WHITE AND WILLIAMS LLP
Erica Kerstein, Esq.
7 Times Square
New York, New York 10036
(212) 868-4837

*Attorneys for Defendant*
*Allied World Assurance Company, Ltd*

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE 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 | : | **(Jointly Administered)** |
| MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC, | : | |
| Plaintiffs, | : | |
| v. | : | |
| ALLIED WORLD ASSURANCE COMPANY, LTD, IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY, | : | **Adv. Proc. No. 16-01251 (MG)** |
| Defendants. | : | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ALLIED WORLD ASSURANCE COMPANY, LTD'S OPPOSITION TO ORDER TO SHOW CAUSE**

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Defendant Allied World Assurance Company, Ltd ("Allied World") respectfully submits this memorandum of law in response to the Court's Order to Show Cause Why Allied World Assurance Company, Ltd ("Allied World"), Iron-Starr Excess Agency Ltd., and Starr Insurance & Reinsurance Limited Should Not Be Held in Contempt, dated November 22, 2016 (the "Order to Show Cause").[1]

## SUMMARY

Allied World has not violated the injunction entered by the Court on August 10, 2016 (Dkt. No. 2282) (the "Bar Order"), because the injunction itself does not preclude Allied World from taking defensive measures to ensure that the coverage dispute arising under the Allied World Policy is resolved pursuant to the Allied World Policy's explicit and unambiguous arbitration clause. Moreover, Allied World has not violated the Bar Order because it is clear from the request for the injunction—and the Court's approval of the injunction—that the purpose of the injunction was not to prevent Allied World from taking defensive measures to protect its arbitration clause, or already-pending arbitration. Rather, the purpose of the Bar Order was to preclude non-settling parties from bringing claims against settling parties regarding the reasonableness of the settlement, or exposing settling parties to further liability for settled matters. Indeed, that is the well-settled purpose of such "Bar Orders." In fact, the Bar Order itself specifically permits—without leave of the Court—"all actions reasonably necessary to consummate the Global Settlement, including, without limitation any payments under certain insurance policies required under the Settlement Agreement . . . ." Accordingly, it is misleading

[1] Allied World does not consent to the entry of final orders or judgment by the bankruptcy court. See Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015) (parties may only consent to a bankruptcy court's constitutional jurisdiction knowingly and voluntarily). By filing this memorandum of law at the request of the Court, Allied World does not waive its right to contest personal jurisdiction, as detailed in its Motion to Dismiss for Lack of Personal Jurisdiction and Improper Service. See Adv. Dkt. 13. (References herein to docket entries are the same as those identified in the adversary complaint). Allied World likewise continue to reserve all rights with respect to its Motion to Compel Arbitration. See Adv. Dkt. 12.

for Plaintiffs' counsel to assert that the Court retained exclusive jurisdiction over the coverage dispute between Allied World and Plaintiffs pursuant to the terms of the Bar Order.

Tellingly, Plaintiffs' counsel has failed to bring to the Court's attention the pendency of the Bermuda Arbitration, which was initiated more than six months before the Bar Order. Nor, following the issuance of the Bar Order, did Plaintiffs' counsel assert to Allied World, or the Court, that Allied World's pursuit of arbitration was in breach of the Bar Order, presumably because they did not believe there had been any such breach. Having not asserted that the pending Bermuda Arbitration was in breach of the Bar Order, it is difficult to see how the ASI (in protection of the pending Bermuda Arbitration) could be a violation of the Bar Order.

Nor has Allied World violated the *Barton* doctrine. That doctrine is intended to prohibit suits against a court-appointed officer for acts in his official capacity without leave of the appointing court. Allied World did not sue a court-appointed officer for acts in his official capacity. Rather, Allied World initiated an arbitration under the terms of the Allied World Policy against MFGAA—the third-party entity that holds all rights and title to the Allied World Policy by assignment. Plaintiffs never asserted that the Bermuda Arbitration was a violation of the *Barton* doctrine.

More recently, Allied World obtained an Injunction Order from the Supreme Court of Bermuda (the "Anti-Suit Injunction" or "ASI") as a defensive measure to ensure that the coverage dispute arising under the Allied World Policy is enforced pursuant to the Allied World Policy's arbitration clause and within the confines of the arbitration proceeding Allied World had already initiated—six months before the Bar Order, and over eight months before Plaintiffs initiated the Adversary Proceeding. In fact, Plaintiffs have actively participated (albeit under a generalized reservation of rights) in the Bermuda Arbitration, including after the Bar Order was

issued. In any event, because the Plan Administrator never held a cause of action for the proceeds of the Allied World Policy in its official capacity as representative on behalf of the MFGH estate, the *Barton* doctrine does not prohibit Allied World's ASI against the Plan Administrator. Indeed, Allied World is not aware of any court applying the *Barton* doctrine in this context.

Accordingly, and for the reasons discussed in detail herein, Allied World respectfully submits that obtaining the Anti-Suit Injunction did not violate either the Bar Order or the *Barton* doctrine.

## STATEMENT OF FACTS

### The Allied World Policy

Before the filing of the Chapter 11 cases of MF Global Holdings Ltd. ("MFGH") and certain of its affiliates, Allied World issued the Allied World Policy to MFGH and certain subsidiaries and employees, for the Policy period May 31, 2011 – May 31, 2012, with Allied World Policy limits of liability of US $15 million (the "Allied World Allied World Policy"). The Allied World Policy contains the following broad and all-encompassing mandatory arbitration provision:

> [a]ny and all disputes arising under or relating to this Allied World 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 as follows . . . .

Adv. Dkt. 14-3, Haylett Aff., Ex. A, Clause IX.[2]

[2] Boldfaced terms are defined terms in the Allied World Policy.

On July 24, 2015, pursuant to the Sale and Assumption Agreement (D.I. 8827), James W. Giddens, as the SIPA Trustee for MF Global, Inc. ("MFGI"), assigned to MF Global Assigned Assets LLC ("MFGAA") all of MFGI's remaining assets, including the Allied World Policy. MFGAA is not a court-appointed officer in the Chapter 11 cases. In fact, MFGAA did not even exist at the time the Court confirmed the debtors' Second Amended and Restated Joint Plan of Liquidation (the "Plan") on April 5, 2013. See D.I 1376. According to the website of the Delaware Department of State, Division of Corporations, MFGAA was formed as a Delaware limited liability company over two years later, on August 26, 2015.

**The Bermuda Arbitration**

On February 11, 2016—long before Plaintiffs entered into the global settlement and long before the Bar Order—Allied World notified the Individual Insureds and MFGAA of its desire to arbitrate, pursuant to the above-quoted arbitration clause in the Allied World Policy, whether the Individual Insureds and/or MFGAA are entitled to coverage under the Allied World Policy (the "Bermuda Arbitration"). See Adv. Dkt. 13-3.

The Bermuda Arbitration is not a suit against a court-appointed officer for acts in his official capacity. Seemingly recognizing that, over the next eight months (under a reservation of rights), Plaintiffs' counsel, on behalf of the Individual Insureds and MFGAA, worked with Allied World to empanel the arbitrators for the Bermuda Arbitration, pursuant to the terms of the Allied World Policy. See Adv. Dkt. 13-4, 13-5, 13-6.

**The Settlement Agreement**

The Individual Insureds under the Allied World Policy sought all insurers' full remaining directors and officers ("D&O") and errors and omissions ("E&O") limits to fund a global settlement on various occasions between April and September 2015. See Adv. Dkt. 13-3. In response, Allied World 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 World Policy available to the Individual Insureds for a settlement.

On July 6, 2016—three months after Allied World had initiated the Bermuda Arbitration—Plaintiffs entered into a settlement agreement with all relevant parties, including the Individual Insureds under the Allied World Policy, and MFGI's former customers (the "Settlement Agreement"). See Adv. Dkt., Compl. ¶¶ 1, 92. In relevant part, pursuant to the Settlement Agreement, the Individual Insureds assigned their rights to full payment under the Allied World Policy to the Plaintiffs (or their designee). See id. at ¶94. Indeed, a key aspect of the Settlement Agreement was that the Individual Insureds would assign all claims and rights under the policies of the excess insurers that had declined to tender their respective E&O limits of liability, including the Allied World Policy (collectively, the "Dissenting Insurers"), to Plaintiffs (or their designee), and that the assignee would immediately commence action against the Dissenting Insurers to obtain proceeds under the Dissenting Insurers' policies to fund the settlement. See D.I., 2271-2 at 1(c).

**The Bar Order**

As part of the Settlement Agreement, Plaintiffs sought and obtained a "Bar Order" (D.I. 2282), 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 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. (emphasis added)

> . . .
>
> 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 . . . . (emphasis added)
>
> 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) . . . . (emphasis added).

**The Anti-Suit Injunction**

On October 27, 2016—over eight months after the Bermuda Arbitration was initiated—MFGH, as Plan Administrator, and MFGAA, as assignee of all claims, rights and interest to the Allied World Policy, initiated an Adversary Proceeding against Allied World and the other Dissenting Insurers in this Court. See Adv. Dkt. 1. In the Adversary Proceeding, the Plan Administrator (which does not hold rights to the Allied World Policy in its official capacity) and MFGAA (a third-party entity that was assigned all rights to the Allied World Policy), ask this Court to resolve the same coverage dispute that the Allied World Policy requires be determined within the already pending Bermuda Arbitration.

In response, on November 7, 2016, Allied World made an application to the Supreme Court of Bermuda for an Anti-Suit Injunction as a defensive measure, to protect the Allied World Policy's binding arbitration clause and the pending Bermuda Arbitration. The Bermuda Court issued the ASI on November 8, 2016, and counsel for Allied World provided Plaintiffs' counsel with notice of the ASI and all documents supporting Allied World's application for the ASI that same day. Plaintiffs' counsel wrote to the Court on November 21, 2016, to advise the Court of

the Anti-Suit Injunction, and asserted that the ASI violates the Court's Bar Order and the *Barton* doctrine. See Adv. Dkt. 7. The Court thereafter issued its November 22, 2016 Order to Show Cause, wherein it directed Allied World to show cause as to "why they should not be held in contempt of court for violating the injunction entered by this Court on August 10, 2016." Adv. Dkt. 6, Order to Show Cause at 2.

## ARGUMENT

### I. ALLIED WORLD DID NOT VIOLATE THE BAR ORDER

The Bar Order, by its terms, specifically permits actions regarding insurance proceeds, without leave of the Court. In any event, the Bar Order does not prohibit Allied World from obtaining an Anti-Suit Injunction as a defensive measure to protect both the Allied World Policy's binding arbitration clause and the pending Bermuda Arbitration. As further evidence that the Bar Order does not prohibit Allied World from continuing to pursue its pending Bermuda Arbitration, or taking steps to protect its arbitration clause and Bermuda Arbitration, at no time prior to November 21, 2016, did Plaintiffs notify Allied World, or assert to the Court, that the Bar Order had this effect. Moreover, the ASI did not violate the Bar Order because the application for an ASI does not constitute a "claim" under the Bankruptcy Code. This conclusion is further supported by the underlying purpose for which the Bar Order was sought, the Court's approval of that Order, and the function of Bar Orders in general.

#### A. The Bar Order Does Not Prohibit the ASI

Allied World has not violated the terms of the Bar Order. By its terms, the Bar Order authorizes "without further order of the Bankruptcy Court . . . any and all actions reasonably necessary to consummate the Global Settlement, including, without limitation, any payments under certain insurance policies." D.I. 2282, ¶ 3. Because the Settlement Agreement specifically contemplated actions against the Dissenting Insurers for all rights to those policies,

and a key aspect of the Settlement Agreement was to obtain proceeds under the Dissenting Insurers' policies to fund the settlement (D.I. 2271-2, at 1(c)), the Bar Order authorizes "any and all actions," without further permission from the Court, regarding payments under the Dissenting Insurers' policies, including the Allied World Allied World Policy.[3]

The injunction in the Bar Order prohibits non-settling entities, including the Dissenting Insurers, from (1) "contesting the Reasonableness of the Settlement"; or (2) "commencing, prosecuting, or asserting any claims, including, without limitation, claims for contribution, indemnity, or comparative fault (however denominated and on whatsoever theory), arising out of or related to the MF Global Actions . . . ." D.I.2282, at ¶¶ 3, 7. There can be no dispute that the ASI does not: (1) contest the reasonableness of the Settlement; or (2) assert a claim for contribution, indemnity, or comparative fault, or the like, arising out of related to the MF Global Actions. Rather, the ASI simply is an effort to protect the Bermuda arbitration clause in the Allied World Policy and the pending Bermuda Arbitration.

In fact, the Bar Order specifically contemplates claims for coverage under the Dissenting Insurers' policies and does not impose any limitation on forum. See D.I. 2282, at ¶ 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) . . . .) (emphasis added).[4]

[3] To the extent the Court finds that the Bar Order did not lift the stay, the ASI is not prohibited by 11 U.S.C. § 362(a), because the ASI does not fall within one of the statutorily enumerated categories Section 362(a) is designed to prohibit. Rather, it is purely a defensive measure taken to protect the arbitration provision in the Policy and the pending Bermuda Arbitration.

[4] Where, as here, the party claiming rights to the insurance policy is specifically permitted to bring suit, it seems illogical that the insurer would not be permitted to bring the same suit.

Against this background, Plaintiffs' counsel is incorrect to assert that the Court retained exclusive jurisdiction over the dispute between Allied World and MFGAA in the Bar Order. Nor did Plaintiffs' counsel assert at any time prior to November 21, 2016, either to Allied World or the Court, that the Bar Order would have this effect. Under the circumstances, Allied World's pursuit of declaratory relief in the Bermuda Arbitration, and to enforce its right to arbitrate through the ASI, cannot be in breach of the Bar Order.

Moreover, the ASI does not violate the terms of the Bar Order because it is not a "claim" within the meaning of the Bankruptcy Code. The Bankruptcy Code defines "claim" as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (b) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

Allied World's application for an ASI in the Bermuda Court is not a "claim" because it did not assert a right to payment from Plaintiffs, nor did it assert a claim for an equitable remedy stemming from an alleged breach of performance giving rise to a right of payment. Rather, the ASI sought to defend the propriety of the Allied World Policy's arbitration clause and the pending Bermuda Arbitration, in light of Plaintiffs' attempt to circumvent both the arbitration clause in the Allied World Policy and the pending Bermuda Arbitration via the Adversary Complaint. Such a defensive declaratory judgment action does not constitute a "claim" within the meaning of the Bankruptcy Code. See AW Treuhand Wirtschaftsprufungsgesellschaft v. Peregrine Sys. (In re Peregrine Sys.), No. 04-1325SLR, 2005 U.S. Dist. LEXIS 21707, at *8-9 (D. Del. Sept. 29, 2005) (defensive declaratory judgment action filed in foreign court did not constitute a "claim" under 11 U.S.C. § 101(5)).

Accordingly, Allied World did not violate the plain terms of the Bar Order.

**B. The Intent of the Bar Order Was Not to Prohibit the ASI**

A review of the purpose behind the Bar Order, and this Court's approval of the Bar Order, indicates that the intent of the Bar Order was not to preclude actions such as the ASI. In the Motion Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure for Entry of an Order Approving the Settlement Agreement Among the Plan Administrator, the Trustee of the Litigation Trust, Individual Defendants, Sapere CTA Fund, L.P., and the Customer Representatives dated July 20, 2016 (the "Settlement Motion"), the settling parties sought a "permanent injunction," as the Court ordered in O'Toole v. McTaggart (In re Trinsum Grp., Inc.), 2013 Bankr. LEXIS 1753, at *10 (S.D.N.Y. April 30, 2013), and as was done in In Re Quigley Co., 676 F.3d 45, 53 (2d Cir. 2012), because it was a "bargained-for requirement of the proposed Settlement, intended to eliminate the danger that payment of the full limits of the D&O and E&O Policies could leave Insurers and Insureds alike exposed to further liability." D.I. 2271, Settlement Motion, ¶ 46. That is, the settling parties, including the funding insurers and insureds, requested that Your Honor issue an injunction against non-settling entities from bringing claims that "conflict with those released under the Settlement." D.I.2271, Settlement Motion, ¶ 46. The Motion seeking Your Honor's approval of the Settlement Agreement, including the Bar Order, expressly stated that the purpose of the Bar Order was:

> [t]o protect the Settlement from collateral attacks, Movants also seek a permanent injunction against interference with the proposed Settlement and against the assertion of claims arising out of or related to the MF Global Actions, including the claims settled here against the Settling Parties.

Id., at ¶ 38. In addition, the supporting Declaration of Erik Graber provides at ¶ 6 states that the Bar Order was a "crucial components of the Settlement, which I am advised that the funding

Insurers and Defendants insisted be part of the Settlement to bring finality to the considerable array of disputes resolved herein."

During the hearing before this Court regarding the Settlement Motion, Your Honor commented "with respect to the dissenting insurers, the [proposed] order precludes a challenge to the reasonableness of the settlement". D.I. 2284, Hearing Transcript, at 12:21-13:1. At the time of approving the Order, Your Honor did not ask Plaintiffs' counsel whether the Dissenting Insurers were on notice that they would be prohibited from enforcing an arbitration clause or continuing to pursue the pending Bermuda Arbitration. Indeed, upon questioning by Your Honor, Plaintiffs' counsel neglected to mention the existence of the pending Bermuda Arbitration, instead representing to Your Honor that the pursuit of coverage from the Dissenting Insurers was a "subject of negotiation" that would be dealt with once the Settlement was approved. See D.I. 2284, Hearing Transcript, 13:22-14:8. This omission is made more stark because Your Honor had previously asked Plaintiffs' counsel whether some of the insurance claims would have to be arbitrated, to which Plaintiffs' counsel responded only that the question is "complicated". See M.D.L. 1065, 12/11/15 Hearing Transcript, 55:15-25. Had Plaintiffs' counsel been forthright with Your Honor, the issue of the arbitration clause in the Allied World Policy and the pending Bermuda Arbitration could have been dealt with head-on at the time.

Placed in the best possible light, Plaintiffs' counsel's failure to bring these issues to Your Honor's attention at the time, coupled with Plaintiffs' failure to direct Allied World to any prohibition in the Bar Order from maintaining its arbitration, reflected Plaintiffs' acknowledgement that the intended purpose of the Bar Order was simply to give piece of mind to the settling parties that they would not be subject to further liability for settled matters. Indeed, the purpose behind such Bar Orders in general is to facilitate settlements by protecting settling

parties from claims by non-settling parties for indemnity or contribution, and to protect the property of the estate from further claims by third parties that could deplete such resources. See, e.g., O'Toole, 2013 Bankr. LEXIS 1753 at *10 (issuing a Bar Order enjoining non-settling parties from pursuing claims against settling parties because of the "unusual circumstance" presented: the assertion of a claim by a non-settling party would have triggered insurance coverage, which would prevent the insurers from funding the settlement); In Re Quigley, 676 F.3d at 53 (affirming bankruptcy court's jurisdiction to enjoin non-settling parties from bringing claims that would result in proceeds being paid out of an insurance policy that was property of the estate, thereby affecting the *res* of the estate). The very cases Plaintiffs' counsel relied upon in requesting that Your Honor issue the Bar Order make clear that a Bar Order does not prohibit Allied World from obtaining an ASI; instead, the Bar Order prohibits suits by non-settling third-parties in the "unique circumstances" where further litigation of the settled matters by non-settling parties would deplete assets of the estate. The ASI does not present such a unique circumstance because it merely attempts to protect the arbitration clause in the Allied World Policy and the pending Bermuda Arbitration, and is not a collateral attack on the Settlement.

Where, as here, the Bar Order was issued after the initiation of the Bermuda Arbitration, and Plaintiffs' counsel never asserted to Allied World or the Court, either before or after the issuance of the Bar Order, that the pending Bermuda Arbitration was a violation of the Bar Order, it is difficult to see how the ASI (which is not a collateral attack on the Settlement Agreement, and which was necessary to protect the pending Bermuda arbitration) could be a violation of the Bar Order.

## II. ALLIED WORLD HAS NOT VIOLATED THE BARTON DOCTRINE

While the Court's Order to Show Cause does not reference the *Barton* doctrine, because Plaintiff's counsel asserts that Allied World's application for the Anti-Suit Injunction violates

that doctrine, Allied World addresses those arguments here. Plaintiffs' assertions are without merit, as Allied World has not run afoul of the *Barton* doctrine.

The *Barton* doctrine arises from the Supreme Court decision in Barton v. Barbour, 104 U.S. 126 (1881), and provides "that a suit [can] not be maintained against a [court-appointed officer] for an act in his official capacity without leave of the court that had appointed him." In re Beck Industries, Inc., 725 F.2d 880, 886 (2d Cir. 1983); see also In re Gen. Growth Properties, Inc., 426 B.R. 71, 74 (Bankr. S.D.N.Y. 2010) ("Growth Properties") (under the *Barton* doctrine, "a party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity.") (quoting Beck v. Fort James Corp, 421 F.3d 963, 970 (9th Cir. 2005). The *Barton* doctrine is inapplicable here for a number of reasons.

### A. The Anti-Suit Injunction Is Not A Suit Against A Court Appointed Officer In Its Official Capacity

Allied World's application for an ASI is not a suit against a court-appointed officer in his official capacity because it is merely in defense of the propriety of a mandatory and pre-existing arbitration clause in the Allied World Policy, and the already pending Bermuda Arbitration proceeding; and, it does not involve a court-appointed officer's official capacity. To Allied World's knowledge, MFGAA—which was not formed until August 2015—has never been given any court-appointed role in connection with the bankruptcy proceedings, including the liquidation under the Plan. Rather, MFGAA appears to be a third-party entity that was assigned all rights to the Allied World Policy by the Trustee of MFGI in the SIPA liquidation, and by the Individual Insureds pursuant to the Settlement Agreement approved by the Court in August 2015. It does not appear that Plaintiffs' counsel believes a suit against MFGAA violates the

*Barton* doctrine, because the Bermuda Arbitration has been pending against MFGAA for almost 10 months now, without any allegation that there has been a *Barton* violation.

Although MFGH is a court-appointed officer as Plan Administrator, it lacks standing to assert claims against Allied World for which it seeks protection under the *Barton* Doctrine. To the extent MFGH is currently attempting to prosecute a cause of action against Allied World for the proceeds of the Allied World Policy (which Allied World contests), that cause of action does not belong to the Plan Administrator in its capacity as representative of MFGH's estate, or otherwise. While MFGH was an insured under the Allied World Policy, Plaintiffs do not allege that MFGH incurred a covered loss under the Allied World Policy. Instead, Plaintiffs allege that MFGI and the Individual Insureds incurred the covered loss (which Allied World disputes), and that both MFGI and the Individual Insureds assigned their rights to any proceeds under the Allied World Policy to MFGAA. See Adv. Dkt. 1, ¶ 22. That assignment took place in or around August 2015, more than two years after confirmation of the Plan, and was not made to the Plan Administrator at all, let alone in its capacity as representative of MFGH's estate. Because MFGH never incurred a covered loss under the Allied World Policy, the Plan Administrator could not have brought the Adversary Proceeding in its official capacity as representative of the MFGH estate.

The Plan Administrator also could not have brought the Adversary Proceeding in its official capacity as representative of the MFGH estate because MFGH did not hold or own such claims at the time the Plan was confirmed.[5] Nor did the claims ever become property of MFGH's estate. Consequently, the claims could not be transferred to, or re-vested in, MFGH under Article XI.A of the Plan. Accordingly, the Plan Administrator (in its official capacity) was

[5] Rather, by Plaintiffs' own allegations, the claims were held by the MFGI estate and the Individual Insureds (which Allied World disputes), and not assigned to MFGAA until 2015. Accordingly, the claims were not included in the Debtors' schedule of actions and claims in Exhibit IV.G. in the Plan Supplement. See D.I. 1283.

never granted any authority or power over such claims when the Court confirmed the Plan in April 2013.

In summary, the claim for coverage under the Allied World Policy is neither held by MFGH or the Plan Administrator, nor subject to the Court's subject-matter jurisdiction under 28 U.S.C. § 1334.[6] Under these circumstances, the *Barton* doctrine does not apply to protect the Plan Administrator.

Even assuming *arguendo* that a suit was filed outside of the Bankruptcy Court challenging the Plan Administrator's official conduct in some manner (which Allied World

[6] In addition to lacking personal jurisdiction over Allied World in the Adversary Proceeding, the Court does not have subject-matter jurisdiction over the coverage claims asserted therein. The claims are subject to mandatory arbitration in Bermuda, which is pending. See McIntire v. China MediaExpress Holdings, Inc., 113 F. Supp. 3d 769, 775 (S.D.N.Y. 2015) (declining to enjoin foreign insurance coverage arbitration, because that would violate the Federal Arbitration Act); Ace Ins. Co. v. Smith (In re BCE West, L.P.), No. 06-0325, 2006 U.S. Dist. LEXIS 67761, at *27 (D. Ariz. Sept. 20, 2006) (district court found bankruptcy court erred when it enjoined Bermuda proceeding regarding insurance coverage because it was not within the bankruptcy court's jurisdiction to enjoin the arbitration). Neither the Plan Administrator nor MFGAA has challenged the Bermuda Arbitration. In addition, there is no related-to post-confirmation jurisdiction over these claims under 28 U.S.C. §1334(b). The claims were never property of MFGH's estate. The claims were assigned to MFGAA over two years after confirmation of the Plan. As a result, MFGH did not identify these claims either in its list of causes of action or in the retention of jurisdiction provision of the Plan. Accordingly, MFGH could not have attempted to retain post-confirmation jurisdiction over claims then owned by third parties. See In re Hall's Motor Transit Co., 889 F.2d 520, 522 (3rd Cir. 1989) ("The bankruptcy court's jurisdiction does not follow the property [after sale], but rather, it lapses when the property leaves the debtor's estate"). Had the parties intended for the Court to retain jurisdiction over claims for coverage under the Allied World Policy now held by MFGAA, they were required to specifically say so in the Plan. See Wash. Mut., Inc. v. XL Specialty Inc., Co. (In re Wash. Mut., Inc.), No. 08-12229 , 2012 Bankr. LEXIS 4673, at *14 (Bank. D. Del. Oct. 4, 2012) ("Debtors cannot be permitted to 'write [their] own jurisdictional ticket' by merely including a generic retention clause in the Plan. . . . If including a retention of jurisdiction clause in a Plan was sufficient, the limitation on post-confirmation jurisdiction would be easily eliminated. Rather, to have a sufficiently close nexus to retain post-confirmation jurisdiction, the plan must 'specifically describe[] an action over which the Court had 'related to' jurisdiction pre-confirmation and expressly provide[] for the retention of such jurisdiction to liquidate that claim for the benefit of the estate's creditors. . . .' Such specific language helps ensure that 'bankruptcy court jurisdiction would not raise the spector of unending jurisdiction' post-confirmation.") (quoting Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.), 372 F.3d 154, 161, 167 (3d Cir. 2004)); Northwood Estates v. Evergreen Bank, NA, 114 F. App'x 416 (2d Cir. 2004) ("[A] bankruptcy court retains post-confirmation jurisdiction in a Chapter 11 proceeding only to the extent provided in the plan of reorganization); In re Metro-Goldwyn-Mayer Studios Inc., 459 B.R. 550, 557 n.3 (Bankr. S.D.N.Y. 1990) (bankruptcy court lacked jurisdiction to approve settlement agreement where "[t]he Plan d[id] not expressly retain jurisdiction to approve settlements"); In re Neptune World Wide Moving, Inc., 111 B.R. 457 (Bankr. S.D.N.Y. 1990) (bankruptcy court lacks subject-matter jurisdiction where the terms of the plan and order did not provide for retained jurisdiction over post-confirmation adversary actions); In re Aylesbury Inn, Inc., 121 B.R. 675 (Bankr. N.D.N.Y. 1990) (court may exercise post-confirmation jurisdiction only to the extent retained in the plan and only with respect to matters pending at confirmation). Accordingly, Allied World reserves all rights with respect to whether this Court has subject-matter jurisdiction over claims asserted in the Adversary Proceeding.

disputes), it is questionable whether the *Barton* doctrine would apply to the Plan Administrator, because the Court authorized the Plan Administrator to carry out his responsibilities "without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or the Bankruptcy Rules." See, D.I. 1288, Confirmation Order ¶34. This provision permitted the Plan Administrator to sue or be sued outside of the Bankruptcy Court. For this reason too, Allied World did not violate the *Barton* doctrine.

The sole reason the Plan Administrator is a necessary party to the ASI is because the Plan Administrator is a Plaintiff in the Adversary Proceeding against Allied World. Indeed, Allied World is puzzled by the Plan Administrator's involvement in the Adversary Proceeding at all, because all rights to recover under the Allied World Policy have been assigned to MFGAA. Putting aside whether the Plan Administrator has standing as a Plaintiff in the Adversary Suit, in order to protect its arbitration clause and the pending Bermuda Arbitration, Allied World was forced to include the Plan Administrator in the ASI. Plaintiffs' counsel has not pointed to—and Allied World is unaware of—any case law finding a violation of the *Barton* Doctrine in these circumstances.

Where, as here, the ASI merely involves the protection of an arbitration agreement in the Allied World Policy, which was executed prior to initiation of bankruptcy proceedings, the ASI does not violate the *Barton* doctrine. See, e.g., Unencumbered Assets Trust v. Hampton-Stein (In re Nat'l Century Fin. Enters.), 426 B.R. 282, 293 (Bankr. S. D. Ohio, 2010) ("To the extent a litigant suing a trustee or its counsel grounds his or her causes of action entirely on events that occurred prior to the commencement of bankruptcy . . . such litigation would not violate the Barton Doctrine."); In re J.S. II, L.L.C., 389 B.R. 570, 584 (Bankr. N.D. Ill. 2008) ("[T]he Barton doctrine would be inapplicable for events occurring [pre-petition].").

The ASI stands in stark contrast to the overwhelming majority of cases in which courts have found the *Barton* doctrine to apply to suits against court-appointed officers for wrongdoing in the administration of the estate, or the trustee's recovery of estate property. See, e.g., Lebovits v. Scheffel (In re Lehal Realty Assocs.), 101 F.3d 272, 276-77 (2d Cir. 1996) (*Barton* doctrine prohibited suit brought without leave against trustee seeking to hold trustee personally liable for alleged "negligence and malpractice" in breach of his "fiduciary duty" in connection with his administration of the estate, because of court's interest in overseeing the conduct of its officers); Growth Properties, 426 B.R. at 74-75 (declining to issue sanctions, but finding *Barton* doctrine barred action against officers of the court that alleged breach of fiduciary duties in the administration of the estate by failing to respond to a take-over bid because that would directly interfere with the administration of the estate); Moxey v. Pryor (In re Moxey), No. 12-74340, 2014 Bankr. LEXIS 2044, at *11, n. 10 (Bankr. E.D.N.Y. 2014) (suit against trustee challenging trustee's sale of estate property violated *Barton* doctrine); In re American Land Acquisition Corp., No. 12-176440, 2013 Bankr. LEXIS 2353, at *9, n.5 (Bankr. E.D.N.Y. 2013) (discussing *Barton* doctrine in context of suit against trustee for alleged constitutional rights violations stemming from trustee's administration of the estate); Bongiovanni v. Grubin, No. 12-6387, 2013 U.S. Dist. LEXIS 139641, at *17-22 (E.D.N.Y. 2013) (pursuant to the *Barton* doctrine, affirming denial of leave to sue trustee in civil court for breach of fiduciary duty and fraud relating to trustee's operating reports and summary reports, because those claims had already been the subject proceedings in the bankruptcy court and therefore were subject to *res judicata* and claimant had no interest in the Debtor property); Katz v. Kucej (In re Biebel), No. 02-32865, 2009 Bankr. LEXIS 1544, at *13, *21(Bankr. D. Conn. May 19, 2009) (*Barton* doctrine barred action against trustee alleging, inter alia, that the trustee had filed a vexatious malpractice action

against defendant, because the action appeared to relate to the trustee's official capacity as an officer of the court); Beck v. Fort James Corp. (In re Crown Vantage, Inc., 421 F.3d 963, 973 (9th Cir. 2005) (*Barton* doctrine barred action against trustee, concerning whether a spin-off transaction constituted a fraudulent conveyance, where same cause of action was already pending in bankruptcy court and trustee had been specifically empowered under the confirmed Plan to bring that action in bankruptcy court); Investor Protection v. Madoff, 460 B.R. 106, at 116-17, 120-23 (Bank. S.D.N.Y. Oct. 12, 2011) (*Barton* doctrine barred foreign action against trustee, because action sought a declaration that defendant was not liable for $25 million of the $100 million that the trustee had been appointed to recover for the customers, which was in direct violation of the automatic stay, and an order by the court; only after finding that the court had jurisdiction over the defendant did the court determine that it had the authority to enjoin the foreign proceeding).[7]

These cases are inapplicable here because Allied World did not sue any court-appointed officer with respect to wrongdoing in the administration of the estate or recovery of estate property. The ASI is instead a defensive measure to protect Allied World's arbitration clause and the already-pending Bermuda Arbitration.

### B. The *Barton* Doctrine Is Rarely Applied In The Insurance Context, And Has Never Been Applied In The Fact Pattern Presented Here

Allied World is only aware of two cases where the *Barton* doctrine has been applied in the insurance context, and both of those cases are readily distinguishable. Moreover, both courts that reviewed *Barton* doctrine in the context of insurance policies with foreign arbitration clauses

[7] As fully described in Allied World's Motion to Dismiss, Allied World contests whether this Court has jurisdiction over Allied World.

were mindful that the Federal Arbitration Act prohibits courts from enjoining foreign arbitrations.

In McIntire, 113 F. Supp. 3d at 771, pursuant to the *Barton* doctrine, the court enjoined insurers from proceeding with a foreign arbitration against the Receiver without prior leave. The insurers had named a court-appointed Receiver as a respondent in a foreign arbitration. Id. The Receiver had been appointed to marshal assets, and was specifically empowered to pursue claims against insurers. Id. at 774. Immediately after arbitration was filed, the Receiver asked the court to enjoin the insurers from proceeding with the foreign arbitration. Id. at 771. Soon thereafter, the Receiver requested that the court issue an anti-litigation order. Id. at 772.

The Court in McIntire declined to issue an anti-litigation order that would prohibit the insurers from seeking leave of court to sue the Receiver regarding whether there is coverage under the insurance policy at issue, because such an injunction would function as an anti-arbitration injunction in violation of the Federal Arbitration Act. Id. at 775-76; see also Drennen v. Certain Underwriters at Lloyd's of London (In Re Residential Capital, LLC), No. 12-12020, 2016 Bankr. LEXIS 3799, n. 16 (Bankr. Ct. S.D.N.Y. Oct. 21, 2016) (Court chose not to analyze applicability of the *Barton* doctrine, but in response to one insurer's request for leave pursuant to the *Barton* doctrine, the Court compelled arbitration—without finding it necessary to reach a decision regarding whether relief from the *Barton* doctrine was necessary).

In any event, McIntire, is entirely distinguishable from the present case for at least the following reasons:

- Unlike the facts at issue in McIntire, Allied World's Notice of Arbitration does not name a court-appointed officer. Allied World has not sought any declaratory judgment as against the Plan Administrator with respect to whether there is coverage under the Allied World Policy.

- Unlike the facts at issue in McIntire, Plaintiffs did not immediately seek to enjoin the pending Bermuda Arbitration. Instead, Plaintiffs allowed the Bermuda Arbitration proceeding to proceed for nearly 10 months, while Plaintiffs actively participated (albeit under a reservation of rights) in the arbitration both before and after the Bar Order was issued.

- Unlike the facts at issue in McIntire, the Plan Administrator does not hold the power to pursue claims against insurers. Any rights to proceeds under the Allied World Policy have been assigned to third-party, MFGAA.

- Unlike the facts at issue in McIntire, the Court did not exclusively retain jurisdiction over the Allied World Policy. In fact, the Bar Order lifted any stay with respect to lawsuits regarding payment under the insurance policies required under the Settlement Agreement. See D.I. 2282.

- Unlike the facts at issue in McIntire, Allied World sought an ASI to protect an already pending Bermuda Arbitration.

Accordingly, McIntire does not support a finding that Allied World's ASI violated the *Barton* doctrine.

The only other case that Allied World is aware of that applied the *Barton* doctrine in the context of an insurance coverage issue is Ace Ins. Co. v. Smith (In re BCE West, L.P.), 06-0325, 2006 U.S. Dist. LEXIS 67761, at *2-6 (D. Ariz. Sept. 20, 2006). In that case, the Arizona bankruptcy court issued sanctions against an insurer for violation of the *Barton* doctrine and attempted to enjoin the Bermuda proceeding. Importantly, the Arizona district court found that the bankruptcy court erred when it enjoined the Bermuda proceeding because the insurance coverage action was a non-core proceeding and, therefore, it was not within the bankruptcy court's jurisdiction to enjoin the arbitration. Id. at *27. Although the district court upheld sanctions against the insurer, that was based not only on the fact that the insurer brought the Bermuda action against the trustee, but also the fact that the insurer refused to dismiss the Bermuda action after the bankruptcy court ordered it to do so. Id. at *34. The Arizona district court did not rely on any precedent for *Barton* violations in the context of an insurance coverage action.

Not only is In re BCE West non-binding on this Court, it is entirely distinguishable from the present case for at least the following reasons:

- Unlike the facts in In re BCE West, the Bermuda Arbitration is not an action against a court-appointed officer.
- Unlike the facts in In re BCE West, the only proceeding brought against the Plan Administrator does not involve a court-appointed officer's official capacity, and is merely in defense of the propriety of a mandatory and pre-existing arbitration clause in the Allied World Policy, and the already pending Bermuda Arbitration proceeding.
- Unlike the facts in In re BCE West, Allied World has not ignored a Court order finding that its Bermuda Arbitration violated the *Barton* doctrine.
- Unlike the facts in In re BCE West, no court-appointed officer holds title to the Allied World Policy.
- Unlike the facts in In re BCE West, Plaintiffs' counsel at no time prior to November 21, 2016, advised Allied World that it believed Allied World to be in violation of the *Barton* doctrine.
- Unlike the facts in In re BCE West, Plaintiffs have participated in the Bermuda Arbitration.

Accordingly, there is no support for applying the *Barton* doctrine under the circumstances presented here.

## III. ALLIED WORLD SHOULD NOT BE HELD IN CONTEMPT OF COURT

For the reasons discussed in detail above, Allied World respectfully submits that it has not violated the Bar Order or the *Barton* doctrine. In the event that the Court concludes that either the Bar Order or the *Barton* doctrine has been violated, Allied World submits that its attempt to protect its arbitration clause and the pending Bermuda Arbitration proceeding through its application for the ASI does not justify a finding of contempt of court.

The Second Circuit has explained that "[a] party may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has

not diligently attempted to comply in a reasonable manner." Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 655 (2d Cir. 2004). A "clear and unambiguous order" is one "specific and definite enough to apprise those within its scope of the conduct that is being proscribed." N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1352 (2d Cir. 1989). In other words, the "order is one that leaves no uncertainty in the minds of those to whom it is addressed, who must be able to ascertain from the four corners of the order precisely what acts are forbidden." King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995) (citations and quotations marks omitted).

Allied World respectfully submits that, at the very least, neither the Bar Order nor the *Barton* doctrine unambiguously prohibited Allied World's application for an ASI, given the circumstances surrounding the issue of the Bar Order and the pre-existing Bermuda Arbitration. Allied World's position represents a reasonable interpretation of both the Bar Order and the *Barton* doctrine in light of those circumstances and, therefore, a contempt finding would be inappropriate.

## CONCLUSION

For the foregoing reasons, Allied World respectfully requests that the Court find that Allied World has not violated the Bar Order or the *Barton* doctrine, and that the Court decline to hold Allied World in contempt of court.

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**WHITE AND WILLIAMS LLP**

By:*/s/Erica Kerstein*
Erica Kerstein
White and Williams LLP
7 Times Square
New York, New York 10036-6524
(212) 868-4837

*Attorneys for Defendant Allied World Assurance Company, Ltd*