminated any corresponding "claim . . . against an insured by a third party" as those terms are defined in the policy (id. § 1). The policy is professional liability insurance—it is not deposit insurance. What will determine whether Bermuda Insurers' defenses succeed or not are the facts surrounding the "loss" alleged by Plaintiffs, the policy terms and the application of New York law.

Second, Bermuda Insurers have a coverage defense premised on the fact that, in the MDL, the Consolidated Amended Class Action Complaint asserted a claim held originally by MFGI (an Insured) against Individual Insureds. (See Compl. ¶ 51 ("Thus, the Customers' and MFGI's litigation claims against the Individual Insureds were consolidated into the MDL Customer Class Action." (emphasis added)).) In the MDL Settlement Agreement, that claim held originally by MFGI was settled and released. As a result, "losses" incurred in connection with the MDL Settlement Agreement are subject to the "insured vs. insured" coverage exclusion. (Adv. Dkt. 1-5 at § 3.8.) This coverage defense hinges on the interpretation of the "insured vs. insured" policy exclusion, and will not implicate the interpretation, enforcement or application of any order of this Court. Notably, the argument is that the claim in question was originally held by MFGI. Bermuda Insurers will argue that assignees of MFGI must step into the shoes of their assignors, taking whatever claims Plaintiffs may now have subject to any defenses that would exist against their predecessors-in-interest. (See Apr. 18 Hr'g Tr. 109:15-110:12, 110:25-111:3.) But, to be clear, Bermuda Insurers have not and will not challenge the validity of the relevant transfers that have resulted in Plaintiffs holding the asserted claim for insurance.

II. The Orders.

A. The 9019 Order.

In August 2016, this Court entered the 9019 Order. In relevant part, the 9019 Order found that the MDL Settlement Agreement was "fair, reasonable, and adequate". (9019 Order ¶ 1.) This Court barred "any person or entity that is not a Party to the [MDL]

Settlement Agreement . . . from contesting or disputing the Reasonableness of Settlement" (9019 Order ¶ 7), including by barring them from contesting whether the payments called for under the MDL Settlement Agreement, "in addition to amounts previously paid, . . . constitute proper, full, fair and complete exhaustion . . . in accordance with, and pursuant to, the[] terms and conditions" of the underlying policies (MDL Settlement Agreement at ¶ (ccccc)).[2]

Plaintiffs mistakenly argue (Opp'n 42-47) that the 9019 Order adjudicated all potential coverage defenses. That is not correct. First, establishing "exhaust[ion]" means only that the underlying policies' limits of liability would be deemed met, not that the underlying insurers (let alone the Bermuda Insurers) lacked meritorious coverage defenses. Second, even if the language reached as broadly as Plaintiffs claim, it could not have issue preclusive effect on the arbitration of the Bermuda Insurers' policies because their coverage defenses were not "actually litigated" in the Chapter 11 proceeding or actually "decided" in the 9019 Order, Interoceania Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997) (cited at Reply 30). As a result, Bermuda Insurers' coverage defenses will not require the interpretation of, nor challenge the enforceability or application of, this Court's 9019 Order.

B. (1) The Trustee Authorizing Order and (2) The NES Approval Order.

Plaintiffs have pointed to two orders issued by this Court in the SIPA liquidation: the CFTC-MFGI Trustee Authorizing Order and the NES Approval Order. These two orders relate to the payment of certain customer net equity claims from the MFGI general estate.

In September 2013, this Court issued the CFTC-MFGI Trustee Authorizing Order, which authorized "the Trustee to execute the [CFTC-MFGI] Consent Order promptly" and "to take any and all actions reasonably necessary to consummate the [CFTC-MFGI] Consent Order and perform any and all obligations thereunder". (Trustee Authorizing Order at 2.) Bermuda Insurers will not challenge the grant of authority made by this Court's Trustee Authorizing Order.

In October 2013, this Court issued its NES Approval Order, "authoriz[ing] [the Trustee] to advance funds from the general estate of MFGI . . . to [certain] customer estates in order to satisfy all allowed customer net equity claims" and ordered that the Trustee "is the assignee of, and otherwise subrogated to, the rights of all customers" in connection with that "advance" payment. (NES Approval Order 3-4.) This Court's NES Approval Order further provided that "all potential claims of customers against third parties to recover for the shortfall in the [relevant customer estates] in existence as of the moment before any advances of funds from the general estate . . . shall be preserved for the benefit of the Trustee as assignee and subrogee". (NES Approval Order 4.)

Finally, in November 2013, the CFTC-MFGI Consent Order itself was entered by the District Court. CFTC-MFGI Consent Order, Deanglis v. Corzine, No. 11-cv-07866-VM-JCF, Dkt. 575 (S.D.N.Y. Nov. 8, 2013) (Marrero, J.). Pursuant to the CFTC-MFGI Consent

[2] As previously stated, Bermuda Insurers will not dispute that the MDL Settlement Agreement was "fair, reasonable and adequate", nor will they dispute that the referenced payments have exhausted the underlying policies. (See Apr. 18 Hr'g Tr. 42:20-43:19, 108:25-109:14, 111:4-9; Reply 35 n.23.)

Order, MFGI was directed to "make restitution" of more than $1.2 billion to satisfy certain customer net equity claims. (CFTC-MFGI Consent Order ¶ III.4.)[3]

In April 2014, according to the Complaint, following the entry of those orders "the SIPA Trustee disbursed his final payments to customers from MFGI general estate funds, resulting in a one-hundred percent satisfaction of those Customers' net equity claims". (Compl. ¶ 61.)

Plaintiffs argue that the NES Approval Order ruled on the merits of Bermuda Insurers' defenses by virtue of being entered. (See Opp'n 42.) That argument fails for the same reasons discussed more fully in the context of the 9019 Order above: the Bermuda Insurers' defenses were not actually litigated or decided in the context of the NES Approval Order, and this Court's determination that the transfer of a potential claim is "reasonable" does not constitute a decision that the claim, whoever it is asserted by, is meritorious. As a result, Bermuda Insurers' coverage defenses will not require the interpretation of, nor challenge the enforceability or application of, this Court's NES Approval Order.

Finally, Plaintiffs argue that Bermuda Insurers would violate the terms of the District Court's CFTC-MFGI Consent Order if they used that Order in furtherance of a crime/fraud coverage defense. (Apr. 28 Hr'g Tr. 92:6-13; Opp'n 44-45.) That concern is misplaced because Bermuda Insurers have not asserted and will not assert a crime/fraud coverage defense. (Reply 34.) Bermuda Insurers do, however, take the position that the policies do not cover payments made pursuant to ¶ III.4 of the District Court's CFTC-MFGI Consent Order, which are described in that order as an obligation to "make restitution" and which, as a factual matter under the policy and New York law, amount to the uninsurable return of customer money.

C. The SAA Approval Order.

In August 2015, this Court issued the SAA Approval Order. In relevant part, pursuant to the SAA, certain purported claims against the Bermuda Insurers for insurance proceeds were assigned to the Plan Administrator, on behalf of MFGH (or its designee). (Bankr. Dkt. 2114, Ex. B, § 1.11(b).) In the SAA Approval Order, this Court authorized the Plan Administrator to enter into the SAA and found that the SAA was "reasonable and appropriate to maximize the value of MFGI's and the Chapter 11 Debtors' estates". (SAA Approval Order 3, 6.) Bermuda Insurers have not challenged, and will not challenge, the validity of the assignments made in the SAA or this Court's finding that the SAA was reasonable. Rather, as explained above, any assignees under the SAA step into the shoes of their assignors, taking the claims subject to any defenses that existed under the contract and state law prior to the transfer.[4]

[3] In addition, the CFTC-MFGI Consent Order provided that "MF Global shall pay a civil monetary penalty in the amount of $100,000,000". (CFTC-MFGI Consent Order ¶ III.5.) Bermuda Insurers understand that Plaintiffs are not seeking coverage for this penalty. (See MDL Settlement Agreement ¶ 10(e).)

[4] Plaintiffs recognize and concede this principle. (Opp'n 22 ("It is well settled that an assignee 'stands in the shoes of its assignor, and takes neither more nor less than the assignor had.'") (emphasis omitted)).

Plaintiffs mistakenly argue that the SAA Approval Order ruled on the merits of Bermuda Insurers' defenses by deeming the assignment of certain insurance claims to be "reasonable". (See Opp'n 42.) That argument fails for the same reasons discussed more fully in the context of the 9019 Order above: those defenses were not actually litigated or decided in the context of the SAA Approval Order, and this Court's determination that the transfer of a potential claim is "reasonable" does not constitute a decision that the claim, whoever it is asserted by, has merit. As a result, Bermuda Insurers' coverage defenses will not require interpretation of, nor challenge the enforceability or application of, the SAA Approval Order.

D. The Plan Confirmation Order.

Plaintiffs suggest that the Plan and Plan Confirmation Order would be implicated by Bermuda Insurers' defenses because "any challenge to the validity of the assignments would require interpretation of the Plan's provisions creating and empowering the Plan Administrator and the Litigation Trust". (Opp'n 46 (emphasis added).) Bermuda Insurers will not challenge the "validity of the assignments" referenced by Plaintiffs. Rather, as explained above, Plaintiffs as assignees step into the shoes of their assignors, taking the claims subject to any defenses that existed under the contract and state law prior to the transfer. No interpretation of the Plan's provisions are required or implicated because the assigned rights remain unchanged.

Respectfully,

/s/ Daniel Slifkin

Daniel Slifkin

Honorable Martin Glenn
United States Bankruptcy Judge
United States Bankruptcy Court for the Southern District of New York
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CERTIFICATE OF SERVICE

I, Daniel Slifkin, certify that on May 4, 2017, I caused the foregoing letter to be filed with the Clerk of Court and served upon all parties via the Court's CM/ECF system.

/s/ Daniel Slifkin
Daniel Slifkin