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MF Global Assigned Assets LLC

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re	:	<b>Chapter 11</b>
	:	
MF GLOBAL HOLDINGS LTD., et al.,	:	<b>Case No. 11-15059 (MG)</b>
	:	
Debtors. <sup>1</sup>	:	<b>(Jointly Administered)</b>
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MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC,	:	
	:	
Plaintiffs,	:	
vs.	:	<b>Adv. Proc. No. 16-01251 (MG)</b>
	:	
ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY,	:	<b>Ref. Docket Nos. 170, 159</b>
	:	
Defendants.	:	
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**PLAINTIFFS' MOTION TO STRIKE DEFENDANT ALLIED WORLD'S DEFECTIVE  
BOND UNDER NEW YORK INSURANCE LAW SECTION 1213, STRIKE  
PLEADINGS AND ENTER A DEFAULT JUDGMENT**

<sup>1</sup> 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.

Plaintiffs MF Global Holdings, Ltd. and MF Global Assigned Assets LLC (the "MFG Plaintiffs") respectfully submit this motion to strike Defendant Allied World Assurance Company Ltd.'s ("AWAC") defective bond under New York Ins. Law § 1213 (Adv. D.I. 170), strike its pleadings and enter a default judgment.

### **PROCEDURAL HISTORY**

In its June 12, 2017 *Memorandum Opinion And Order Finding That Allied World Must Post A Bond Pursuant To New York Insurance Law Section 1213* (Adv. D.I. 159) (the "Bond Order"), the Court determined that AWAC "may not skirt the bond requirement in section 1213(c) while continuing to wage a costly battle over an insurance policy it issued that is expressly governed by New York law, addressed to a New York insured, and was ultimately delivered to a New York address." Id. at 19. The Court accordingly ordered AWAC "to post a \$15 million bond with the Clerk of the Court within 14 days of the issuance of this Opinion" (i.e., on or before June 26, 2017). Id. Quoting then-district judge Sotomayor, Signal Capital Corp. v. E. Marine Mgmt. Inc., 899 F. Supp. 1167, 1171 (S.D.N.Y. 1995) (Sotomayor, J.), this Court made clear that if AWAC "fails to post a bond, as required, its pleadings will be stricken and a default judgment will be entered." Id. at 18; see also id. at 4-5.

On June 26, 2017, without seeking or obtaining advance approval from this Court, AWAC posted with the Court what it claims to be a surety bond entered into with U.S. Specialty Insurance Company (the "AWAC Bond") (Adv. D.I. 170), in purported "compliance" with the Court's Bond Order. Although AWAC claims that the bond was posted to "secure . . . payment of any final judgment that may be rendered in favor of Plaintiffs . . . and against Allied World in the above-captioned adversary proceeding" (Id. at 2), performance under the AWAC Bond is expressly conditioned upon the exhaustion of any AWAC appeals of a final judgment entered by this Court:

If the Court enters a final judgment in favor of Plaintiffs, and Allied World does not file an appeal from the final judgment, its appeal from a final judgment is dismissed or, after exhausting its appeals, the final judgment is affirmed, and Allied World does not pay the judgment amount, together with costs, interest and fees, then U.S. Specialty Insurance Company shall satisfy such money judgment, as may be modified on appeal, and shall make any payments to Plaintiffs provided for in the final judgment, together with costs, interest and fees, not exceeding \$15,000,000.00.

Id. at ¶ 1.

### **ARGUMENT**

#### **THIS COURT SHOULD STRIKE AWAC'S BOND AS NON-COMPLIANT WITH NEW YORK INS. LAW § 1213, THE BANKRUPTCY RULES AND ITS BOND ORDER, STRIKE AWAC'S PLEADINGS AND ENTER A DEFAULT JUDGMENT**

The AWAC Bond fails to comply with the plain text of the requirements set forth in New York Insurance Law § 1213(c), the Federal Rules of Bankruptcy Procedure, and this Court's Bond Order. New York Insurance Law § 1213(c) gives a foreign insurer a choice: to "deposit with the clerk of the court in which the proceeding is pending cash or securities *or* file with such clerk a bond with *good and sufficient sureties, to be approved by the court*, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding . . . ." (emphasis added). AWAC declined the first option of depositing cash or securities with the clerk of the court. Instead, AWAC chose the second option – filing a surety. Yet, AWAC failed to follow this statutory command in several ways.

First, under the plain language of New York Insurance Law § 1213, a surety bond filed by a foreign insurer (such as AWAC here) must "be approved by the court." Prior to the June 26, 2017 deadline for compliance with the Bond Order, AWAC failed to obtain this Court's approval of its proposed surety bond as contemplated by New York Insurance Law § 1213(c). See, e.g., Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., No. 00 Civ. 4336 (AKH), 2002 WL 31519622, at \*1

(S.D.N.Y. Nov. 12, 2002) (foreign insurer sought and obtained court approval to post surety bond in lieu of letters of credit prior to foreign insurer's posting of surety bond).

Second, AWAC could not have obtained such court approval because its proposed surety bond contains impermissible conditions and, as such, cannot constitute "good and sufficient sureties" under New York Insurance Law § 1213(c). That is because AWAC's proposed surety bond directly contravenes both the statute's express purpose and its requirements. As made clear in its preamble, New York Insurance Law § 1213 was enacted to enable New York insureds to fully assert their legal rights against foreign insurers in a New York forum.<sup>2</sup> By requiring foreign insurers to deposit with the clerk of the court, "cash," "securities," or a "bond with good and sufficient sureties" "sufficient to secure payment of any final judgment which may be rendered in the proceeding," New York Insurance Law § 1213(c) ensures that New York insureds are able to collect, following their entry, final judgments entered in the trial court against foreign insurers, absent the issuance of a stay of execution pending appeal. See Fed. R. Bankr. P. 7062, 7069 and 8007. By conditioning performance on the exhaustion of any AWAC appeals, the AWAC Bond not only improperly reads such a condition into New York Insurance Law § 1213(c), but undermines the statute's express purpose of putting New York insureds on the same footing vis-a-vis foreign insurers as they would be with any other defendant.<sup>3</sup>

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<sup>2</sup> New York Ins. Law § 1213(a) ("The purpose of this section is to subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies.").

<sup>3</sup> If the MFG Plaintiffs obtain a final judgment from this Court, and AWAC appeals, but does not obtain a stay, the MFG Plaintiffs will be left without recourse to the AWAC Bond. At the same time, AWAC has consistently taken the position in this litigation that it has no assets in the United States. As such, the MFG Plaintiffs would be back to "square one" – forced to "resort to far-away jurisdictions to assert their rights." Bond Order (Adv. D.I 159) at 7.

Third, AWAC's proposed surety bond conditions attempt to circumvent Federal Rule of Bankruptcy Procedure 8007, which expressly requires a party, "either before or after the notice of appeal is filed," to "move first in the bankruptcy court" for "a stay of a judgment, order or decree of the bankruptcy court pending appeal" and for "the approval of a supersedeas bond." Fed. R. Bankr. Proc. 8007(a)(1). The AWAC Bond appears designed to avoid those obligations. Notably, the "burden on the movant seeking the extraordinary relief of a stay is a 'heavy' one," and the decision of "whether or not to grant a stay of an order pending appeal lies within the sound discretion of the court." In re Sabine Oil & Gas Corp., 551 B.R. 132, 142 (Bankr. S.D.N.Y. 2016) (internal citations omitted) (emphasis added).<sup>4</sup> Through its filing, AWAC attempts to obtain—in advance—the relief of a stay from a judgment pending appeal, but without even having applied for one, let alone having established any of the prerequisites. Moreover, the AWAC Bond could never stand in the place of a supersedeas bond, because under Local Bankruptcy Rule 8007-1, the supersedeas bond for a money judgment "shall be in the amount of the judgment plus 11% to cover interest and such damages for delay as may be awarded, plus \$250 to cover costs" – i.e., an amount that, at a minimum, would exceed the AWAC Policy's \$15 million in limits and the corresponding \$15 million AWAC Bond.

In sum, by adding conditions to its bond, AWAC has granted itself a stay pending appeal, in contravention of the New York Insurance Law and the Bankruptcy Rules. There is nothing in this Court's order requiring AWAC to post a bond that would allow AWAC to attach such conditions.

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<sup>4</sup> "[T]he court must consider four factors in exercising this discretion: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interest that may be affected." Id. (internal citations and quotations omitted). Moreover, if the movant "seeks the imposition of a stay without a bond, the applicant has the burden of demonstrating why the court should deviate from the ordinary full security requirement." In re General Motors Corp., 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009) (internal quotations and citations omitted).

Finally, the AWAC Bond should also be stricken on the independent ground that AWAC has failed to offer sufficient proof that its \$15 million surety bond is "sufficiently collateralized by identifiable assets." Centurifico Delveneto, (USA) Ltd. v. Switzerland Gen. Ins. Co., Ltd., 580 N.Y.S.2d 273, 274 (1st Dep't 1992) (finding that the requisites of New York Insurance Law §1213(c) were not met because the "defendant ha[d] not offered sufficient proof that the face amount of the bond, even if proper, [was] sufficiently collateralized by identifiable assets"). That is because AWAC's filing neglects to state the amount of collateral that AWAC provided to U.S. Specialty Insurance Company in connection with the issuance of the AWAC Bond.

Accordingly, AWAC's defective bond ought to be stricken. And since AWAC failed to post an appropriate bond within 14 days of the issuance of this Court's order, AWAC's filings must also be stricken and a default judgment entered. See Bond Order (Adv. D. I. 159) at 18.

#### **CONCLUSION**

The MFG Plaintiffs respectfully request that the Court enter an order (i) striking AWAC's defective New York Ins. Law § 1213 Bond (Adv. D.I. 170); (ii) striking AWAC's pleadings and entering a default judgment against AWAC; and (iii) granting such other and further relief to the MFG Plaintiffs as the Court may deem proper.

Dated: June 27, 2017  
New York, New York

Respectfully submitted,

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