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

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In re	:	Chapter 11
	:	
MF GLOBAL HOLDINGS LTD., et al.,	:	Case No. 11-15059 (MG)
	:	
Debtors. ¹	:	(Jointly Administered)
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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,	:	Ref. Docket Nos. 170, 159
	:	
Defendants.	:	
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**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO STRIKE
DEFENDANT ALLIED WORLD'S DEFECTIVE BOND UNDER
NEW YORK INSURANCE LAW SECTION 1213, STRIKE
PLEADINGS AND ENTER A DEFAULT JUDGMENT**

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.

INTRODUCTION

After a thorough examination of the requirements and the legislatively stated goals of New York Insurance Law § 1213, this Court ordered Defendant Allied World Assurance Company Ltd. ("AWAC") to post a \$15 million bond. AWAC's bond, however, was defective on its face. The bond explicitly conditioned its availability upon the exhaustion of appeals, thereby adding a non-existent condition into Section 1213 and undermining the statute's express purpose of ensuring that New York insureds have the same rights against foreign insurers as they would against any other defendant. In response to the MFG Parties' motion to strike the bond and pleadings and enter a default judgment, AWAC offered some revisions to the bond conditions, purportedly to render it compliant with this Court's order. Yet these revisions do not eliminate the defects in AWAC's bond. Accordingly, the Court should strike it along with AWAC's pleadings and enter a default judgment.

ARGUMENT

I. THIS COURT SHOULD NOT APPROVE AWAC'S BOND BECAUSE IT ATTACHES IMPERMISSIBLE CONDITIONS AND THUS DOES NOT COMPLY WITH NEW YORK INSURANCE LAW § 1213

The MFG Parties' opening brief established that AWAC's attempts to condition the availability of its surety bond upon the exhaustion of appeals flout the plain language of New York Insurance Law § 1213 and that statute's underlying purpose. See Opening Br. at 3-4. AWAC continues to misinterpret the term "final judgment" in Section 1213 both in its defense of the original bond language and in its suggested revisions.

It is well established that "[i]nasmuch as the bond in suit was given pursuant to [a] statute, the statutory text is to be read into the instrument." Graybar Elec. Co. v. New Amsterdam Cas. Co., 292 N.Y. 246, 251 (1944); see also Scaffold Russ Dilworth Ltd. v. Shared Mgmt. Grp., Ltd., 289 A.D.2d 932, 934 (N.Y. App. Div. 2001) ("Where, as here, the bond was issued pursuant to [a statute], the statutory text is to be read into the instrument." (citing Graybar Elec. Co., 292 N.Y. at 251)).

Section 1213(c) makes clear that an unauthorized foreign insurer like AWAC must post a bond that is "sufficient to secure payment of any *final judgment* which may be rendered in the proceeding." N.Y. Ins. Law § 1213(c) (emphasis added). A "final judgment," in turn, is defined at both the state and federal level as a judgment entered by the *trial court* which "represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal." See, e.g., Da Silva v. Musso, 76 N.Y.2d 436, 440 (1990); see also Fed. R. Bankr. P. 7062, 7069, 8007. Accordingly, a final judgment by the trial court is considered "final" even when an appeal is sought. As the New York Court of Appeals has explained, "while an appeal from a final judgment or order may leave an inchoate shadow on the rights defined therein, those rights are nonetheless fully enforceable in the absence of a judicially issued stay pending disposition of the appeal." Da Silva, 76 N.Y.2d at 440. Consistent with this well-established understanding of a "final judgment," Section 1213(c)'s reference to a "final judgment" can only have one meaning—that any bond posted by an unauthorized insurer must be available upon the entry of a final judgment by the trial court, regardless of whether an appeal is taken.

AWAC ignores New York, federal bankruptcy, and federal civil procedure law by defending its original bond language and claiming that its "bond will secure any final judgment pending exhaustion of any appeals." AWAC Br. at 5, 6 n.6. While AWAC criticizes the MFG Parties for citing applicable Bankruptcy Rules, which, along with the underlying Federal Rules of Civil Procedure and New York case law, explicitly define the term "final judgment," AWAC cites no enactment or a case that would even suggest, let alone define, that term to include "exhaustion of any appeals." AWAC Br. at 5, 6 n.6. Nor could AWAC cite to any such authority, because—as described in the MFG Parties' opening brief and above—both New York and federal procedural law

are clear that a final judgment is enforceable even while an appeal is pending, absent a stay. See Da Silva, 76 N.Y.2d at 440; see also Fed. R. Bankr. P. 7062, 7069, 8007.

There is nothing in Section 1213 to indicate that its use of "final judgment" departs from this background rule; to the contrary, the statute's stated purpose reinforces that rule. AWAC's counter-statutory interpretation disadvantages New York insureds vis-à-vis foreign insurance companies by placing extra obstacles in New York insureds' path to collecting judgments, and by giving foreign insurers rights that other defendants do not have. As such, AWAC's interpretation is diametrically opposite to the New York Legislature's goal of ensuring that insureds do not face "insuperable obstacle[s]" when litigating against an unauthorized foreign insurance company. See N.Y. Ins. Law § 1213(a). Thus, AWAC's claim that "Section 1213 does not by its terms require that the bond be immediately payable after the entry of a final judgment, without respect to any appeal," AWAC Br. at 4, is baseless and contrary to existing law.

AWAC's revised bond language remains deficient for similar reasons. First, since a "final judgment" excludes appeals, AWAC's proposal permitting U.S. Specialty Insurance Company to decline to satisfy any final judgment until it is "modified on appeal" is contrary to law; indeed, AWAC cites no authority in support. AWAC Br. at 6 n.6. Second, AWAC's newly added language also conditioning payment under this bond on "no stay of execution [being] in place" is likewise invalid as it seeks to circumvent the separate superseadeas bond requirement, or at the least creates unneeded ambiguity as to when the MFG Plaintiffs can actually execute against U.S. Specialty. To be sure, separately, AWAC can enter into a side agreement with the surety company regarding any refunds if the final judgment is modified on appeal; AWAC can also apply for a stay of execution and attempt to post a supersedeas bond pending any appeal of a final judgment entered in this case. What AWAC cannot do is use this Section 1213 bond as a stand-in for the superseadeas bond because the

superseadeas bond will be for a higher amount than the policy limits, as the MFG Parties' motion explained. See Adv. D. I. 171 at 4 (citing Local Bankruptcy Rule 8007-1).

Finally, AWAC's bond creates yet another potential problem (unrelated to finality of a judgment or stays or appeals). The bond states that if "Allied World does not pay the judgment amount, together with costs, interests and fees, U.S. Specialty Insurance Company shall *satisfy* such money judgment . . . and shall make any payments to Plaintiffs . . . not exceeding \$15,000,000." (emphasis added). This language adds ambiguity as to whether this Section 1213 bond limits the MFG Plaintiffs' ability to collect upon any final judgment in excess of \$15 million after U.S. Specialty pays that amount. This is yet another example of AWAC's attempt to use the surety bond to curtail the MFG Parties' rights.

In sum, AWAC cannot post a bond that would abridge the MFG Parties' rights under New York Insurance Law § 1213(c) by permitting the surety company to withhold payment until *after* an appellate court issues its ruling, regardless of whether AWAC obtains a stay pending appeal and posts a separate superseadeas bond. See, e.g., Graybar Elec. Co., 292 N.Y. at 251; Scaffold Russ Dilworth Ltd., 289 A.D.2d at 934. Because that is what AWAC's surety bond allows, even in its amended form, it is defective under New York Insurance Law § 1213.

II. ENTRY OF A DEFAULT JUDGMENT IS THE APPROPRIATE REMEDY HERE

As this Court's Order requiring AWAC to post a \$15 million bond and the MFG Parties' prior filings have explained, New York law is clear that the proper remedy for an unauthorized foreign insurer's failure to post the bond required under Section 1213 is to strike the unauthorized foreign insurer's pleadings and to enter a default judgment. See Adv. D.I. 159 at 5 (citing Signal Capital Corp v. E. Marine Mgmt., Inc., 899 F. Supp. 1167, 117 (S.D.N.Y. 1995) (Sotomayor, J.) (in connection with a plaintiff's motion to strike an unauthorized foreign insurer defendant's answer, concluding that the defendant "must either post a bond or have its answer stricken and a default

judgment entered" (alteration and quotation marks omitted)).² Indeed, the New York Court of Appeals has recognized that the "State's interest in ensuring the availability of funds from which a judgment against a foreign or alien unlicensed insurer may be promptly paid, instead of requiring claimants to resort to far-flung forums for satisfaction," is sufficiently important that the entry of a default judgment—even against a defendant financially unable to post a bond—does not violate due process. Curiale v. Ardra Ins. Co., 88 N.Y.2d 268, 277-78 (1996); see also British Int'l Ins. Co. v. Seguros La Republica, S.A., 212 F.3d 138, 142 (2d Cir. 2000) (per curiam).

AWAC does not address any of this case law in its opposition, instead relying solely upon cases that do not involve, let alone mention, Section 1213. AWAC Br. at 6-7. If anything, AWAC's case law supports the entry of a default judgment here. In Enron Oil Corp. v. Diakuhara, 10 F.3d 90 (2d Cir. 1993) (AWAC Br. at 6), for example, the court explained that in entering a default judgment, which is committed to the "sound discretion" of the trial court, the trial court should consider whether a party "made a good faith effort to adhere to the rules of the court" and whether it was "obstructionist." Id. at 96, 98. As this Court is aware, AWAC has repeatedly failed to act in good faith in this action by ignoring this Court's orders. Starting with its Barton violation, resulting in this Court's Order holding AWAC in contempt, Adv. D.I. 67, to the latest example of posting a facially defective bond, AWAC even refused to follow this Court's Order by filing its opposition brief more than three hours after the Court-ordered deadline without any explanation for its delay, Adv. D.I. 173 ("Allied World is directed to file any response to the Motion by July 6, 2017, at 5:00 p.m."). Thus,

² See also, e.g., 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) (conditionally "grant[ing the Plaintiff's] motion to strike [the unauthorized foreign insurance defendants'] Answer and enter[ing] a default judgment against [them]" absent the posting of the requisite bond within sixty days); 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) ("Pursuant to [Section 1213(c)], if a foreign insurer fails to post security as required, a court can grant the movant party's motion by default.") (Adv. D. I. 118 at 14).

AWAC's own authority confirms that AWAC's failure to post a bond in compliance with New York Insurance Law § 1213 warrants the entry of a default judgment here.

CONCLUSION

The MFG Plaintiffs respectfully request that the Court enter an order (i) striking AWAC's defective New York Insurance 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: July 11, 2017
New York, New York

Respectfully submitted,

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