UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	Civil Action No. 1:18-cv-06658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Cross-Claim and Third-Party Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, et al., Cross-Claim and Third-Party Defendants.	Civil Action No. 1:18-cv-12018 (JSR)

THIRD-PARTY AND CROSS-CLAIM PLAINTIFFS BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE STATE SECURITY STATUTES

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PRELIMINARY STATEMENT

Foreign insurers and reinsurers like Beechwood Re Ltd ("Beechwood") who do business in New York and Indiana are given a choice: they can either become authorized under state law to do business in the state, which would require (among other things) subjecting themselves to extensive regulations and depositing funds in the state; or they can, every time they are sued in the state concerning their policies or reinsurance agreements, post security to cover the amount of the claims against them. Statutes in both states (and practically every state), referred to as "security statutes," provide these options for an obvious reason: they ensure that foreign insurers and reinsurers will honor their contractual obligations to policyholders and cedents, either by posting funds when they are authorized to do business in the state or upon being sued in the state. Without the security statutes, foreign insurers and reinsurers could do exactly what Beechwood—a Cayman-based reinsurer—is seeking to do now, namely, do business in New York and Indiana without being authorized to do so, breach their contracts and then stiff their policyholders and cedents. Under the security statutes, Beechwood must post security to secure any judgment against it, and, if it does not do so, the statutes and settled law require that its pleadings be stricken and a default judgment entered.

This is not a punishment, but merely reflects the choice Beechwood made when it decided not to become authorized to do business in New York and Indiana: by avoiding regulatory scrutiny by state regulators and not depositing funds in the state, it knowingly subjected itself to statutes that would subject it to default judgments if it did not post security in the event it was sued. Having made that choice and having benefitted from it for years, it must now deal with the consequences. And those consequences are clear: unless it posts security, its pleading must be stricken.

In this action, Melanie L. Cyganowski, as Receiver for certain Platinum entities (the "Receiver"), has sued, among others, Beechwood, WNIC and BCLIC. Although WNIC and BCLIC are victims of the Platinum/Beechwood fraud, the Receiver alleges that they can be liable for allegedly ignoring red flags concerning Beechwood's relationship with Platinum and not blowing the whistle on a fraud that supposedly could have been discovered earlier. The Receiver seeks more than $70 million from BCLIC and WNIC based on this theory of liability. Dkt. No. 83 ("FAC") ¶ 316.[1] Because the Receiver's claims against WNIC and BCLIC are completely derivative of her claims against Beechwood and indeed are based on WNIC's and BCLIC's allegedly ignoring Beechwood's fraud, WNIC and BCLIC asserted cross-claims against Beechwood, seeking indemnity and contribution. Dkt. No. 75 ("Cross-claims") ¶¶ 919-22. That is, if WNIC and BCLIC are liable to the Receiver for Beechwood's conduct, then Beechwood is liable to WNIC and BCLIC to the same extent ($70 million). WNIC and BCLIC have also asserted breach of contract claims against Beechwood based on Beechwood's breaches of the Reinsurance Agreements. Cross-claims ¶¶ 861-65. WNIC and BCLIC seek over $180 million from Beechwood, as described below.

Because Beechwood is not a licensed insurer in either Indiana or New York, where WNIC and BCLIC, respectively, are domiciled, Beechwood is subject to those states' security statutes that require it to either become licensed or else post security for a judgment that WNIC and BCLIC might obtain against Beechwood. Significantly, these security statutes require Beechwood to post security before "fil[ing] ***any pleading*** in ***any proceeding*** against [it]" N.Y. Ins. Law § 1213(c)(1) (emphasis added). Under settled law, the term "pleading" is interpreted

[1] Unless otherwise noted, citations to the docket refer to the docket in the case captioned *Cyganowski v. Beechwood Re Ltd, et al.*, No. 18-cv-12018-JSR.

broadly and includes motions to dismiss and to compel arbitration, which Beechwood has filed in opposition to WNIC's and BCLIC's cross-claims. Pursuant to the security statutes, Beechwood must post security immediately and, if it fails to do so, its motions should be stricken and a default judgment should be entered.

STATEMENT OF FACTS

WNIC is an insurance company domiciled in Indiana with its principal place of business in Carmel, Indiana. BCLIC is an insurance company domiciled in New York with its principal place of business in New York. Beechwood was incorporated as a Cayman Islands insurer in June 2013. Cross-claims ¶¶ 478-79, 509. It is not licensed as an insurer in New York or Indiana. *Id.* ¶ 509.

Starting in or around July 2013, Beechwood presented itself to WNIC and BCLIC as a start-up reinsurer that sought to compete to reinsure WNIC's and BCLIC's long-term care policies. *See, e.g.*, Cross-claims ¶¶ 536-44. On February 10, 2014, Beechwood entered into separate Reinsurance Agreements with each of WNIC and BCLIC. Dkt. Nos. 170-1 through 170-9. The Reinsurance Agreement with WNIC is governed by Indiana law, and the Reinsurance Agreement with BCLIC is governed by New York law. As set forth in the Cross-claims, Beechwood repeatedly breached the Reinsurance Agreements. *See, e.g.*, Cross-claims ¶¶ 657-76, 861-65. On September 29, 2016, state insurance regulators in New York (where BCLIC is domiciled) and Indiana (where WNIC is domiciled) concluded that many assets in the trusts were "not compliant" with the investment guidelines prescribed by applicable state laws and the Reinsurance Agreements. Cross-claims ¶ 678.

The state insurance regulator in New York gave BCLIC ten days to bring the BCLIC trusts into compliance, while the state insurance regulator in Indiana required WNIC to bring the WNIC trusts into compliance immediately. Cross-claims ¶ 679. As Beechwood's own attorneys

admitted, however, Beechwood could not possibly begin to meet these kinds of deadlines given the illiquidity of the Platinum-controlled funds and entities into which Beechwood had invested WNIC's and BCLIC's trust assets. These directives from the New York and Indiana insurance regulators effectively required WNIC and BCLIC to terminate the Reinsurance Agreements and recapture the business they ceded to Beechwood or else face disciplinary action, including the loss of their reinsurance credits for the ceded risks. Cross-claims ¶ 679.

On September 29, 2016, therefore, WNIC and BCLIC terminated the Reinsurance Agreements and filed a demand for arbitration against Beechwood in accordance with arbitration provisions in the Reinsurance Agreements. Cross-claims ¶ 681. That arbitration has now been stayed due, at least in substantial part, to the Receiver's commencement of her action against Beechwood, WNIC, BCLIC and others.

Since the arbitration was filed, the Receiver has filed suit against BCLIC and WNIC, claiming, in general terms, that BCLIC and WNIC are derivatively responsible for Beechwood's and Platinum's fraud because they ignored "red flags" and "failed" to investigate Beechwood's relationship with Platinum. As a result of those allegations, WNIC and BCLIC asserted contribution and indemnity cross-claims against Beechwood in this proceeding. Cross-claims ¶¶ 919-22. The Receiver has alleged that WNIC and BCLIC are liable for damages to the Receiver in excess of $70 million—liability that would and should pass straight to Beechwood under WNIC's and BCLIC's cross-claims for contribution and indemnity. Beechwood has moved to dismiss the cross-claims or compel arbitration of the cross-claims, thus subjecting themselves to the security statutes requiring it to post security or else have its pleading stricken.

LEGAL ARGUMENT

I. PRE-PLEADING INTERIM SECURITY IS REQUIRED UNDER NEW YORK INSURANCE LAW § 1213 AND INDIANA CODE § 27-4-4-4(A)(1) & (2), AND THUS BEECHWOOD'S MOTIONS TO DISMISS AND COMPEL ARBITRATION SHOULD BE STRICKEN AND A DEFAULT JUDGMENT ENTERED

A. Basic Principles Under The Security Statutes

The state laws governing the Reinsurance Agreements—New York and Indiana laws—both require foreign insurers and reinsurers, such as Beechwood here, to post security before they will be permitted to defend themselves against insureds or ceding parties, such as WNIC and BCLIC, who seek damages. The relevant state statutes are New York Insurance Law § 1213(c)(1)(A) and Indiana Code § 27-4-4-4 (the "Security Statutes").

The New York Security Statute provides, in relevant part, as follows:

> (1) Before any unauthorized foreign or alien insurer [such as Beechwood] files any pleading in any proceeding against [the insurance company], it ***shall*** either;
>
> (A) deposit with the clerk of the court . . . cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, ***in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding,*** but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, ***or***
>
> (B) procure a license to do an insurance business in this state.

N.Y. Ins. Law § 1213(c)(1) (emphasis added).

The Indiana Security Statute mirrors the New York Security Statute and provides, in relevant part, as follows:

> Sec. 4. (a) Before any unauthorized foreign or alien insurer [such as Beechwood] shall file or cause to be filed any pleading in any action, suit, or proceeding instituted against it, such unauthorized insurer ***shall***:

> (1) deposit, with the clerk of the court in which such action, suit, or proceeding is pending, cash or securities, or file with such clerk a bond with good and sufficient sureties, to be approved by the court, ***in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action***; ***or***
>
> (2) procure a certificate of authority to transact the business of insurance in this state.

Ind. Code §§ 27-4-4-4(a)(1) & (2) (emphasis added).

Thus, New York and Indiana law provide unauthorized foreign insurers seeking to contest a legal claim a choice: they can either procure a license to do insurance business in those states, in which case they subject themselves to state law requirements that they maintain certain deposits available for the benefit of creditors, ***or*** they must post a bond or other collateral sufficient to secure ***"any final judgment"*** against them. Beechwood chose the latter option. It did not procure a license to do insurance business in New York (where BCLIC is domiciled) or in Indiana (where WNIC is domiciled). Accordingly, it is required to post a bond or other collateral before contesting the merits of WNIC's and BCLIC's claims under Indiana and New York law, respectively.

Significantly, each Security Statute is mandatory—the foreign unauthorized insurer or reinsurer must select one of the two statutory options ("***shall***"). Foreign unauthorized reinsurers do not have the option of contesting domestic legal proceedings without either posting collateral sufficient to secure "***any final judgment***" against them, or obtaining the requisite state license, with all the regulatory baggage that entails. *Levin v. Intercontinental Cas. Ins. Co.*, 95 N.Y.2d 523, 527 (N.Y. 2000) ("Section 1213(c)(1) ***requires*** any unauthorized foreign or alien carrier to post a bond before it 'files any pleading in any proceeding against it'") (emphasis added); *see also In re MF Glob. Holdings Ltd.*, 569 B.R. 544, 550 (S.D.N.Y. Bankr. 2017) ("[T]his section ***requires*** an unauthorized foreign insurer to either obtain a license to conduct insurance business

in New York, or to post a bond with the clerk of the court in which the proceeding is pending, before filing any pleading in a proceeding against it.") (emphasis added).[2]

Importantly, the Security Statutes are considered state regulatory requirements, and not mere prejudgment security. *British Int'l Ins. Co. v. Seguros La Republica, S.A.*, 212 F.3d 138, 143 (2d Cir. 2000) (per curiam) ("Unlike most prejudgment security statutes, § 1213 is not available at a plaintiff's option, without any notice to the defendant, ***but is a regulatory requirement imposed on all unlicensed foreign and alien insurers***.") (internal quotation marks omitted; emphasis added). As such, its provisions are mandatory. *Id*. at 140 (statute "***requires*** unauthorized or foreign alien insurers . . . to post bonds or other security before they are permitted to defend a case on the merits in New York courts") (emphasis added); *see also id*. ("***mandating*** that out-of-state insurers post security or obtain a license in order to be allowed to participate in court proceedings") (emphasis added). As such, BCLIC is entitled to security from Beechwood under the New York Security Statute, and WNIC is entitled to security from Beechwood under the Indiana Security Statute.

The purpose of the Security Statutes is straightforward. As held by the New York Court of Appeals, "Insurance Law 1213 has clear objectives. It imposes accountability on foreign or alien carriers who, although not authorized to do business in this State, issue or deliver insurance policies here." *Levin*, 95 N.Y.2d at 526. Domestic insureds or cedents should not have to resort to distant forums to collect judgments against foreign unauthorized insurance or reinsurance

[2] Likewise, under Indiana law, before an unauthorized foreign insurer can file any responsive pleading in an action against it, "such unauthorized insurer ***must*** deposit with the clerk of the court . . . cash or securities or file with such clerk a bond . . . in an amount to be fixed by the court sufficient to secure the payment of any final judgment . . . or procure a certificate of authority to transact the business of insurance in the state." 16 Ind. Law Encyc. Insurance § 247 (emphasis added) (citing Ind. Code § 27-4-4-4(a)(1), (2)).

companies. *In re MF Glob. Holdings Ltd.*, 569 B.R. at 449; *British Int'l Ins. Co.*, 212 F.3d at 140. This law has "clear objectives," including "impos[ing] accountability on foreign or alien carriers who, although not authorized to do business in this State, issue or deliver insurance policies here" by ensuring that those entities' "funds will be available in this State to satisfy any potential judgment against it from the proceeding." *Levin*, 95 N.Y.2d at 526-27; *see also In re MF Glob. Holdings Ltd.*, 569 B.R. at 549 (same); *Curiale v. Ardra Ins. Co.*, 88 N.Y.2d 268, 275 (N.Y. 1996) (Section 1213 ensures that "[a]lien insurers [will] maintain sufficient funds in the [s]tate to satisfy any potential judgment arising from the policies of insurance (including reinsurance treaties) they issue").

Thus, the Security Statutes were enacted to achieve the very purpose that WNIC and BCLIC seek to uphold in this motion: to ensure that an "unauthorized foreign or alien" reinsurer cannot render legal proceedings such as this proceeding meaningless by frustrating their ability to collect on a judgment or award. *See Quanta Specialty Lines Ins. Co. v. Inv'rs Capital Corp.*, 2008 WL 1910503, at *8 (S.D.N.Y. Apr. 30, 2008) (citing *British Int'l Ins. Co. Ltd.*, 212 F.3d at 140).

This provision also "benefits . . . foreign insurance companies" by permitting such entities "to operate in [the states] without first obtaining insurance licenses." *Signal Mut. Indem. Ass'n, Ltd. v. Rice Mohawk U.S. Const. Co.*, 1997 WL 148813, at *2 (S.D.N.Y. Mar. 28, 1997). As a result, foreign insurance companies, unlike "licensed insurers," do not need to "maintain certain reserves and deposits (*see, e.g.*, Insurance Law §§ 1115 [limitation of risk], 1303 [maintenance of reserves], 1314-1320 [deposit of securities])." *Curiale*, 88 N.Y.2d at 277. These statutes "accomplish[] [their] purpose[s] . . . by mandating that out-of-state insurers post security or obtain a license in order to be allowed to participate in court proceedings in [the states]."

British Int'l Ins. Co., 212 F.3d at 140. "[B]y requiring a foreign carrier to post a bond at the outset of a proceeding, the statute seeks to assure that a foreign carrier's funds will be available in this State to satisfy any potential judgment against it from the proceeding." *Levin*, 95 N.Y.2d at 527.

Instead of obtaining insurance licenses in New York and Indiana, Beechwood chose the alternative option offered under the Security Statutes: continue operating without a license, but be on the hook for full security if it was sued in the future. Beechwood made that choice, and it benefited from that choice. For years, Beechwood avoided having to maintain reserves and deposits in both New York and Indiana while it continued transacting business with residents of those states. Now it has been sued by New York and Indiana residents. As such, BCLIC and WNIC are entitled to security from Beechwood under the Security Statutes of New York and Indiana, respectively.

B. The Security Statutes Apply to Reinsurers

The New York Security Statute governs not only unauthorized foreign or alien insurers when insureds bring damages claims against them, but also unauthorized foreign or alien ***reinsurers*** when the ceding insurers bring damages claims against them. *British Int'l Ins. Co. Ltd.*, 212 F.3d at 141 ("[T]he argument that a reinsurance contract is not a policy of insurance or a contract of insurance is not sufficient to contravene the express language of § 1101(b)(2) . . . . [T]he express language of § 1101(b)(2) demonstrates that . . . the legislature . . . did not intend that unauthorized reinsurers be exempted from New York's long-arm statute and [S]ecurity [Statute] requirement.") (internal quotation marks and citations omitted); *Nw. Nat'l Ins. Co. v. Kansa Gen. Ins. Co., Ltd.*, 1992 WL 367085, at *3 (S.D.N.Y. Nov. 25, 1992) (imposing requirements of New York Security Statute against unauthorized foreign or alien reinsurer before permitting it to file pleading); *Am. Centennial Ins. Co. v. Seguros La Republica, S.A.*, 1992 WL

162770, at *1 (S.D.N.Y. June 22, 1992) (stating that the legislature made clear that the Security Statute applied to unauthorized foreign or alien reinsurers, in addition to insurers); *Morgan v. Am. Risk Mgmt., Inc.*, 1990 WL 106837, at * 4 (S.D.N.Y. July 20, 1990) (noting that N.Y. Ins. Law § 1101(b)(2) makes clear that the Security Statute applies to "transactions with respect to the ***reinsurance*** of risks of authorized insurers [such as BCLIC]") (emphasis added).

That the Indiana Security Statute applies to Beechwood, as the reinsurer here, is apparent from the terms of the Statute itself. The Statute exempts unauthorized foreign or alien reinsurers from the Statute's requirements, but only if the reinsurance agreement at issue "contains a provision designating the [state's insurance regulator] or a bona fide resident of the state of Indiana to be [the reinsurer's] true and lawful attorney upon whom may be served all lawful process." Ind. Code § 27-4-4-6. The Reinsurance Agreement between WNIC and Beechwood contains no such provision.[3]

C. The Security Statutes Apply Not Just to Traditional Pleadings but Also to Motions to Dismiss and Motions to Compel Arbitration, and Beechwood Was Required to Post Security Before Filing Its Motion to Dismiss or Compel Arbitration

Both Security Statutes require that Beechwood post ***pre-pleading*** security, that is, that Beechwood post security ***before*** submitting any pleading in this proceeding. *Levin*, 95 N.Y.2d at 527-28; *Nw. Nat'l Ins. Co.*, 1992 WL 367085, at *3 (requiring reinsurer to post security under New York's Security Statute before seeking to compel arbitration). To be sure, the term

[3] Numerous other courts have applied their statutes to reinsurers even where, as in New York and Indiana, the statute does not explicitly refer to reinsurers. *Int'l Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd's of London*, 868 F. Supp. 923, 928-929 (S.D. Ohio 1994) (Ohio law); *Stephens v. Nat'l Dist. & Chem. Corp.*, 1994 WL 1091853, at *1 (S.D.N.Y. Mar. 8, 1994) (Kentucky law); *Security Ins. Co. of Hartford v. Universal Reinsurance Co.*, 2007 WL 214606, at *2 (D. Conn. Jan. 26, 2007) (Connecticut law); *Int'l Ins. Co. v. Caja Nacional de Ahorro*, 293 F.3d 392, 395 (7th Cir. 2002) (Illinois law).

"pleading" under the Security Statutes is interpreted broadly, and includes, but is not limited to, a motion to dismiss, a motion to compel arbitration, and an answer, counterclaim or cross-claim. *See In re MF Glob. Holdings Ltd.*, 569 B.R. at 553. Because Beechwood failed to post any security or to even have the amount of security fixed by the Court, it has already breached the Security Statutes. In any event, under settled law Beechwood's motion has triggered the Security Statutes.

D. Beechwood's Merits Defenses Are Irrelevant Under the Security Statutes

It is settled law that a foreign insurer or reinsurer cannot escape the Security Statutes by attacking the merits of the policyholder's or cedent's case; if they could, the Security Statutes would be meaningless because the court would have to make a merits determination prior to awarding security, while the statutes require that the security be posted ***before*** the foreign insurer or reinsurer is able to argue the merits. As stated by the New York Court of Appeals:

> Allowing Intercontinental to raise its defenses without posting a bond would compromise section 1213(c)'s goal of assuring that funds are available in New York to satisfy any judgment in plaintiff's favor. A foreign carrier could wage extensive, costly motion practice, and yet avoid the bond requirement by simply advancing a host of defenses before interposing a formal answer. If defeated, the carrier could simply ignore the remainder of the proceedings and relegate the plaintiff to a default judgment with no in-State collateral. This is what the Legislature sought to avoid by enacting section 1213(c). We therefore read the term "pleading" to include Intercontinental's motion to dismiss.

Levin, 95 N.Y.2d at 528; *see also Morgan*, 1990 WL 106837, at *8 (holding that "defendants' defenses, no matter how meritorious, have no bearing on the security requirement").

Thus, Beechwood should not be heard to contend that the cross-claims lack merit or are subject to arbitration. What's more, even if Beechwood is entitled to arbitration, under settled law it would still have to post a bond in an amount fixed by this Court before seeking to compel arbitration, and the bond would remain in effect until the arbitration was concluded. *In re MF*

Glob. Holdings Ltd., 569 B.R. at 553 n. 9 ("If the insured files a court proceeding in New York . . . a bond must be posted even if arbtration is ultimately ordered. The protection the statute provides to New York insureds cannot otherwise be assured.").

E. Beechwood Must Post Security or Its Pleading Should Be Stricken with Entry of a Default Judgment

The requirement that an unlicensed foreign reinsurer post security before being allowed to participate in a proceeding against it is so absolute that the failure to do so will result in any pleadings filed by the reinsurer being stricken, with a default judgment being entered against it. *See Curiale*, 88 N.Y.2d at 278-79 (holding that the striking of defendant's answer and entry of default judgment against it for failure to post security in the required time did not violate due process); *Am. Centennial Ins. Co. v. Aseguradora Interacciones, S.A.*, 2000 WL 1425078, at *8 (S.D.N.Y. Sept. 26, 2000) (conditionally "grant[ing the Plaintiff's] motion to strike [the unauthorized foreign insurance defendants'] Answer and enter[ing] a default judgment against [them]" absent the posting of the requisite bond within 60 days); *Skandia Am. Reins. Corp. v. Caja Nacional de Ahorro y Segoro*, 1997 WL 278054, at *2 (S.D.N.Y. May 23, 1997) ("Pursuant to [§ 1213(c)], if a foreign insurer fails to post security as required, a court can grant the movant party's motion by default."); *Signal Capital Corp. v. E. Marine Mgmt. Inc.*, 899 F. Supp. 1167, 1171 (S.D.N.Y. 1995) (requiring an unauthorized foreign insurer to "either post a bond or have its Answer stricken and a default judgment entered").

Accordingly, Beechwood's motion to dismiss WNIC's and BCLIC's cross-claims and its motion to compel arbitration should be stricken. Moreover, before Beechwood is permitted to make any such filings, it must post security in the amount set by this Court, which should be in the amount of any judgment that could be rendered against Beechwood on WNIC's and BCLIC's cross-claims.

F. The Court Should Order Beechwood to Post Security of $180 Million on the Cross-Claim Asserting a Breach of Contract, and $70 Million on the Cross-Claim Asserting Contribution and Indemnity

The Security Statutes require that a court "set a bond in an amount sufficient to 'secure the payment of any judgment which may be rendered in the proceeding.'" *Signal Capital Corp.*, 899 F. Supp. at 1171. As set forth in paragraph 864 of the cross-claims, WNIC and BCLIC seek over $180 million on their breach of contract cross-claim, consisting of the losses WNIC and BCLIC incurred as a result of (a) not receiving, upon recapture and termination of the Reinsurance Agreements, assets having a fair market value equal to the liabilities being recaptured, as Beechwood was required to do under the Reinsurance Agreements (instead, WNIC and BCLIC received assets that were $110 million *less* than the liabilities recaptured); (b) Beechwood's admitted failure to reimburse WNIC and BCLIC in the amount of $18 million for claims and expenses that WNIC and BCLIC paid, but which Beechwood was obligated to pay; and (c) the significant expenses, exceeding $10 million, that WNIC and BCLIC incurred as a proximate result of Beechwood's breaches of the Reinsurance (and accompanying) Agreements and recapture. WNIC also incurred an additional $42 million of losses as a result of Beechwood's failure to repay, upon termination and recapture, the $42 million ceding commission that Beechwood received upon entering into the Reinsurance Agreements. Cross-claims ¶ 864.

In addition, WNIC and BCLIC have asserted a cross-claim seeking contribution and indemnity based on the Receiver's claims against them that are based on Beechwood's conduct and derivative of her claims against Beechwood. *See, e.g.*, FAC ¶¶ 336, 338. This amount is separate and apart from the $180 million WNIC and BCLIC are seeking from Beechwood based on its breaches of contract. As stated above, the $180 million is based in part on the recaptured assets; that is, the difference between assets having a fair market value equal to the liabilities

being recaptured, as Beechwood was required to provide WNIC and BCLIC under the Reinsurance Agreements. Now the Receiver contends that many of the recaptured assets actually belong to the receivership entities, and she seeks to hold WNIC and BCLIC liable for recapturing those assets from Beechwood, and for other damages based on Beechwood's conduct. None of the damages the Receiver seeks from WNIC and BCLIC are included in the $180 million WNIC and BCLIC seek for their breach of contract cross-claim; rather, they will only increase such losses should the Receiver prevail.

WNIC and BCLIC thus respectfully request that the Court require Beechwood to post $250 million in security, as required by the Security Statutes: $180 million for the breach of contract cross-claim, and $70 million for the contribution/indemnity cross-claim.

II. THE LIMITED SECURITY FOR COSTS ORDERED BY THE ARBITRATION PANEL IS IRRELEVANT TO THIS MOTION

In its motions to dismiss and compel arbitration, Beechwood argued that this Court should not award any security because the arbitration panel (the "Panel") already awarded pre-hearing security of $5 million. Dkt. No. 210, at 21. But what occurred in arbitration is irrelevant because the Panel was operating under different rules and ordered a different form of security for different reasons, and in any event, the Panel's decision was issued long ago under a different set of circumstances and do not bind this Court.

First, the Panel did not award any security under the Security Statutes. In its September 14, 2017 Order Regarding Interim Security (Declaration of Adam J. Kaiser ("Kaiser Dec."), Ex. 1), the Panel made clear that it was exercising its discretion under AAA Commercial Rule 37 to fix security in an amount it believed was "just." Kaiser Dec., Ex. 1 ¶ 4. In so ruling, the Panel was guided by the language of the Reinsurance Agreements requiring that any arbitration be "final and binding." *Id.* ¶ 3. While the Panel correctly noted that "there is case law that supports

the Panel ordering the full amount requested by Claimants, and the Panel could so order without regard to any analysis with respect to the merits of Claimant's case," the Panel found that ordering security would not make any arbitral award "any more 'final and binding' due to Beechwood's lack of funds." *Id.* So, the Panel reasoned, security would not achieve a "final and binding" arbitration—what the Reinsurance Agreements required—because Beechwood had little funds to post, and certainly nowhere near the damages WNIC and BCLIC were seeking. That is, the arbitration would never be final and binding, and pre-hearing security could not fix that.

Moreover, the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures (the "AAA Rules"), *available at* https://www.adr.org/sites/default/files/Commercial%20Rules.pdf, may have prevented the Panel from enforcing the Security Statutes to the extent they require a pleading to be stricken and a default judgment entered, and the Panel—made up of seasoned and highly-experienced professional arbitrators—may have concluded as much. *See* AAA Rule 31 ("An award shall not be made solely on the default of a party"); AAA Rule 58 ("The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. *The arbitrator may not enter a default award as a sanction*.") (emphasis added). So, if the Panel ruled that Beechwood would be held in default if it did not post security, Beechwood could potentially seek to vacate any such award on the basis that such a default violated the AAA Rules.

While the Panel had the freedom in arbitration to invoke the discretion afforded by both the AAA Rules and the general rules of law permitting arbitrators to apply legal principles as they see fit, and thus award or reject security for any reason (including that Beechwood couldn't pay it), none of that applies here. WNIC and BCLIC are not asking this Court to fix security for the arbitration, and the AAA Rules and federal law protecting arbitrators' discretion do not apply here (and the AAA Rules potentially preventing entry of a default do not apply here either; to the contrary, the Security Statutes require entry of a default if Beechwood cannot post security). Rather, WNIC and BCLIC are asking the Court to fix security under the Security Statutes, which have been repeatedly interpreted by courts as requiring courts to fix security in the amount at issue as a necessary component of enforcing important state insurance statutes. By the same token, the AAA Rules that may have prevented the Panel from defaulting Beechwood do not apply here; to the contrary, the Security Statutes require entry of a default if Beechwood cannot post security ordered by this Court.

Second, contrary to Beechwood's representations, the Panel's pre-hearing security award had nothing to do with Beechwood paying any judgment. Rather, the pre-hearing award was expressly designed only to ensure that WNIC and BCLIC could recover some portion of the attorneys' fees they had to expend pursuing the arbitration. Kaiser Dec., Ex. 1 ¶¶ 7-9. Plainly, that pre-hearing security for arbitration costs has no overlap with the order WNIC and BCLIC seek here, which is to order security for a merits judgment under the Security Statutes in the amount of the cross-claims. There is no security at all in arbitration for any award against Beechwood, and certainly not for the contribution and indemnity claims asserted in this case more than a year and a half after the Panel issued its pre-hearing security award for costs at a time before the Receiver sued BCLIC and WNIC.

Third, as is always true, the Panel itself noted that it could at any time increase or decrease the amount of pre-hearing security for costs. *See* Kaiser Dec., Ex. 2 ¶ 5 ("The Panel [may] . . . adjust or increase any interim security as appropriate throughout the pendency of this proceeding"). Hence, Beechwood's argument that the pre-hearing security ordered in arbitration—which was solely for costs—represents even the Panel's final say on security is wrong. And, in any event, whatever the Panel may do once the arbitration stay is lifted to require Beechwood to post more funds to cover WNIC's and BCLIC's costs is utterly irrelevant to what this Court ought to do under the Security Statutes in a federal court case.

Fourth, the world has changed since the Panel's Third Order (October 23, 2017). The Receiver has filed a lawsuit against WNIC and BCLIC demanding more than $70 million in damages based on WNIC and BCLIC not discovering and stopping the Platinum/Beechwood fraud. The Receiver and the PPVA Liquidators have admitted in their pleadings that Platinum was a fraud scheme and that Beechwood was Platinum's "alter ego" that conspired with Platinum and other fraudsters to steal WNIC's and BCLIC's money. The Receiver and Liquidators—who have had access to millions of documents that WNIC and BCLIC did not have (and still do not have) access to—have filed detailed pleadings setting forth Beechwood's participation in the fraud. Murray Huberfeld has been sentenced to prison. In 2018, CIMA filed a petition in the Cayman Islands courts to wind up Beechwood, which the Cayman Islands courts granted, detailing other wrongdoing by Beechwood.[4] The idea that the Panel's pre-hearing

[4] In its Winding Up petition, CIMA acknowledged a number of ways in which Beechwood had been a scofflaw under Cayman Islands law, including but not limited to the following: (a) it failed to maintain its minimum capital and solvency requirements, including having a $9.3 million shareholder's deficit in 2014; (b) without seeking CIMA's approval, it entered into an $80 million loan agreement that required CIMA's approval; and (c) it failed to file its annual return, including audited financial statements, with CIMA for 2015 and 2016. Kaiser Dec., Ex. 3.

security award for arbitration costs in 2017 should somehow tie the hands of this Court thereby precluding it from enforcing important state laws in a separate proceeding asserting additional claims in 2019 is simply absurd.

In short, the Security Statutes specifically vest this Court with the authority to determine the security that Beechwood must post to avoid a default judgment in this action. As the Panel correctly noted, case law supports this Court's setting security based on the full amount WNIC and BCLIC are seeking on their claim that Beechwood breached the Reinsurance Agreements. This Court, respectfully, should enforce the Security Statutes and require Beechwood to post security or else have its motions stricken and a default entered.

CONCLUSION

WNIC and BCLIC respectfully request (a) that Beechwood's May 16 and May 17 filings on their motions to dismiss the claims of WNIC and BCLIC and their motion to compel arbitration be stricken, (b) that WNIC and BCLIC be awarded security under the New York and Indiana Security Statutes in the amount of $250 million and (c) for such other and further relief as the Court deems just.

Respectfully submitted,

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