UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In re: MF GLOBAL HOLDINGS LTD., *et al.*, Debtors.[1]	Chapter 11 Case No. 11-15059 (MG) (Jointly Administered)
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC, Plaintiffs, -against- ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY, Defendants.	Related: S.D.N.Y. Civ. Action Nos. 1:17-cv-00113-RWS 1:17-cv-00106-RWS Adv. Proc. No. 16-01251 (MG)

NOTICE OF APPEAL

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January 26, 2017

[1] The debtors in the chapter 11 cases (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.

Defendant Allied World Assurance Company, Ltd ("Allied World"), by and through its undersigned counsel, appeals to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. §158(a) and Federal Rules of Bankruptcy Procedure 8003 and 8004 from the Preliminary Injunction and Order Holding the Bermuda Insurers in Contempt, both entered in this adversary proceeding before the United States Bankruptcy Court for the Southern District of New York (Hon. M. Glenn) on January 12, 2017. Both Orders were premised on a holding that there is specific personal jurisdiction over Allied World. True and correct copies of both the January 12, 2017 Preliminary Injunction and Order Holding the Bermuda Insurers in Contempt are attached hereto.

The names of all parties to the Orders appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

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CERTIFICATE OF SERVICE

I, Daniel Slifkin, certify that on January 26, 2017, I caused the foregoing Notice of Appeal of Defendant Allied World Assurance Company, Ltd to be filed with the Clerk of the Court and served upon all counsel of record via the Court's CM/ECF system.

/s/ Daniel Slifkin
Daniel Slifkin

Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OPINION AND PRELIMINARY INJUNCTION

A P P E A R A N C E S:

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MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

On December 21, 2016, this Court issued a *Memorandum Opinion and Temporary Restraining Order* (the "TRO Opinion" or the "TRO," ECF Doc. # 35),[1] enjoining the Bermuda Insurers from taking any action to enforce certain provisions of the Injunctive Orders (defined below) issued by the Supreme Court of Bermuda, Civil Jurisdiction (Commercial Court) (the "Bermuda Court"). *See MF Global Holdings Lt. v. Allied World Assurance Co. Ltd. (In re MF Global Holdings Ltd.)*, ___ B.R. ___, 2016 WL 7388546 (Bankr. S.D.N.Y. Dec. 21, 2016). The TRO was issued for 14 days, with the preliminary injunction hearing scheduled for January 4, 2017, before the TRO expired. At the outset of the January 4, 2017 hearing, the Court extended the TRO for an additional 14 days to permit the Court to decide whether to issue a preliminary injunction. Now pending before the Court is the determination whether there are grounds to issue a preliminary injunction enjoining the Bermuda Insurers from taking any action to enforce these Injunctive Orders.

In connection with the preliminary injunction hearing, Allied World Assurance Company, Ltd. ("Allied") filed the *Memorandum of Law in Support of Defendant Allied World*

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the TRO Opinion.

Assurance Company, Ltd.'s Opposition to Memorandum Opinion and Temporary Restraining Order (the "Allied TRO Response," ECF Doc. # 37). In support of the Allied TRO Response, Allied filed the *Affirmation of Erica Kerstein in Support of Defendant Allied World Assurance Company, Ltd's Opposition to Memorandum Opinion and Temporary Restraining Order* (the "Kerstein Affirmation," ECF Doc. # 38). Attached as exhibits to the Kerstein Affirmation are Allied's *Motion to Dismiss for Lack of Personal Jurisdiction and Lack of Service of Process*, Allied's *Motion to Compel Arbitration*, and Allied's *December 7, 2016 Opposition to This Court's Order to Show Cause*, along with the exhibits originally attached to each of these motions.

The Iron-Starr Insurers[2] filed the *Iron-Starr Defendants' Memorandum of Law in Opposition to Court's* Sua Sponte *Preliminary Injunction* (the "Iron-Starr TRO Response," ECF Doc. # 36). MF Global Holdings, Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA" and together with MFGH, the "Plaintiffs"), filed the *Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order* (the "Plaintiffs' TRO Response," ECF Doc. # [--], filed under seal on December 28, 2016).

For the reasons set forth below, the Court finds that there are sufficient grounds to enter a preliminary injunction enjoining the Bermuda Insurers from taking any action to enforce the Injunctive Orders.

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[2] Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited are referred to collectively as the "Iron-Starr Insurers."

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I. BACKGROUND

The facts relevant to the issue currently before the Court are set forth in the TRO Opinion and previous opinions and orders issued by this Court. Additional relevant facts are set forth below.

A. The Temporary Restraining Order

As noted above, through the entry of the TRO, this Court restrained and enjoined the Bermuda Insurers from taking any action to enforce the injunctive orders (the "Injunctive Orders," ECF Doc. ## 7-2, 7-3) issued by the Bermuda Court on November 8, 2016. Specifically, the TRO restrained and enjoined the Bermuda Insurers from taking any action to enforce the following provisions of the Injunctive Orders:

> 1. [MF Global Holdings, Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA," together with MFGH, the "Plaintiffs" or the "MFG Parties")] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, commence, prosecute or otherwise pursue litigation in the United States insofar as that litigation concerns, arises out of and/or relates to the insurance policy issued to the [Plaintiffs] by the [Bermuda Insurers], Policy No. C007357/005 ("the Policy") including, for the avoidance of doubt, litigation containing allegations of breach of "good faith and fair dealing" relating to the Policy) and/or otherwise breaches the terms of the valid and binding Bermuda arbitration agreement between the [Plaintiffs and the Bermuda Insurers].
>
> 2. The [Plaintiffs] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, seek and/or obtain an anti-suit injunction and/or an anti-anti-suit injunction and/or a temporary, preliminary or permanent order restraining and/or preventing the [Defendant] from pursuing and/or otherwise enforcing the said valid and binding Bermuda arbitration agreement, until trial or further order.

TRO Opinion, 2016 WL 7388546, at *17.

B. The Skeleton Argument and the December 22, 2016 Bermuda Court Orders

On December 22, 2016, the day after this Court entered the TRO, the Bermuda Insurers filed certain pleadings (the "Skeleton Argument") and appeared and were heard before the Bermuda Court. In the Skeleton Argument, the Bermuda Insurers expressly requested certain relief from the Bermuda Court, including:

> 12.1 An Order that the [Bermuda Insurers] be granted leave to amend the Originating Summonses in these proceedings, pursuant to RSC Order 20 rules 5 and 7, to include a further or alternative claim for permanent injunctive relief, in the form of a permanent injunction mandating the [Plaintiffs], acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith to dismiss (without prejudice) the Adversary Complaint proceedings commenced by the [Plaintiffs] against the [Bermuda Insurers] in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) ("the Adversary Proceedings");
>
> 12.2 An interim injunction mandating the [Plaintiffs], acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith (i.e. within the next 28 days) to dismiss (without prejudice) the Adversary Proceedings (as defined above).

(Skeleton Argument ¶¶ 12.1, 12.2 (emphasis in original).) The Bermuda Court then entered two orders (the "December 22, 2016 Orders") in the Bermuda proceedings initiated by (i) Allied and (ii) the Iron-Starr Insurers.[3] The December 22, 2016 Orders provide in relevant part that:

> 1. The [Bermuda Insurers] shall be granted leave to amend the Originating Summons in these proceedings, pursuant to RSC Order 20 rules 5 and 7, in the form of the draft Amended Originating Summons included in Exhibit JEH-3, to include a further or alternative claim for permanent injunctive relief, in the form of a permanent injunction mandating the [Plaintiffs], acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith to dismiss

[3] The November 8, 2016 and December 22, 2016 Orders were issued by Chief Justice Kawaley of the Supreme Court of Bermuda, Civil Jurisdiction (Commercial Court) in the proceedings denoted as "2016: No. 393" and "2016: No. 394."

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> (without prejudice) the adversary proceedings commenced by the [Plaintiffs] against the [Bermuda Insurers] in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) ("the Adversary Proceedings"), with associated relief.
>
> 2. The [Plaintiffs] shall, and are hereby mandated on an interlocutory basis, acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith (i.e. within the next 28 days) to dismiss (without prejudice) the adversary proceedings commenced by the [Plaintiffs] against the [Bermuda Insurers] in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) ("the Adversary Proceedings"). For the avoidance of doubt, this interlocutory injunction shall remain in force until final determination of the [Bermuda Insurer's] Originating Summons, or until further Order of this Court, save that the [Plaintiffs] shall be at liberty to apply to this Court to set aside or vary the terms of paragraph 2 of this Order on at least 48 hours' written notice to the [Bermuda Insurers].

(December 22, 2016 Orders ¶¶ 1–2.)

In the December 22, 2016 Orders, the Bermuda Court also stated that the Plaintiffs "will not be contravened by the [Bermuda Insurers] and/or their US attorneys addressing the United States Bankruptcy Court Southern District of New York *on the limited issue of whether or not the [Bermuda Insurers have] contravened" the Bar Order*. (December 22, 2016 Orders at 1 (emphasis added).) With respect to whether the Bar Order and the *Barton* doctrine (described below) have been violated, the Court has set a schedule for one last round of briefs on those issues (January 11, 2017 for the Bermuda Insurers; January 18, 2017 for the Plaintiffs), and has scheduled argument for 10:15 a.m., January 23, 2017. Because of the December 22, 2016 Orders, the Court, however, remains unable to make a determination whether this dispute is arbitrable. Until the Court has full briefing and argument on the issue from the Plaintiffs and the Bermuda Insurers, the Court cannot decide the Bermuda Insurers' motion to compel arbitration.

Our adversary system requires that all parties must be able to address the issues, not just the moving parties.

The December 22, 2016 Orders, *which included the above-referenced relief sought by the Bermuda Insurers*, permit the Plaintiffs to address only the limited issues whether the Bar Order and *Barton* doctrine prohibited the Bermuda Insurers from filing the Bermuda action, but those orders still enjoin the Plaintiffs from conducting any other activity in this adversary proceeding—specifically including opposing the motion to compel arbitration that the Bermuda Insurers filed in this Court. Moreover, the December 22, 2016 Orders *require* that the Plaintiffs dismiss this adversary proceeding within 28 days, without the ability to be heard on any other issues currently pending before this Court. (December 22, 2016 Orders ¶¶ 1–2.) The effect of the orders obtained by the Bermuda Insurers is an intolerable interference in this Court's ability to exercise its authority in a case within its jurisdiction.

C. The Bermuda Court's December 23, 2016 "Reasons for Decision"

On December 23, 2016, the day after entering the December 22, 2016 Orders, the Bermuda Court issued its "Reasons for Decision," a 10-page decision explaining the basis for its rulings in issuing the *ex parte* anti-suit injunctions. It is helpful to read Chief Justice Kawaley's explanation of the rationale for entry of the anti-suit injunctions. To the extent consistent with this Court's responsibility to decide matters properly before this Court, the Court strives through the exercise of international comity to avoid unnecessary conflict with foreign courts. But this Court cannot shy away from deciding issues properly presented to it. The *ex parte* anti-suit injunctions, entered after this adversary proceeding was filed, prevent this Court and the U.S.-based Plaintiffs from addressing important issues under U.S. bankruptcy law.

An underlying issue that one of the courts will have to decide is whether the insurance

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coverage dispute between the Plaintiffs and the Bermuda Insurers must be decided in arbitration in Bermuda or adjudicated by this Court. But the immediate issue pending in this Court is whether the Bermuda Insurers were prohibited by applicable U.S. law and orders previously issued by this Court from commencing the Bermuda Court proceedings. The Plaintiffs identify two separate grounds—either one potentially legally sufficient—to bar the filing of the Bermuda actions—namely, the Bar Order included in a global settlement approved by this Court in August 2016, or the *Barton* doctrine. Assuming that one of those two bases barred the Bermuda Insurers from commencing the Bermuda action, and assuming the Bermuda Insurers made a timely motion in this Court to compel arbitration in Bermuda, this Court would be required to decide the question whether this dispute is arbitrable. If the Bermuda Insurers prevail and this Court compels arbitration, an order compelling arbitration would be entered, and this adversary proceeding would then be dismissed. If the motion to compel arbitration is denied, this adversary proceeding would proceed in the normal manner. Essentially, then, the issue the Court will decide after briefing is complete and argument is heard on January 23, 2017 is whether the Bermuda Insurers were barred by applicable U.S. law from filing the Bermuda Court action.

Once the motion to compel arbitration is fully briefed (something that the Bermuda Court Injunctive Orders currently prevents), this Court can decide whether to compel arbitration. The decision on that question—either in the U.S. or Bermuda courts—if both were able to decide the issue might not be the same. *Under U.S. law*, the answer to the question whether particular disputes must be arbitrated depends on the application of both arbitration law *and* U.S. bankruptcy law. It is a nuanced analysis. As explained in the TRO Opinion,

> Courts in this district have recognized that when a Bankruptcy Court is presented with a motion to compel arbitration, as this Court currently is, the Court must apply a four-part test:

> [F]irst, it must determine whether the parties agree to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.

> Naturally, [w]hen arbitration law meets bankruptcy law head on, clashes inevitably develop. Specifically, [t]he issue of waiver predominates arbitration disputes involving bankruptcy claims, and the first indication of waiver is whether a claim is core or non-core. Despite what the Bermuda Insurers may have attested to before the Bermuda Court, the determination of whether a claim is core or non-core can be complex, including in insurance coverage disputes.

TRO Opinion, 2016 WL 7388546, at *14 (internal quotation marks and citations omitted); *see also In re U.S. Lines, Inc.*, 197 F.3d 631, 636–37 (2d Cir. 1999).

Whether a motion to compel arbitration can be denied because arbitration conflicts with policies of the Bankruptcy Code depends on a careful analysis of both U.S. bankruptcy law and arbitration law. The excess E&O insurance policies issued by the Bermuda Insurers are expressly governed by New York law and the policies were issued to New York-based MF Global Holdings Ltd. This Court previously determined that all of the D&O and E&O insurance policies (primary and excess) issued to MF Global Holdings Ltd. were property of the Chapter 11 Debtors' estates. *In re MF Glob. Holdings Ltd.,* 469 B.R. 177, 190 (Bankr. S.D.N.Y. 2012), *subsequently dismissed sub nom*. *Sapere Wealth Mgt. LLC v. MF Glob. Holdings Ltd*., 566 F. App'x 81 (2d Cir. 2014) ("[I]t is well-settled that a debtor's liability insurance is considered property of the estate.").

In explaining his Reasons for Decision, Chief Justice Kawaley relied heavily on his earlier decision in *ACE Bermuda Insurance Ltd. v. Peers Pederson as Plan Trustee for the*

Estates of Boston Chicken Inc. [2005] Bda LR 44, a case in which he granted a similar *ex parte* anti-suit injunction "by way of enforcing agreements to arbitrate insurance coverage disputes." (Reasons for Decision ¶ 4.)

Boston Chicken was a debtor in chapter 11 cases pending in the U.S. Bankruptcy Court for the District of Arizona. ACE Bermuda ("ACE") was an upper level excess insurance carrier in Boston Chicken's D&O insurance tower. ACE denied coverage for Boston Chicken's officers and directors who had been sued by Gerald K. Smith ("Smith"), the Plan Trustee under Boston Chicken's confirmed chapter 11 plan. The lawsuit filed by Smith in the federal district court also named as defendants the underwriters of Boston Chicken securities, and the company's accountants and lawyers. With a coverage dispute clearly brewing, ACE preemptively obtained an *ex parte* anti-suit injunction from the Bermuda Court *before* coverage litigation was commenced by Boston Chicken in the bankruptcy court. *See ACE Insurance Co., Ltd. v. Smith (In re BCE West, L.P.)*, 2006 WL 8422206 (D. Ariz. Sept. 20, 2006) [hereinafter *Smith*].

Smith, in his capacity as Plan Trustee, reached a settlement with several of the Boston Chicken officers and directors.[4] The settlement included an assignment to Smith of the officers' claims against the D&O insurers (including ACE) that denied coverage. Some of the non-settling defendants in the district court action objected to approval of the settlement. The district court overruled the objections and approved the settlement, and the Ninth Circuit affirmed. *See Smith v. Arthur Anderson LLP*, 421 F.3d 989 (9th Cir. 2005). Smith then brought an action against ACE in the bankruptcy court to recover on the insurance policy and for additional

[4] As I advised the parties during the preliminary injunction hearing, before I became a judge, I represented one of the Boston Chicken officer defendants in Smith's district court action, and I represented two of the officers in negotiating a settlement with Smith of the district court action.

damages.[5] ACE moved in the bankruptcy court to compel arbitration in Bermuda. The bankruptcy court granted in part ACE's motion to compel arbitration, but on different terms than those included in the insurance contract, and granted Boston Chicken's motion to enjoin the Bermuda case that ACE had earlier filed. The bankruptcy court also found that ACE had violated the *Barton* doctrine and awarded Smith $100,000 in damages.[6] *See Smith*, 2006 WL 8422206, at *2–3.

The district court affirmed in part and reversed in part.[7] *Id.* at *10.

The district court in *Smith* explained the *Barton* doctrine, named for the decision in *Barton v. Barbour*, 104 U.S. 126, 136–37 (1881) ("[W]hen the court of one State has . . . property in its possession for administration as trust assets, and has appointed a receiver to aid in the performance of its duty by carrying on the business to which the property is adapted . . . a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him . . . ."). *See Smith*, 2006 WL 8422206, at *2 n.4. The *Barton* doctrine operates independently of the Bar Order in the *MF Global* case, and may provide a separate basis for barring the Bermuda Insurers' action.[8] As the district court explained in affirming the bankruptcy court's determination that ACE violated the *Barton*

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[5] After the Ninth Circuit affirmed the approval of the settlement, I had no further involvement in the matter, including in the insurance coverage case in the bankruptcy court.

[6] Unlike the *MF Global* case, there was no Bar Order in *Boston Chicken* that arguably prevented ACE from filing its Bermuda action.

[7] The district court determined that under applicable Ninth Circuit case law, the insurance coverage dispute in *Boston Chicken* was a non-core proceeding; therefore, the bankruptcy court erred "when it compelled arbitration on terms materially different than the terms contained in the D&O policy's arbitration clause." *Id.* at *7. The district court also reversed the bankruptcy court's injunction barring ACE from prosecuting the Bermuda action since the decision to compel arbitration also provided that the bankruptcy court adversary proceeding would be dismissed. The district court, however, expressly noted that with respect to the "core/non-core determination," Second Circuit case law was different, *see In re U.S. Lines, Inc.*, 197 F.3d 631 (2d Cir. 1999) (concluding that the insurance coverage dispute was "core," and the bankruptcy court properly denied the motion to compel arbitration),which may have resulted in a different conclusion. *Id.* at *5 n.14.

[8] On January 23, 2017, following the completion of further briefing, the Court will hear argument whether the Bar Order in this case prohibited the Bermuda Insurers from filing the Bermuda Action.

doctrine, the *Barton* doctrine requires that "leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee for the acts done in the trustee's official capacity and within the trustee's authority as an officer of the court." *Id.* at *2 (quoting *In re DeLorean Motor Co.,* 991 F.2d 1236, 1240 (6th Cir. 1993)). "There is no indication that the doctrine is limited in scope or that it is otherwise inapplicable to a party who seeks to file suit in an international forum." *Id.* at *8. As such, "regardless of where ACE sought to file suit against the Trustee, the bankruptcy court correctly found that ACE was required under the *Barton* doctrine to seek leave prior to filing suit." *Id.*[9]

Reviewing the portions of his *Boston Chicken* decision that Chief Justice Kawaley quotes in his Reasons for Decision, *but also* reviewing what transpired thereafter in the *Boston Chicken* case in the U.S. Bankruptcy Court for the District of Arizona (where the *Boston Chicken* bankruptcy case was pending), and, on appeal by ACE from the bankruptcy court decision, in the U.S. District Court for the District of Arizona, provides a better understanding of the conflict between the U.S. and Bermuda courts. With due respect to Chief Justice Kawaley, his decisions in *Boston Chicken* and *MF Global* reflect a disregard of the applicable U.S. bankruptcy law principles, specifically with respect to the bankruptcy court's obligation to interpret and enforce its own previously entered orders, and to apply applicable common law such as the *Barton* doctrine. Perhaps this is so because in both *Boston Chicken* and in *MF Global*, Bermuda insurers obtained *ex parte* anti-suit injunctions, without the court having the benefit of full briefing or argument by the debtors, or their successors, on any of these issues.

Here, in part, is what Chief Justice Kawaley explained in *Boston Chicken*:

> It is difficult to imagine any jurisdiction in the world which,

[9] The bankruptcy court and district court in *Boston Chicken* applied the *Barton* doctrine in circumstances similar to this case: Smith, the Plan Trustee in *Boston Chicken*, brought suit based on claims against ACE assigned by the officers and directors. The Plaintiffs here have done the same thing.

> statutory incorporation apart, would apply a foreign procedural law instead of its own domestic law to an action properly commenced under local law within the jurisdiction. When Bermudian estate representatives seek the cooperation of the United States bankruptcy courts, they invariably do so under the umbrella of the provisions of section 304 of the US Bankruptcy Code [now replaced by chapter 15], if not chapter 11. They do not apply to set aside actions commenced in the US against Bermudian companies in liquidation on the grounds that leave of the Bermuda court should have been obtained by virtue of Bermuda domestic law. . . .
>
> But even if this Court had the power to stay proceedings brought in Bermuda in deference to a foreign bankruptcy proceeding, it seems improbable that such jurisdiction would enable this Court to grant the relief the Applicants presently seek. Because the only application presently before the Court is based on the premise that an extra-territorial doctrine of US bankruptcy law arguably supersedes Bermuda statute law . . . and that US law deprives this Court of jurisdiction expressly conferred upon it to grant leave to serve abroad proceedings brought here to enforce a contract governed by Bermuda law.
>
> It is also settled this court cannot stay proceedings on forum non-convenience grounds where the parties have agreed to arbitrate here, which is no doubt why this doctrine (in its traditional sense) has not, in any coherent way at least, been invoked by the Applicants. Yet the doctrine is relied upon in support of the proposition that the Arizona court is the more appropriate forum for determining whether or not the arbitration clause should be respected . . . .

(Reasons for Decision ¶ 4, citing *Boston Chicken*, [2005] Bda LR 44). Chief Justice Kawaley's ruling appears to conclude that a decision from this Court that the Bermuda Insurers filed the Bermuda action in violation of the *Barton* doctrine will not be recognized and enforced in Bermuda. (*Id.* ("But even if this Court had the power to stay proceedings brought in Bermuda in deference to a foreign bankruptcy proceeding, it seems improbable that such jurisdiction would enable this Court to grant the relief the Applicants presently seek. Because the only application presently before the Court is based on the premise that an extra-territorial doctrine of US bankruptcy law arguably supersedes Bermuda statute law . . . and that US law deprives this

Court of jurisdiction expressly conferred upon it to grant leave to serve abroad proceedings brought here to enforce a contract governed by Bermuda law.").) But this Court sees the issues differently: Did the Bar Order or the *Barton* doctrine prohibit the Bermuda Insurers from filing the Bermuda action? If so, may this Court decline to recognize and enforce the Bermuda Court's orders that prevent this Court from deciding issues in the adversary proceeding in which the Court concluded it has personal and subject matter jurisdiction over the Bermuda Insurers? And, if so, may this Court order the Bermuda Insurers to dismiss their Bermuda actions?

Obviously, this Court cannot force the Bermuda Court to recognize and enforce a decision of this Court based on a well-recognized doctrine of U.S. law, first set forth in the 1881 Supreme Court decision in *Barton*; but a refusal to recognize and enforce such a decision should it be rendered is not a sufficient reason for this Court to avoid reaching a decision if the facts and law support it (something that is still undetermined and will be heard on January 23, 2017). Even if a decision by a U.S. court is not recognized and enforced in Bermuda, and a judgment is entered against the Bermuda Insurers in New York, the Bermuda Insurers write insurance policies for and collect premiums from companies in the New York and the United States, so the Plaintiffs may well have recourse to recover on any judgment obtained in the United States, if that eventuality comes to pass.[10] Hopefully, this cross-border dispute will not come to that.

D. The Second Order to Show Cause

On December 29, 2016, this Court entered the *Order to Show Cause Why Allied World Assurance Company Ltd., Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr*

[10] To be clear, if the Court is not prevented from hearing and deciding the motion to compel arbitration based on full briefing by the parties, the Court intends to do so. The current anti-suit injunction prevents the Plaintiffs from briefing and arguing the motion to compel arbitration. The Court will issue a separate order determining whether the Bermuda Insurers should be held in contempt for violating the TRO in applying for and obtaining the December 22, 2016 Orders, with possible sanctions including striking their pleadings and entering a default.

Insurance & Reinsurance Limited Should Not be Held in Contempt for violating the TRO (the "Second OSC," ECF Doc. # 41). The Second OSC referred to the injunctive provisions of the TRO, the relief sought by the Bermuda Insurers in the Skeleton Argument after the TRO was issued, and the orders subsequently entered by the Bermuda Court on December 22, 2016. The Second OSC ordered the Bermuda Insurers to file a written response addressing why they should not be held in contempt for violating the TRO by asking the Bermuda Court to order the Plaintiffs to dismiss the adversary proceeding before this Court.[11]

II. THE PRELIMINARY INJUNCTION

A. Legal Standard

Pursuant to section 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The traditional standards for issuance of an injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure are made applicable to adversary proceedings under Bankruptcy Rule 7065. *See Eastern Air Lines v. Rolleston (In re Ionosphere Clubs, Inc.)*, 111 B.R. 423, 431 (Bankr. S.D.N.Y. 1990). Moreover, the standards for a temporary restraining order and a preliminary injunction are not materially different. *See Adelphia Commc'ns Corp. v. The American Channel, et al. (In re Adelphia Commc'ns Corp.)*, No. 02-41729 (REG), 2006 WL 1529357, at *4 (Bankr. S.D.N.Y. June 5, 2006). "A decision to grant or deny a preliminary injunction is committed to the discretion of the district court." *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 78 (2d Cir. 1994).

The Second Circuit has explained that a party seeking a preliminary injunction must show that either "he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an

[11] As noted above, the disposition of the Second OSC will be addressed in a separate order.

injunction is in the public interest," or alternatively "show irreparable harm and either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015) (internal citations and quotations omitted); *see also Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") (citations omitted). Because the Court (rather than the Plaintiffs) initiated the TRO and preliminary injunction hearing to protect its jurisdiction over this adversary proceeding, the Plaintiffs are not required to post security for the preliminary injunction as otherwise required by Rule 65(c).

B. The Parties' Contentions

1. The Plaintiffs' Contentions

The Plaintiffs, in the Plaintiffs' TRO Response, argue that a preliminary injunction is necessary to address the Bermuda Insurers' continued violations of the Bar Order, the *Barton* doctrine, and the TRO.[12] As noted above, in the Second Circuit there are two formulations of the test for a preliminary injunction, and the Plaintiffs argue that a preliminary injunction is warranted because they have demonstrated "(a) irreparable harm and (b) . . . [that there are] sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tip[s] decidedly toward the party requesting the preliminary relief."

[12] A sizable portion of the Plaintiffs' TRO Response is dedicated to arguing that the Bermuda action continues to violate the Bar Order and the *Barton* doctrine.

Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 215 (2d Cir. 2012).

In particular, the Plaintiffs argue that there are serious questions as to the merits of both the Bermuda Insurers' violation of the Bar Order and the *Barton* doctrine, as well as questions regarding whether this dispute is arbitrable under applicable bankruptcy law, and an injunction is necessary to permit the Court to address these issues. (Plaintiffs' TRO Response at 16.) The Plaintiffs also argue that they continue to suffer irreparable harm by being forced to incur additional expense and effort in the Bermuda Court, by being unable to avail themselves of their chosen forum, and by being restrained from filing pleadings before this Court. (*Id.* at 17.) The Plaintiffs maintain that the balance of equities and public policy weigh in their favor because the Bermuda Insurers' actions in the Bermuda Court undermine the efficient administration of the adversarial system in the United States, and because the Plaintiffs should not be forced to resort to a distant forum to adjudicate their rights when they have already chosen a legitimate forum. (*Id.* at 18–19.)

2. The Bermuda Insurers' Contentions

Both Allied and the Iron-Starr Insurers, in their responses to the TRO, restate that this Court lacks specific personal jurisdiction and subject matter jurisdiction over the Bermuda Insurers and, in particular, over this dispute. (Allied TRO Response at 5–18; Iron-Starr TRO Response at 7–22.) Likewise, the Bermuda Insurers reiterate their belief that service of process on them was improper. (Allied TRO Response at 25; Iron-Starr TRO Response at 22–24.)

Additionally, the Iron-Starr Insurers argue that the Plaintiffs cannot establish a likelihood of success on the merits as the coverage claims dispute here is "squarely a 'non-core' claim." (Iron-Starr TRO Response at 24.) The Iron-Starr Insurers also argue that the balance of

hardships weighs in favor of the Bermuda Insurers, as a determination of the underlying coverage issues in this Court would strip the Bermuda Insurers of their bargained-for contractual rights. (*Id.* at 25.)

Similarly, Allied argues that the Plaintiffs cannot demonstrate imminent or irreparable harm because the Plaintiffs have known about the invocation of the arbitration provision for ten months. (Allied TRO Response at 19.) Allied also argues that requiring the Plaintiffs to arbitrate does not constitute "irreparable harm" when the Plaintiffs can still argue before the arbitration tribunal and the Bermuda Court that arbitration is improper. (*Id.* at 20–21.) Allied argues that the balance of equities tips in its favor because *it* will be irreparably harmed if forced to litigate in this Court as it would be stripped of its arbitration clause and forced to submit to jurisdiction in the United States. (*Id.*) Additionally, Allied argues that public policy weighs in favor of arbitration given the strong federal policy in favor of arbitration where parties have voluntarily agreed to arbitrate. (*Id.* at 22.) Relatedly, Allied argues that under the first-filed rule, if applicable, the arbitration in Bermuda constitutes the first-filed action, and that as a matter of comity, anti-suit injunctions should be used sparingly, particularly where no bankruptcy policy would be frustrated if this dispute were arbitrated. (*Id.* at 22–24.)

C. Discussion

In the TRO Opinion, the Court already determined that the Court has personal and subject matter jurisdiction over the Bermuda Insurers and this dispute. The Court will not revisit those rulings in this Opinion.

"[T]he standards for a temporary restraining order and a preliminary injunction are not materially different," *Adelphia,* 2006 WL 1529357 at *4, and though the Court set forth an

analysis of the preliminary injunction factors in the TRO Opinion, the Court now has the benefit of briefing from both the Plaintiffs and the Bermuda Insurers.

For the reasons set forth below, the Plaintiffs have demonstrated that a preliminary injunction is warranted because they continue to suffer "irreparable harm and . . . [there are] sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tip[s] decidedly" in their favor. *Christian Louboutin*, 696 F.3d at 215.

Each of these elements is discussed in turn below.

1. Irreparable Harm

The Plaintiffs have suffered and continue to suffer from the inability to meaningfully participate in the adversary proceeding that they commenced in the forum of their choice. The Bermuda Insurers have filed motions to dismiss and motions to compel arbitration. (ECF Doc. ## 13-1, 14, 17, 20.) The Plaintiffs suffer the inequity of being unable to respond to any of these motions. As such, the Plaintiffs have demonstrated that they continue to suffer irreparable harm.

2. Sufficiently Serious Questions Going to the Merits

Here, there are sufficiently serious questions going to the merits of both the purported violation of the Bar Order and the *Barton* doctrine such that these disputes are fair grounds for litigation. As noted in the TRO, the issue whether the Bar Order has been violated is nuanced, and each party has non-frivolous arguments that this Court should entertain. For example, the Plaintiffs argue that the Bermuda Insurers impermissibly seek to collaterally attack the reasonableness of the Settlement Agreement, and that the Bermuda Insurers have asserted claims against the Plaintiffs in violation of the Bar Order. (Plaintiffs' TRO Response at 3–5.) The Bermuda Insurers maintain that the plain language of the Bar Order does not prohibit the filing of the Bermuda action. (*See* Allied TRO Response at 11 n. 4, Ex. C.)

The Court now has briefing on this issue, and will hold a hearing on the issue on January 23, 2017. Nevertheless, this factor is satisfied as the Plaintiffs have demonstrated that there are sufficiently serious questions going to the merits of this dispute.

3. The Balance of Equities

While the Plaintiffs continue to suffer the inequities described above, upon the issuance of this preliminary injunction, the Bermuda Insurers will suffer no apparent harm. The Bermuda Insurers complain that they are being stripped of their bargained-for arbitration provision, but the Bermuda Insurers ignore the procedural framework in which this dispute currently resides. At this juncture, the Court has not determined whether the coverage dispute should properly be heard in this Court or in arbitration in Bermuda. The Bermuda Insurers filed motions in this Court to compel arbitration, but they filed the motions only after they obtained anti-suit injunctions from the Bermuda Court, which prevented the Plaintiffs from responding to the motions. After the TRO Opinion was entered, the Bermuda Insurers again obtained injunction orders from the Bermuda Court handcuffing the Plaintiffs. The Bermuda Insurers will not suffer any harm by having this Court decide the issues presented by the motions the Bermuda Insurers themselves filed in this Court.

The Bermuda Insurers have intolerably interfered in the Court's exercise of its authority and undermined the Plaintiffs' ability to participate in the proceedings properly before this Court, and in doing so, have undercut the adversarial nature of this adversary proceeding. The balance of equities weighs in favor of granting relief for the Plaintiffs.

4. The Public Interest

Additionally, public policy weighs in favor of granting injunctive relief to the Plaintiffs. As explained in the TRO, the determination whether a claim is arbitrable is complex, as is the

determination whether a claim is core or non-core, including in insurance coverage disputes. By seeking to sidestep this entire analysis, and by taking actions that undercut this Court's ability to apprise itself of all relevant facts and arguments, the Bermuda Insurers have upset the adversarial nature of the judicial system. Considerations of fairness and equity weigh in favor of granting relief for the Plaintiffs.

III. CONCLUSION

For the reasons set forth above, the Plaintiffs have demonstrated that there are sufficient grounds to issue a preliminary injunction.

By this Order, the Bermuda Insurers are hereby RESTRAINED and ENJOINED from taking any action to enforce the following provisions in the Injunctive Orders:

1. The [Plaintiffs] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, commence, prosecute or otherwise pursue litigation in the United States insofar as that litigation concerns, arises out of and/or relates to the insurance policy issued to the [Plaintiffs] by the [Bermuda Insurers], Policy No. C007357/005 ("the Policy") including, for the avoidance of doubt, litigation containing allegations of breach of "good faith and fair dealing" relating to the Policy) and/or otherwise breaches the terms of the valid and binding Bermuda arbitration agreement between the [Plaintiffs and the Bermuda Insurers].

2. The [Plaintiffs] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, seek and/or obtain an anti-suit injunction and/or an anti-anti-suit injunction and/or a temporary, preliminary or permanent order restraining and/or preventing the [Defendant] from pursuing and/or otherwise enforcing the said valid and binding Bermuda arbitration agreement, until trial or further order.

For the avoidance of doubt, the Bermuda Insurers are also RESTRAINED and ENJOINED from taking any action to impede or obstruct the administration of this

Case 1:17-cv-00742-UA Document 1-1 Filed 01/30/17 Page 23 of 23

adversary proceeding. The Bermuda Insurers are so enjoined until further order entered by the Court.

IT IS SO ORDERED.

Dated: January 12, 2017
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge

Exhibit B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	X	**FOR PUBLICATION**
MF GLOBAL HOLDINGS LTD., *et al*.,	:	
Debtors.	:	Chapter 11
	:	Case No. 11-15059 (MG)
	X	(Jointly Administered)
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC,	:	
Plaintiffs,	:	
v.	:	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.	:	
	X	

MEMORANDUM OPINION AND ORDER HOLDING THE BERMUDA INSURERS IN CONTEMPT

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MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

Pending before the Court is the *Order to Show Cause Why Allied World Assurance Company Ltd., Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited Should Not be Held in Contempt* (the "Second Order to Show Cause," ECF Doc. # 41) for violating the *Memorandum Opinion and Temporary Restraining Order* (the "TRO Opinion" or the "TRO," ECF Doc. # 35) (s*ee MF Global Holdings Lt. v. Allied World Assurance Co. Ltd. (In re MF Global Holdings Ltd.)*, ___ B.R. ___, 2016 WL 7388546 (Bankr. S.D.N.Y. Dec. 21, 2016)) issued by this Court on December 21, 2016. The TRO enjoined Allied World Assurance Company Ltd., Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited (together, the "Bermuda Insurers") from taking any action to enforce certain injunctive orders issued by a Bermuda court. Following this Court's issuance of the TRO Opinion, the Bermuda Insurers submitted pleadings to the Supreme Court of Bermuda, Civil Jurisdiction (Commercial Court) (the "Bermuda Court"), and appeared before the Bermuda Court at a hearing on December 22, 2016, seeking relief tantamount to the enforcement of the injunctive orders.

In response to the Second Order to Show Cause, the Bermuda Insurers filed *The Bermuda Insurers' Memorandum of Law in Opposition to Order to Show Cause Dated December 29, 2016* (the "Bermuda Insurers' Brief," ECF Doc. # [--], submitted to the Court under seal on January 3, 2017). In support of their brief, the Bermuda Insurers also filed a number of exhibits under seal. MF Global Holdings, Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA" and together with MFGH, the "Plaintiffs") filed the *Memorandum of Law on the Bermuda Defendants' Continued Violation of this Court's Bar Order* (the "Plaintiffs' Brief," ECF Doc. # [--], submitted to the Court under seal on December 28, 2016). The Court granted the request to file these briefs and exhibits under seal, *except* to the extent that the Court references or cites to these documents in its Opinions or Orders.

Because the Bermuda Insurers took actions clearly prohibited by the TRO, the Court will hold the Bermuda Insurers in contempt for violating an order of this Court.

I. BACKGROUND

A. The Bar Order in the Global Settlement

On August 10, 2016, this Court entered an order approving a global settlement in these chapter 11 cases (the "Global Settlement," D.I. 2282).[1] The Global Settlement included a bar order (the "Bar Order") which provides in relevant part:

> 3. To the extent not previously authorized by this Court, the plan injunction ("Plan Injunction") as to the Debtors and their respective property established pursuant to paragraph 75 in the *Order Confirming Amended and Restated Joint Plan of Liquidation* entered by this Court on April 5, 2013, to the extent applicable, shall be modified solely to the extent necessary, and without further order of the Bankruptcy Court, to authorize any and all actions reasonably necessary to consummate the Global Settlement, including without limitation, any payments under certain insurance policies required under the Settlement . . . . Furthermore, any person or entity that is not a Party to the Settlement Agreement is permanently barred, enjoined, and

[1] References to the docket in the main chapter 11 case will be denoted as "D.I."

> restrained from commencing, prosecuting, or asserting any claims arising out of payments made under certain insurance policies in accordance with the Settlement Agreement or any other agreement referenced therein or associated therewith.
>
> . . . .
>
> 7. Upon entry of this Order, any person or entity that is not a Party to the Settlement Agreement, including any Dissenting Insurer, is permanently barred, enjoined, and restrained from contesting or disputing the Reasonableness of Settlement, or commencing, prosecuting, or asserting any claims, including, without limitation, claims for contribution, indemnity, or comparative fault (however denominated an on whatsoever theory), arising out of or related to the MF Global Actions . . . .
>
> 8. For the avoidance of doubt, nothing in this Order shall preclude:
>
> . . . (iii) any claims by the Insurance Assignees to enforce the Assigned Rights; (iv) any claim or right asserted by an MFG Plaintiff against any Dissenting Insurer on its own behalf (as distinct from the Assigned Rights) . . . .

(Global Settlement ¶¶ 3, 7, 8.)

As noted in a brief filed earlier in this adversary proceeding (the "Allied Response," ECF Doc. # 28), in connection with the Global Settlement, Allied "tendered the full limit of liability of its separately-issued excess D&O policy, but declined to make the E&O coverage provided under the Allied [policy] available . . . for a settlement" as Allied's adversaries had requested. (Allied Response at 4–5.) Pursuant to the Global Settlement, the individuals ostensibly covered by the Allied E&O policy were to assign "their rights to full payment under the Allied [policy] to the Plaintiffs" and the "assignee would immediately commence action against the [Bermuda Insurers] to obtain proceeds" under the E&O policies. (*Id.* at 5.)

B. The Arbitration Clauses

The insurance policies issued by the Bermuda Insurers each contain a mandatory arbitration provision.[2] These arbitration clauses provide that all disputes arising under or relating to these policies shall be fully and finally resolved by arbitration in Bermuda. (Complaint, Ex. B at 7.)

Allied maintains that as early as February 11, 2016, many months before the Global Settlement was reached, Allied notified MFGAA and others "of its desire to arbitrate, pursuant to the . . . arbitration clause in the Allied [policy] . . . ." (Allied Response at 4.) Allied further maintains that over the next eight months, "(under a reservation of rights), Plaintiffs' counsel . . . worked with [Allied] to empanel the arbitrators for the Bermuda Arbitration, pursuant to the terms of the Allied [policy]." (*Id.*) The Plaintiffs dispute Allied's assertions regarding the status of the alleged Bermuda arbitration.

C. The Complaint and the Injunctive Orders

On October 27, 2016, the Plaintiffs filed a complaint (the "Complaint," ECF Doc. # 1) initiating this adversary proceeding against the Bermuda Insurers and Federal Insurance Company.[3] The defendants had issued the top four layers of excess E&O insurance policies to MFGH. All other insurers in MFGH's D&O and E&O insurance towers paid their policy limits

---

2 For example, the Allied Policy's arbitration clause reads in relevant part:

> Any and all disputes arising under or relating to this policy, including its formation and validity, and whether between the **Insurer** and the **Named Insured** or any person or entity deriving rights through or asserting rights on behalf of the **Named Insured**, shall be finally and fully determined in Hamilton, Bermuda under the provisions of The Bermuda International Conciliation and Arbitration Act of 1993 (exclusive of the Conciliation Part of such Act), as may be amended and supplemented, by a board composed of three arbitrators to be selected for each controversy . . . .

(Complaint, Ex. B at p. 7.)

3 Federal Insurance Company ("Federal") did not seek to obtain an anti-suit injunction against the Plaintiffs, and is not the subject of this Order.

(to the extent not already exhausted) as part of the Global Settlement. The Plaintiffs brought this action to recover the $25 million policy proceeds under the defendants' E&O insurance policies.

On October 28, 2016, a summons and notice of a pretrial conference was entered on the docket in this adversary proceeding. (ECF Doc. # 2.) On November 1, 2016, the Plaintiffs requested that the Clerk of the Court mail the summons and Complaint to the Bermuda Insurers pursuant to Rule 4(f)(2)(c)(ii). (ECF Doc. # 3.) The Clerk's Office entered a Certificate of Mailing showing that the Clerk's Office mailed (by DHL overnight carrier) the summons and Complaint to each of the Bermuda Insurers on November 3, 2016. (ECF Doc. # 4.) On November 4, 2016, the Plaintiffs filed an affidavit of service noting that the summons and Complaint were mailed to the Bermuda Insurers. (ECF Doc. # 5.)

On November 8, 2016, the Bermuda Insurers obtained, *ex parte*, injunctive orders from the Bermuda Court, ordering that:

> [The Plaintiffs] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, commence, prosecute or otherwise pursue litigation in the United States insofar as that litigation concerns, arises out of and/or relates to the insurance policy issued to the [Plaintiffs] by the [Bermuda Insurers], Policy No. C007357/005 ("the Policy") including, for the avoidance of doubt, litigation containing allegations of breach of "good faith and fair dealing" relating to the Policy) and/or otherwise breaches the terms of the valid and binding Bermuda arbitration agreement between the [Plaintiffs and the Bermuda Insurers] set out in Clause IX of the Policy, until trial or further order.
>
> The [Plaintiffs] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, seek and/or obtain an anti-suit injunction and/or an anti-anti-suit injunction and/or a temporary, preliminary or permanent order restraining and/or preventing the [Defendant] from pursuing and/or otherwise enforcing the said valid and binding Bermuda arbitration agreement, until trial or further order.

(ECF Doc. # 7-2 at 2.) Each of the Bermuda Insurers obtained substantially similar injunctive orders (the "Injunctive Orders"). (*See* ECF Doc. ## 7-2, 7-3.)

On November 22, 2016, the Plaintiffs submitted a letter to this Court informing the Court that the Bermuda Insurers had obtained these Injunctive Orders, and suggesting that the entry of the Injunctive Orders violated (i) the Bar Order in the Global Settlement, and (ii) the *Barton* doctrine. (ECF Doc. # 7.) After receiving the Plaintiffs' November 22, 2016 letter, the Court entered an order to show cause (the "First Order to Show Cause," ECF Doc. # 6) raising the issue whether the filing of proceedings in Bermuda (the "Bermuda Action") and the obtaining of the Injunctive Orders violated (i) the Bar Order included in the Global Settlement, or (ii) the *Barton* doctrine. The Bermuda Insurers submitted briefs and declarations in response, but the Plaintiffs, on account of the Injunctive Orders, were restrained from filing any papers.

The Court conducted a hearing on the First Order to Show Cause on December 14, 2016. At this hearing, counsel to the Bermuda Insurers refused to consent to allow the Plaintiffs' counsel an opportunity to be heard in connection with the First Order to Show Cause, or any other matter. At the hearing, counsel to the Bermuda Insurers argued that (i) the Bar Order did not prevent the Bermuda Insurers from filing the anti-suit injunction in the Bermuda Court, (ii) this Court does not have jurisdiction over the Bermuda Insurers, and (iii) service on the Bermuda Insurers was improper. Counsel to the Plaintiffs stated their names to the Court on the record, and remained silent throughout the entire hearing. Following the hearing, the Court declined to hold the Bermuda Insurers in contempt.

D. The Motions to Dismiss and to Compel Arbitration

On November 28, 2016, both Allied and the Iron-Starr Insurers filed motions to compel arbitration (the "Motions to Compel Arbitration," ECF Doc. ## 13-1, 20).[4] Also on November 28, 2016, Allied and the Iron-Starr Insurers each filed motions to dismiss for lack of personal jurisdiction and improper service of process (the "Motions to Dismiss," ECF Doc. ## 14, 17).[5] On account of the Injunctive Orders, the Plaintiffs have not responded to these motions.

E. The Temporary Restraining Order

On December 21, 2016, this Court issued the TRO, enjoining the Bermuda Insurers from taking any action to enforce certain provisions of the Injunctive Orders issued by the Bermuda Court. As noted above, through the entry of the TRO, this Court restrained and enjoined the Bermuda Insurers from taking any action to enforce the Injunctive Orders issued by the Bermuda Court on November 8, 2016. Specifically, the TRO restrained and enjoined the Bermuda Insurers from taking any action to enforce the following provisions of the Injunctive Orders:

> 1. [MF Global Holdings, Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA," together with MFGH, the "Plaintiffs" or the "MFG Parties")] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, commence, prosecute or otherwise pursue litigation in the United States insofar as that litigation concerns, arises out of and/or relates to the insurance policy issued to the [Plaintiffs] by the [Bermuda Insurers], Policy No. C007357/005 ("the Policy") including, for the avoidance of doubt, litigation containing allegations of breach of "good faith and fair dealing" relating to the Policy) and/or otherwise breaches the terms of the valid and binding Bermuda arbitration agreement between the [Plaintiffs and the Bermuda Insurers].

---

[4] An affirmation of Jan E. Haylett was filed in connection with Allied's motion to compel arbitration on November 29, 2016. (ECF Doc. # 23.)

[5] An affirmation of Jan E. Haylett was also filed in connection with Allied's motion to dismiss on November 28, 2016. (ECF Doc. # 14-2.)

> 2. The [Plaintiffs] shall not, whether by themselves or through their employees, servants, agents, representatives, attorneys or otherwise, seek and/or obtain an anti-suit injunction and/or an anti-anti-suit injunction and/or a temporary, preliminary or permanent order restraining and/or preventing the [Defendant] from pursuing and/or otherwise enforcing the said valid and binding Bermuda arbitration agreement, until trial or further order.

The TRO remained in effect for fourteen days (from December 21, 2016 to January 4, 2017), but was extended by this Court for an additional fourteen days and is set to expire at 3:00 p.m. on January 18, 2017. (*See* ECF Doc. # 51.)

F. The Skeleton Argument and the December 22, 2016 Bermuda Court Orders

On December 22, 2016, the day after this Court entered the TRO, the Bermuda Insurers filed certain pleadings (the "Skeleton Argument") and appeared and were heard before the Bermuda Court. In the Skeleton Argument, the Bermuda Insurers expressly requested certain relief from the Bermuda Court, including:

> 12.1 An Order that the [Bermuda Insurers] be granted leave to amend the Originating Summonses in these proceedings, pursuant to RSC Order 20 rules 5 and 7, to include a further or alternative claim for permanent injunctive relief, in the form of a permanent injunction mandating the [Plaintiffs], acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith to dismiss (without prejudice) the Adversary Complaint proceedings commenced by the [Plaintiffs] against the [Bermuda Insurers] in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) ("the Adversary Proceedings");
>
> 12.2 An interim injunction mandating the [Plaintiffs], acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith (i.e. within the next 28 days) to dismiss (without prejudice) the Adversary Proceedings (as defined above).

(Skeleton Argument ¶¶ 12.1, 12.2 (emphasis in original).) The Skeleton Argument further explains that "the [Plaintiffs'] conduct since 8 November 2016 in pursuit of the Adversary

Proceedings, especially when that conduct is assessed in conjunction with the [Plaintiffs'] actions taken before 8 November 2016, and in light of its consequences, clearly demonstrate[s] that a mandatory anti-suit injunction is now the *minimum* relief necessary to ensure that the [Bermuda Insurers'] contractual rights under their arbitration agreements with the [Plaintiffs] are properly protected and preserved by [the Bermuda Court.]" (Skeleton Argument ¶ 24.)

In addition to the Skeleton Argument, both Allied and the Iron-Starr Insurers submitted certain affidavits in support of their respective positions. The Iron-Starr Insurers submitted the Third Affidavit of Lawrence P. Engrissei (the "Third Engrissei Affidavit"), which was signed and dated on December 20, 2016 (before the entry of the TRO); Allied submitted the Third Affidavit of Jan Elizabeth Haylett (the "Third Haylett Affidavit," and together with the Third Engrissei Affidavit, the "Affidavits"), which is not signed or dated. Paragraphs 33 of the Affidavits are essentially identical, and set forth a number of the Bermuda Insurers' concerns that provide the basis for the relief requested from the Bermuda Court on December 22, 2016. Specifically, the Affidavits state:

> 33. Given the [Plaintiffs'] and the [Plaintiffs'] US attorneys' deliberate filings and communications with the United States Bankruptcy Court on 22 November 2016, 23 November 2016, 12 December 2016, 14 December 2016, and 19 December 2016 (as set out above), and the approach which they have thus far taken in these Bermuda proceedings through their Bermuda attorneys, Harneys (Bermuda) Limited, the [Bermuda Insurers] are extremely concerned that:
>
> > 33.1 the [Plaintiffs] do not intend to comply with this Court's Orders and interlocutory AntiSuit Injunction dated 8 November 2016;
> >
> > 33.2 the [Plaintiffs] do not intend to comply with any permanent Anti-Suit Injunction which this Court might grant;
> >
> > 33.3 the [Plaintiffs] intend to proceed with the Adversary Complaint, in breach of and despite the valid and binding arbitration agreement between the parties (which is governed by

> and subject to Bermuda law and a Bermuda seat), and this Court's Orders dated 8 November 2016;
>
> 33.4 the [Plaintiffs] intend to try to apply commercial pressure on the [Bermuda Insurers] to abandon their rights under the arbitration agreement and the Orders dated 8 November 2016, by (directly or indirectly) persuading United States Bankruptcy Judge Martin Glenn either to hold the [Bermuda Insurers] in breach, or contempt, of his Order dated 10 August 2016, alternatively to issue a new Order purporting to restrain the [Bermuda Insurers] from continuing, or purporting to mandate the [Bermuda Insurers] to discontinue, these Bermuda proceedings, before the Supreme Court of Bermuda can finally determine, or enforce, the [Bermuda Insurers'] claims in these proceedings against the [Plaintiffs]; and
>
> 33.5 the [Plaintiffs] intend to try to apply commercial pressure on the [Bermuda Insurers] to settle the insurance coverage dispute between the parties, not by reference to the substantive merits of the insurance coverage dispute, but by reference to the publicity, costs and risks of litigation in the United States Bankruptcy Court (in breach of the arbitration agreement, and in breach of section 46 of the Bermuda International Conciliation and Arbitration Act 1993).

(Affidavits ¶ 33.) The Affidavits also each include substantially the same requests for relief as the relief sought in the Skeleton Argument at paragraphs 12.1 and 12.2.[6] (Affidavits ¶¶ 34.1, 34.2.)

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[6] Specifically, the Affidavits request:

> 34.1 An Order that the Plaintiffs be granted leave to amend the Originating Summons in these proceedings, pursuant to RSC Order 20 rules 5 and 7, to include a further or alternative claim for permanent injunctive relief, in the form of a permanent injunction mandating the Defendants, acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith to dismiss (without prejudice) the adversary proceedings commenced by the Defendants against the Plaintiffs in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) (the Adversary Proceedings). A copy of the draft Amended Originating Summons, for which leave to amend is sought, is attached at pages 194-197 of Exhibit LPE-3;
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> 34.2 An interim injunction mandating the Defendants, acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith (i.e. within the next 28 days) to dismiss (without prejudice) the adversary proceedings commenced by the Defendants against the Plaintiffs in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) (the Adversary Proceedings) . . . .

(Affidavits ¶¶ 34.1–2 (compare with Skeleton Argument ¶¶ 12.1–2).)

At the December 22, 2016 hearing, however, the Bermuda Insurers proclaimed a different rationale in support of the relief sought in the Skeleton Argument. Alex Potts ("Potts"), counsel to the Bermuda Insurers, stated that "[t]he interlocutory relief is not designed to enforce the existing interlocutory relief, it's designed to enforce the Arbitration Agreement between the parties." (December 22, 2016 H'rg Tr. 210:19–22.) Potts did note, though, that "it would appear that there is non-compliance with the existing anti-suit injunction, which was designed to preserve the status quo, pending a trial." (December 22, 2016 H'rg Tr. 210:23–211:1.) Apparently recognizing the import of the circumstances following the issuance of the TRO,[7] Potts added that this Court "has restrained [the Bermuda Insurers] temporarily from enforcing the existing anti-suit injunctions and [the Bermuda Insurers] are not enforcing those injunctions at this stage." (December 22, 2016 H'rg Tr. 209:22–24.)

The Bermuda Court subsequently entered two orders (the "December 22, 2016 Orders") in the Bermuda proceedings initiated by (i) Allied and (ii) the Iron-Starr Insurers.[8] The December 22, 2016 Orders provide in relevant part that:

> 1. The [Bermuda Insurers] shall be granted leave to amend the Originating Summons in these proceedings, pursuant to RSC Order 20 rules 5 and 7, in the form of the draft Amended Originating Summons included in Exhibit JEH-3, to include a further or alternative claim for permanent injunctive relief, in the form of a permanent injunction mandating the [Plaintiffs], acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith to dismiss (without prejudice) the adversary proceedings commenced by the [Plaintiffs] against the [Bermuda Insurers] in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059

[7] Chief Justice Kawaley, at the hearing, observed that there was a "question of whether it might not be said that the purpose of the mandatory injunction that [the Bermuda Insurers] are seeking is to enforce the existing Order by getting additional relief." (December 22, 2016 H'rg Tr. 210:3–6.) Potts goes on to "invite [Judge Kawaley] to rule on whether or not the step [the Bermuda Insurers] are taking from the New York perspective is enforcement of an existing injunction or an application for a different injunction." (December 22, 2016 H'rg Tr. 212:10–14.)

[8] The November 8, 2016 Injunctive Orders and the December 22, 2016 Orders were issued by Chief Justice Kawaley of the Bermuda Court in the proceedings denoted as "2016: No. 393" and "2016: No. 394."

> (MG), Adv. Proc. No: 16-01251 (MG) ("the Adversary Proceedings"), with associated relief.
>
> 2. The [Plaintiffs] shall, and are hereby mandated on an interlocutory basis, acting by themselves and/or acting through their employees, servants, agents, representatives, and attorneys, to terminate, discontinue, withdraw and/or to apply forthwith (i.e. within the next 28 days) to dismiss (without prejudice) the adversary proceedings commenced by the [Plaintiffs] against the [Bermuda Insurers] in the United States Bankruptcy Court, Southern District of New York, Case No: 11-15059 (MG), Adv. Proc. No: 16-01251 (MG) ("the Adversary Proceedings"). For the avoidance of doubt, this interlocutory injunction shall remain in force until final determination of the [Bermuda Insurer's] Originating Summons, or until further Order of this Court, save that the [Plaintiffs] shall be at liberty to apply to this Court to set aside or vary the terms of paragraph 2 of this Order on at least 48 hours' written notice to the [Bermuda Insurers].

(December 22, 2016 Orders ¶¶ 1–2.)

In the December 22, 2016 Orders, the Bermuda Court also stated that the Plaintiffs "will not be contravened by the [Bermuda Insurers] and/or their US attorneys addressing the United States Bankruptcy Court Southern District of New York on the limited issue of whether or not the [Bermuda Insurers have] contravened" the Bar Order. (December 22, 2016 Orders at 1.) With respect to whether the Bar Order and the *Barton* doctrine (described below) have been violated, the Court has set a schedule for one last round of briefs on those issues (January 11, 2017 for the Bermuda Insurers; January 18, 2017 for the Plaintiffs), and has scheduled argument for 10:15 a.m., January 23, 2017. The Court, however, remains unable to make a determination whether this dispute is arbitrable, and will not do so until the Court has full briefing on the issue.

The December 22, 2016 Orders, which included the above-referenced relief sought by the Bermuda Insurers in the Affidavits and Skeleton Argument, permit the Plaintiffs to address only the limited issue whether the Bar Order was breached, but still enjoin the Plaintiffs from conducting any other activity in this adversary proceeding. Moreover, the December 22, 2016 Orders *require* that the Plaintiffs dismiss this adversary proceeding within 28 days, without the

ability to be heard on any other issues currently pending before this Court. (December 22, 2016 Orders ¶¶ 1–2.)

On December 23, 2016, the day after entering the December 22, 2016 Orders, the Bermuda Court issued its "Reasons for Decision," a 10-page decision explaining the basis for its rulings in issuing the ex parte anti-suit injunctions.

G. The Second Order to Show Cause

On December 29, 2016, this Court entered the *Order to Show Cause Why Allied World Assurance Company Ltd., Iron-Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited Should Not be Held in Contempt* for violating the TRO. The Second Order to Show Cause referred to the injunctive provisions of the TRO, the relief sought by the Bermuda Insurers in the Skeleton Argument, and the subsequently entered orders, and ordered the Bermuda Insurers to file a written response addressing why they should not be held in contempt for violating the TRO by asking the Bermuda Court to order the Plaintiffs to dismiss the adversary proceeding before this Court and for other relief.

H. The January 4, 2017 Hearing

On January 4, 2017, the Court held a hearing to address the Second Order to Show Cause and whether the temporary restraining order would give rise to a preliminary injunction. At the start of the hearing, the Court admitted into evidence the exhibits filed in connection with the responses to the Second Order to Show Cause and the TRO Opinion, along with the transcript from the December 22, 2016 hearing in the Bermuda Court. Neither the Plaintiffs nor the Bermuda Insurers offered any other evidence at the hearing. The Court heard argument from both the Plaintiffs and the Bermuda Insurers on whether the Bermuda Insurers willfully violated a clear and unambiguous provision in the TRO. The Court also heard argument on whether there

are grounds to issue a preliminary injunction to further enjoin the Bermuda Insurers from taking any action to enforce the provisions of the Injunctive Orders.

II. THE PARTIES' CONTENTIONS

A. The Plaintiffs' Contentions

The Plaintiffs, at the January 4, 2017 hearing, argued that the Skeleton Argument, the Affidavits, and the transcript of the December 22, 2016 hearing in Bermuda, read together, demonstrate that the Bermuda Insurers have willfully violated the TRO. Specifically, the Plaintiffs argue that the basis for the injunctive relief outlined in the Affidavits, at least one of which is dated December 20, 2016, is materially different than the rationale set forth in court before Chief Justice Kawaley on December 22, 2016. The Plaintiffs point out that in the Affidavits, the Bermuda Insurers argue that additional relief is required because the Plaintiffs "do not intend to comply with [the Bermuda Court's] Orders and interlocutory Anti-Suit Injunction dated 8 November 2016" and "do not intend to comply with any permanent Anti-Suit Injunction which [the Bermuda Court] might grant . . . ." (Affidavits ¶¶ 33.1, 33.2.) At the December 22, 2016 hearing, however, counsel to the Bermuda Insurers states that *the very same relief* requested in the Affidavits and Skeleton Arguments "is not designed to enforce the existing interlocutory relief, it's designed to enforce the Arbitration Agreement between the parties." (December 22, 2016 H'rg Tr. 210:19–22.)

The Plaintiffs argue that this inconsistency stems from the fact that the Affidavits were prepared before the issuance of the TRO, and the December 22, 2016 hearing occurred after the entry of the TRO. The Plaintiffs argue that the Bermuda Insurers were aware that the relief they were seeking from the Bermuda Court was tantamount to enforcement of the Injunctive Orders (as explained in the Affidavits) because at the December 22, 2016 hearing, counsel to the

Bermuda Insurers plainly stated that this Court has "restrained [the Bermuda Insurers] temporarily from enforcing the existing anti-suit injunctions" and the Bermuda Insurers only altered the purported rationale for the relief requested in an attempt to avoid a flagrant violation of the TRO.

B. The Bermuda Insurers' Contentions

The Bermuda Insurers argue that they have not violated the TRO, and by seeking the relief they requested in the Bermuda Court on December 22, 2016, they were merely "prosecuting the case" they brought in Bermuda in compliance with the language of the TRO. *See TRO Opinion*, 2016 WL 7388546, at *16 ("But, to be clear, at this stage of this case, the Court is not enjoining the Bermuda Insurers from prosecuting the case they filed in the Bermuda Court."). Specifically, the Bermuda Insurers argue that they did not take "any action to enforce" the Injunctive Orders, though in their brief, the Bermuda Insurers acknowledge that they sought an injunction ordering the Plaintiffs to move to dismiss this adversary proceeding within 28 days. (Bermuda Insurers' Brief at 4.) The Bermuda Insurers also note in their brief that in their Skeleton Argument, they state that "*nothing* in the [Bermuda Insurers'] . . . Skeleton Argument, nor in the hearing that is scheduled to take place on 22 December 2016 either is, or is intended to be, '*an action to enforce*' the '*Injunctive Orders*' dated 8 November 2016, or any of the provisions thereof, whether directly or indirectly." (Bermuda Insurers' Brief at 4–5 (citing the Skeleton Argument ¶13).)

Additionally, the Bermuda Insurers argue that sanctions for contempt are not warranted because the Bermuda Insurers did not willfully violate the TRO, the Plaintiffs have not suffered any specific damages as a result of the alleged violation of the TRO, and the Plaintiffs declined

to put forth any evidence or argument before the Bermuda Court in connection with the hearing on December 22, 2016 in Bermuda. (Bermuda Insurers' Brief at 13–14.)

III. LEGAL STANDARD

A. Court's Authority to Punish for Contempt

Courts have inherent power to enforce compliance with their lawful orders through civil contempt. *See Spallone v. United States*, 493 U.S. 265 (1990); *Shillitani v. United States*, 384 U.S. 364, 369 (1966). As the Supreme Court stated in *Ex parte Robinson*, 86 U.S. 505, 510 (1874), "the power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and, consequently, to the due administration of justice."

Courts have embraced the inherent contempt authority as a power "necessary to the exercise of all others." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994) ("Courts independently must be vested with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and to preserve themselves and their officers from the approach and insults of pollution."); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (stating that contempt powers are "the most prominent" of court's inherent powers "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court").

The power to impose civil contempt sanctions applies in Bankruptcy Court as well. Indeed, it is well established that bankruptcy courts have power to enter civil contempt orders. *In re MarketXT Holdings Corp.*, Case No. 04-12078, 2006 WL 408317, at *1 (Bankr. S.D.N.Y. Jan. 27, 2006) ("It is well accepted, in light of the 2001 amendments to Rule 9020, that bankruptcy courts have power to enter civil contempt orders."); *see also In re World Parts, LLC*,

291 B.R. 248, 253 (Bankr. W.D.N.Y.2003) ("Bankruptcy courts possess the power to impose sanctions for acts of civil contempt.") (citing *In re Chateaugay Corp.*, 920 F.2d 183, 187 (2d Cir. 1990)).

B. The Objectives of Civil Contempt

The purpose of civil contempt is to compel a reluctant party to do what a court requires of him. *See Badgley v. Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986); *see also Shillitani*, 384 U.S. at 368 (stating that the act of disobedience consisted solely "in refusing to do what had been ordered" and the judgments imposed conditional imprisonment for the purpose of compelling the witnesses to obey the orders to testify). Civil contempt sanctions may also compensate for any harm that previously resulted. *See Nat'l Org. for Women v. Terry*, 159 F.3d 86, 93 (2d Cir. 1998); *Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir. 1996) (stating that sanctions for civil contempt serve two purposes: to coerce future compliance and to remedy any harm past noncompliance caused the other party).

C. Standards for Imposing Civil Contempt

A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply. *See King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995); *Monsanto Co. v. Haskel Trading, Inc.*, 13 F. Supp. 2d 349, 363 (E.D.N.Y. 1998). "Clear and unambiguous" means that the clarity of the order must be such that it enables the enjoined party "to ascertain from the four corners of the order precisely what acts are forbidden." *Monsanto Co.*, 13 F. Supp. 2d at 363; *see also Terry*, 886 F.2d at 1351–52 (finding that the order could serve as the foundation for a contempt citation because it was sufficiently specific and

clear as to what acts were proscribed to enable defendants to ascertain precisely what they could and could not do).

IV. DISCUSSION

The Bermuda Insurers argue that by asking the Bermuda Court to order the Plaintiffs to dismiss the adversary proceeding, they were simply following "the normal course of the already-pending Bermuda proceedings." (Bermuda Insurers' Brief at 11.) But this simplistic characterization conveniently ignores the fact that the Injunctive Orders restrained the Plaintiffs from prosecuting or otherwise pursuing litigation in the U.S. relating to the underlying insurance policy, and the Bermuda Insurers, through the Skeleton Argument, the Affidavits, and argument made at the December 22, 2016 hearing, asked the Bermuda Court to order the Plaintiffs to dismiss the adversary proceeding altogether. This is substantively indistinguishable from enforcement of the Injunctive Orders. The Bermuda Insurers have consistently undermined this Court's ability to adjudicate the issues properly before it, and in order to protect "the due and orderly administration of justice," the Court will hold the Bermuda Insurers in contempt. *Roadway Express*, 447 U.S. at 764.

A. The TRO Opinion was Clear and Unambiguous

The TRO Opinion clearly stated that the Bermuda Insurers were restrained and enjoined from taking any action to enforce the Injunctive Orders issued by the Bermuda Court. *TRO Opinion*, 2016 WL 7388546, at *17. The TRO Opinion did not enjoin the Bermuda Insurers from proceeding in the Bermuda Court altogether, and permitted the parties to appear and argue their respective positions before the Bermuda Court. For example, the parties were not prohibited from arguing in the Bermuda Court that the dispute is arbitrable. Put another way, the Bermuda Insurers were not completely enjoined "from prosecuting the case they filed in the Bermuda Court," but were enjoined from seeking to enforce the Injunctive Orders, which have

prevented this Court and the Plaintiffs from addressing the issues raised in this adversary proceeding. *Id*.

B. Proof of the Bermuda Insurers' Noncompliance is Clear and Convincing

The evidentiary record in this case is substantial; the affidavits, pleadings, and hearing transcripts demonstrate that the Bermuda Insurers' noncompliance with the TRO is clear and convincing.

First, the Affidavits, prepared before the issuance of the TRO Opinion, set forth the relief the Bermuda Insurers were seeking, and the reasons why they were seeking this relief. As noted above, the Affidavits explain the Bermuda Insurers' position that the Plaintiffs intend to proceed with the adversary proceeding in this Court, and do not intend to comply with the Injunctive Orders, and as such, the Bermuda Insurers seek an injunction ordering the Plaintiffs to dismiss the adversary proceeding in this Court. (Affidavits ¶ 33.)

After the issuance of the TRO Opinion, however, the Bermuda Insurers, though still seeking the same relief in the Skeleton Argument at paragraph 12 as the relief laid out in the Affidavits at paragraph 34 (an order requiring the Plaintiffs to dismiss this adversary proceeding), changed the purported rationale for the relief to a supposed desire to "preserve the status quo" and "enforce the Arbitration Agreement." (December 22, 2016 H'rg Tr. 210:21–22, 25.) The fact that the Bermuda Insurers changed their tune in this way points strongly to the fact that the Bermuda Insurers knew that the relief they were seeking was noncompliant with the TRO.

Ultimately, though, the simple fact that the Bermuda Insurers petitioned the Bermuda Court to order the Plaintiffs to dismiss this adversary proceeding *after* the issuance of the TRO provides sufficient grounds for this Court to find that the Bermuda Insurers violated the TRO.

Through the TRO Opinion, this Court restrained and enjoined the Bermuda Insurers from taking any action to enforce the provision of the Injunctive Order that provides, in part, that the Plaintiffs shall not prosecute litigation in the United States relating to the underlying insurance policies. On December 22, 2016, the day after the TRO Opinion was issued, the Bermuda Insurers argued before Chief Justice Kawaley that the Bermuda Court should order the Plaintiffs to dismiss this adversary proceeding altogether.

C. The Bermuda Insurers Have Not Attempted to Comply with the TRO

Despite the Bermuda Insurers' numerous proclamations to the contrary, the evidentiary record is clear that the Bermuda Insurers have flouted the proscriptions of the TRO. If the Bermuda Insurers actually intended to comply with the TRO, they would not have asked the Bermuda Court to order the Plaintiffs to dismiss this adversary proceeding.

IV. CONCLUSION

For the reasons set forth above, the Court holds the Bermuda Insurers in contempt and orders the following relief.

The Bermuda Insurers shall have seven (7) days from the date of this Order to have the Bermuda Court vacate the Injunctive Orders and the December 22, 2016 Orders issued by the Bermuda Court at the request of the Bermuda Insurers. If the Bermuda Insurers fail to have those orders vacated within that time, the Court will strike all of the Bermuda Insurers' pleadings filed in this adversary proceeding and enter a default in favor of the Plaintiffs.

If the pleadings are stricken and a default is entered, the case will then proceed in this Court with an inquest to determine and impose damages. In addition, on a proper showing, the

Court will impose monetary sanctions to compensate the Plaintiffs for any harm that resulted from the contempt.

IT IS SO ORDERED.

Dated: January 12, 2017
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge