UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	:	18-cv-06658 (JSR)
MELANIE L. CYGANOWSKI, Plaintiff, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-12018 (JSR)

BEECHWOOD RE'S RESPONSE TO
CNO'S MOTION TO ENFORCE STATE SECURITY STATUTES

LIPSIUS BENHAIM LAW LLP
Ira S. Lipsius
80-02 Kew Gardens Rd.
Suite 1030
Kew Gardens, New York 11415
Tel: (212) 981-8440

Attorney for Cross-Claim Defendant
Beechwood Re (in Official Liquidation)
s/h/a Beechwood Re Ltd.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Cross-Claim Defendant Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd. ("Beechwood"), by and through its undersigned counsel, respectfully submits its response to the motion filed by Cross-Claim Plaintiffs Bankers Conseco Life Insurance Company ("BCLIC") and Washington National Insurance Company ("WNIC") (collectively, "CNO") seeking $250 million in security (the "Motion").

INTRODUCTION

For years, CNO has tried to avoid accountability for its tortious acts and contractual breaches. [redacted] When that did not work, in July 2017, CNO filed a motion seeking $137 million in security in a transparent attempt to force a default and prevent Beechwood from asserting its meritorious defenses and counterclaim. [redacted] Indeed, CNO's bad conduct has forced Beechwood into liquidation, which is pending before the Grand Court of the Cayman Islands under Cause No. 144 of 2018 (NSJ).[1]

[redacted]

[1] On May 16, 2019, Beechwood filed a Chapter 15 Petition with the United States Bankruptcy Court for the Southern District of New York, Case No. 19-11560 (MG) (Glenn, J.). That Petition seeks recognition of the Cayman proceedings as a foreign main proceeding and Chapter 15 relief. On June 25, 2019, Beechwood filed a Renewed Motion for Provisional Relief in that proceeding, which explains that an adverse determination on CNO's security motion would severely prejudice the ability of the Cayman Court to adjudicate the Cayman Proceeding and oversee Beechwood's liquidation as provided for under Cayman Law. (No. 19-11560, ECF No. 23.)

[redacted]

When requesting security in the arbitration, CNO directed the arbitrators to the exact same security statutes that it now cites to this Court—New York Insurance Law § 1213 and Indiana Law § 27-4-4-4 (the "Security Statutes"). The arbitrators made an express determination that these Security Statutes applied, but then rejected CNO's request for the $137 million as unsubstantiated. The arbitrators instead directed Beechwood to post $5 million, which Beechwood did. Importantly, the arbitrators' award was confirmed by this Court and reduced to judgment.

Unsatisfied with this result, CNO now takes a second shot at security under the exact same Security Statutes, this time demanding $250 million. CNO provides no evidence to support its "pie in the sky" demand, which is not a reasonable estimate of any final judgment that could responsibly be rendered. Contrary to CNO's assertions, this Court is not required to blindly accept CNO's far-fetched number. Equally importantly, CNO has no business litigating its disputes with Beechwood in this Court given the parties' pending arbitration and this Court's judgment confirming the arbitrators' previous adjudication of the Security Statutes. Indeed, those statutes have been held not to apply to foreign insurers in pending foreign liquidation proceedings, like Beechwood.

CNO abuses the spirit, purpose and letter of the Security Statutes. As set forth below, CNO's Motion should be denied because (I) the arbitrators must decide the preclusive effect of their Orders regarding security, not this Court, (II) the doctrines of *res judicata* and collateral

estoppel bar CNO from relitigating its claim under the Security Statutes, (III) CNO is already fully secured, and (IV) CNO's request for security is therefore untethered to any final judgment.

FACTUAL BACKGROUND

Beechwood is a Cayman Islands-based life and annuity reinsurer. Founded in 2013, Beechwood served customers like CNO seeking reinsurance for long-term care insurance programs. The disputes between CNO and Beechwood arise under the separate Reinsurance Agreements Beechwood entered into with BCLIC and WNIC in February 2014 (the "Reinsurance Agreements"). (*See* Ex. 1 [Reinsurance Agreements].) Pursuant to the Reinsurance Agreements and related trust agreements, CNO ceded to Beechwood 100% of the liabilities arising under certain long-term care insurance policies, and CNO provided agreed-upon assets to Beechwood for the payment of claims arising under those policies. As consideration for this transaction, CNO paid Beechwood a negative ceding commission of $42.2 million.

The Security Provisions

Under the Reinsurance Agreements, CNO assumed a risk of loss with respect to the assets and liabilities that it ceded to Beechwood. In order to mitigate that risk, the parties agreed at the outset to terms providing for collateral and setting forth a formula as to how the required collateral would be calculated. (*See id.* at B013 ("at all times during the term of this New York Reinsurance Agreement, Reinsurer shall provide collateral and enter into the New York Trust Agreement . . . ." (emphasis added)), 203 (effectively same).)

The agreed collateral terms, as set forth in the Reinsurance Agreements, are that the reinsurance program must remain collateralized at 107% of the expected liabilities. (*See id.* at B013–16, 203–06.) These provisions required Beechwood to maintain a "Trust Amount" equal to 107% of "the book value of the statutory reserves necessary for [the] Ceding Company to take full statutory credit for the reinsurance ceded pursuant to" the Reinsurance Agreements. (*Id.* at B009,

198.) Thus, the parties effectively agreed that CNO would be entitled to 7% in security over and above the statutory reserves for expected liabilities under the Reinsurance Agreements.

CNO's Wrongful Termination And Improper Recapture Of Trust Assets

The reinsurance arrangement initially proceeded without incident. However, in reaction to negative publicity relating to Platinum Partners, on September 29, 2016, CNO sent Beechwood a letter purporting to immediately terminate the Reinsurance Agreements in direct violation of the contractual notice and cure provisions. (*Id.* at B021–23, 212–13; Ex. 2.)

The same day CNO issued its improper termination notice, CNO instructed the trustee to immediately return all assets in the trust accounts to CNO. [redacted][2]

[redacted]

[2] The parties agreed that Beechwood had no obligation to return any portion of the $42.2 million negative cede unless WNIC properly terminated the pertinent Reinsurance Agreement pursuant to Section 9.2. (*See*, *e.g.*, Ex. 1, at B212–13.) As explained herein, WNIC never properly terminated the Reinsurance Agreement; accordingly, Beechwood (not WNIC) is entitled to retain the negative cede.

[redacted]

The Arbitration

On September 29, 2016 (the same day as the wrongful termination), CNO initiated an arbitration against Beechwood by filing a 147-paragraph demand. (Ex. 5 [Arbitration Demand].) CNO initiated the arbitration pursuant to broad arbitration provisions contained in the Reinsurance Agreements requiring arbitration of "all disputes or differences between the Parties arising under or relating to th[ese] Reinsurance Agreement[s] upon which an amicable understanding cannot be reached . . . ." (Ex. 1, at B023–24, 213–14.)

CNO's arbitration demand asserted sweeping claims for breach of contract, breach of fiduciary duty, conversion, fraud, negligent and intentional misrepresentation, civil conspiracy, and violation of the Racketeer Influenced and Corrupt Organizations Act. (*See* Ex. 5, ¶¶ 147(A–C).) [redacted]

[redacted]

CNO's Request For Security In The Arbitration

On July 28, 2017, ten months after filing its arbitration demand, CNO filed a "Motion for Interim Security" in the arbitration, seeking $137 million in security for its purported damages under the Reinsurance Agreements. (*See* Ex. 8 [Motion for Interim Security], at 2.) Among other things, CNO contended that Beechwood was required to post this security pursuant to the Security Statutes because Beechwood was not an admitted reinsurer in New York or Indiana. (*See id.* at 12–17.)

On August 11, 2017, Beechwood responded to CNO's motion asserting that the Security Statutes did not apply to the arbitration and, even if they did, CNO was not entitled to any security because (1) the Reinsurance Agreements already provided for security, and CNO already recaptured that security and more; (2) CNO wrongfully terminated the Reinsurance Agreements, barring its alleged claims against Beechwood; and (3) the damages calculations upon which CNO based its request for security were overstated and unreliable on their face. (*See* Ex. 9 [Response to Motion for Interim Security], at 1–3.)

The parties supported their positions with extensive briefs, affidavits, and documentary evidence. (*See* Exs. 8–9; Ex. 10 [Reply to Motion for Interim Security and Declarations].)

The Arbitration Security Orders

After hearing extensive oral argument, the arbitrators issued several Orders regarding security in August through October 2017. (*See* Ex. 11.)[3] Importantly, the arbitrators found that the Security Statutes applied and that "Beechwood Re may be ordered to post pre-hearing security sufficient to secure the payment of any final judgment in this proceeding" pursuant to those Statutes. (Ex. 12, at 1.) Specifically, the arbitrators held:

> New York Insurance Law §1213 and Indiana Law §27-4-4-4 apply to reinsurance contracts and to arbitration proceedings and are part of the regulatory framework of those States. As such, Beechwood Re may be ordered to post pre-hearing security sufficient to secure the payment of any final judgment in this proceeding[.]

(*Id.*) The arbitrators determined, however, that the $137 million of security requested by CNO would "not afford a just result as too many questions remain open," citing to discrepancies in CNO's alleged damages calculations. (Ex. 13, at 2.) Ultimately, the arbitrators directed Beechwood to post $5 million in security to be deposited in an escrow account. (Ex. 11, at 2.) Beechwood posted this security. (*See* Ex. 14.)

In November 2017, the arbitrators issued an additional Order regarding security and directing Beechwood to transfer the monies from the escrow account into a letter of credit. (*Id.*) Beechwood complied with this Order and the $5 million of security remains posted in the letter of credit today. (Ex. 15.)

CNO Confirmed The Security Orders

On April 23, 2019, CNO filed its unopposed "Motion to Confirm Arbitral Awards" with this Court, requesting that the Security Orders be confirmed pursuant to Section 7 of the Federal

[3] The arbitrators issued Orders on the following dates: August 22, 2017, September 14, 2017 and October 23, 2017. These Orders are attached as Exhibits 11 through 13 and referred to collectively as the "Security Orders."

Arbitration Act ("FAA") and reduced to a judgment. (ECF No. 286.)[4] On April 24, 2019, this Court granted the motion and entered its "Judgment Confirming Arbitral Awards." (ECF No. 293.)

CNO's Request For Security In This Court Action

On March 27, 2019, CNO filed its Answer, Cross-Claims and Third-Party Complaint in the captioned lawsuit. (ECF No. 204.) In the cross-claim, CNO filed breach of contract (Count 10) and contribution and indemnity (Count 18) claims against Beechwood. (*Id.* at 227–28, 242.) As in the arbitration, CNO generally alleges that Beechwood breached the Reinsurance Agreements and committed fraud by hiding its connections to Platinum and improperly investing trust assets in Platinum-related investments. (*Id.* at 95–150, 227.) As in the arbitration, CNO contends that due to Beechwood's misconduct, the trust assets are not sufficient to meet the expected liabilities for the ceded claims. (*Id.* at 227.) As in the arbitration, CNO seeks hundreds of millions of dollars in damages for the alleged deficit. (*See id.* at 227–28.)

The allegations in CNO's cross-claim mirror the allegations in CNO's arbitration demands. For example, attached as Exhibit 16 is a chart comparing the allegations for breach of contract across CNO's pleadings, which shows the extensive overlap.

As part of the cross-claim, CNO cites to just one of the Security Statutes and asks the Court to award it security for its purported damages. (*Id.* at 228.) Thereafter, CNO filed its current Motion asking the Court to order Beechwood to post $250 million in security under the Security Statutes.

[4] Unless otherwise noted, citations to the docket refer to the docket in the case captioned *In re Platinum-Beechwood Litigation*, No. 18-cv-06658-JSR.

Beechwood's Motion To Compel Arbitration

On May 16, 2019, Beechwood filed a motion asking this Court to compel CNO to arbitrate the cross-claims it has filed in this case. (ECF Nos. 378–79.) [redacted] Rather, CNO seeks to force Beechwood to default, thereby (a) relieving CNO of its burden to actually prove its alleged damages, which it cannot do, and (b) defeating Beechwood's meritorious counterclaim pending in the arbitration.

ARGUMENT

This Court does not tolerate parties who knowingly "pursue[] claims that either should have been decided in arbitration, as the plaintiffs' contracts specified, or were completely without merit." *Banus v. Citigroup Glob. Mkts., Inc.*, 757 F. Supp. 2d 394, 402–03 (S.D.N.Y. 2010) (entering sanctions against plaintiffs' attorney where, after participating in an arbitration for almost eighteen months, the plaintiffs filed a court action presenting arbitrable claims that were "baseless" and "made in bad faith," with the goal of delaying the arbitration). But, as explained herein, that is precisely what CNO has done here. CNO's Motion should be denied because (I) the arbitrators

must decide the preclusive effect of their Security Orders, (II) the doctrines of *res judicata* and collateral estoppel bar CNO from relitigating its claim under the Security Statutes, (III) Beechwood has already satisfied the Security Statutes, and (IV) the Security Statutes do not apply to foreign insurers in pending foreign liquidation proceedings.

I. The Arbitrators Must Decide The Preclusive Effect of Their Security Orders.

Under the FAA, all of the parties' disputes arising under the Reinsurance Agreements must be arbitrated pursuant to the broad arbitration provisions contained in those Agreements. *See* ECF No. 379, at 19–21; *see also* 9 U.S.C. §§ 3, 4. By agreement, such arbitration is governed by the American Arbitration Association's (AAA) Commercial Arbitration Rules, including Rule R-7 providing that the arbitrators "shall have the power to rule on [their] own jurisdiction." Ex. 1, at B023, 213; Ex. 18, at R-7(a); *see also, e.g.*, *Gwathmey Siegel Kaufman & Assocs. Architects, LLC v. Rales*, 518 F. App'x 20, 21 (2d Cir. 2013) (by incorporating the AAA Rules into their arbitration agreement, the parties clearly and unmistakably expressed their intent to have the arbitrator decide disputes over arbitrability); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208–09 (2d Cir. 2005) (same).

CNO's request for security in its current Motion is precluded by the previous Security Orders entered in the arbitration. Under the FAA and AAA Rules cited above, however, the preclusive effect of the Security Orders is a question for the arbitrators to resolve, rather than this Court. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Belco Petroleum Corp.* ("*Belco*"), 88 F.3d 129, 131 (2d Cir. 1996); *see also Citigroup, Inc. v. Abu Dhabi Invest. Auth.*, 776 F.3d 126, 130–32 (2d Cir. 2015).

In *Belco*, the Second Circuit affirmed the district court's holding that the preclusive effect of a prior, related arbitration between the parties must be determined by the arbitrator in the current arbitration, rather than by the court. *Belco*, 88 F.3d at 131, 135–36. The Second Circuit found

that the preclusion issue was "itself a component of the dispute on the merits." *Id.* at 135–36. The Second Circuit then concluded that the arbitration provision was broad enough "to encompass disputes about what was decided in a prior arbitration." *Id.* at 136; *see, e.g.*, *Citigroup, Inc.*, 776 F.3d at 131 ("[I]it is a simple intuitive step to conclude that the arbitrators should also decide the claim-preclusive effect of a federal judgment confirming an arbitration award."); *Stamford Holding Co. v. Clark*, No. 3:02CV1236, 2003 WL 1597206, *7 (D. Conn. Mar. 25, 2003) (requiring preclusive effect of prior arbitration to be arbitrated).

Because the broad arbitration provisions in the Reinsurance Agreements likewise encompass disputes about what was decided in the Security Orders, the preclusive effect of the Security Orders must be arbitrated. This is particularly obvious here, where CNO has confirmed that all of the parties' disputes will ultimately be ordered back to arbitration. (*See* Ex. 17 ("After the Court fixes the additional security, if any, Beechwood Re must post and Beechwood Re posts it, Claimants will join Beechwood Re in seeking to refer the contract dispute back to the Panel (assuming that Beechwood Re also seeks that relief).").)

II. *Res Judicata* And Collateral Estoppel Bar CNO From Relitigating Its Claim Under The Security Statutes.

If this Court nevertheless considers the merits of CNO's Motion, the Motion should be denied on the grounds of *res judicata* and collateral estoppel.

As an initial matter, CNO contends that this Court cannot consider Beechwood's claim preclusion arguments until *after* Beechwood posts the $250 million of security CNO demanded under the Security Statutes. This exact argument was considered and rejected in *Moore*, where the plaintiff sought security from a Brazilian reinsurer under the New York Security Statute and moved to strike the reinsurer's preclusion defense for "failure to post a pre-answer security." *Moore v. Aegon Reinsurance Co. of Am.,* 608 N.Y.S.2d 166, 169 (N.Y. App. Div. 1994). The

court had no difficulty holding that the plaintiff was collaterally estopped from seeking the security based on the "practical construction of the statutes in view of the 'realities' of this litigation," where the request for "security pursuant to Insurance Law § 1213(c)(1) raised in this action is identical to the issue raised in the federal action involving the identical parties." *Id.* at 171, 173 (citation omitted).

This Court should similarly consider Beechwood's claim preclusion arguments here, which likewise bar the demand for security.

A. *Res Judicata* Bars CNO's Motion.

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 284–85 (2d Cir. 2000) (citations omitted). The doctrine applies here because the Security Orders are: (1) a judgment on the merits, (2) from a prior action between the same parties, and (3) the claim asserted here was raised in the arbitration. *See Greco v. Local.com Corp.*, 806 F. Supp. 2d 653, 657 (S.D.N.Y. 2011) (citations omitted).

First, the Security Orders were confirmed by this Court and reduced to a judgment on the merits.[5] (ECF Nos. 287-1, 287-2, 293.) Numerous courts recognize that confirmed arbitration awards are final judgments for purposes of *res judicata*. *E.g.*, *Ufheil Constr. Co. v. Town of New Windsor*, 478 F. Supp. 766, 768 (S.D.N.Y. 1979) ("The doctrines of res judicata and collateral

[5] It is well-established that prehearing security awards are deemed "final" awards that may be confirmed and reduced to judgment in court. *See, e.g.*, *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 259, 261–64 (2d Cir. 2003); *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Cont'l Cas. Co.*, 37 F.3d 345, 348–51 (7th Cir. 1994).

estoppel apply to issues adjudicated in arbitration where the arbitration award has been entered as a judgment." (citation omitted)), *aff'd*, 636 F.2d 1204 (2d Cir. 1980).

Second, the arbitration was initiated before the current action and involves Beechwood and CNO. (*See* Exs. 5, 6.) Thus, the final judgment is from a prior action involving the same parties.

Third, the claim CNO asserts here was raised in the arbitration. In the arbitration, CNO asked the arbitrators to award it security under the Security Statutes. (Ex. 8, at 18–29.) The arbitrators in fact did so, finding:

> New York Insurance Law §1213 and Indiana Law §27-4-4-4 apply to reinsurance contracts and to arbitration proceedings and are part of the regulatory framework of those States. As such, Beechwood Re may be ordered to post pre-hearing security sufficient to secure the payment of any final judgment in this proceeding.

(Ex. 12, at 1.) CNO now asks this Court to award it security under the exact same Security Statutes.

Moreover, CNO is seeking security for the same alleged fraud and breaches of the Reinsurance Agreements. "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Monahan*, 214 F.3d at 285 (citations omitted). All of these elements are present here, where CNO has improperly presented duplicative claims in the arbitration and this action, supported by the same alleged facts and purported evidence. (*See* Ex. 16 (comparing allegations in CNO's arbitration demands and cross-claim).)

Based on the above, all elements of *res judicata* are satisfied and the Motion should be denied. CNO's arguments to the contrary should be rejected for the following reasons:

- CNO contends that the arbitrators did not order security under the Security Statutes. (ECF No. 436, at 18.) As demonstrated by the following points, CNO is wrong: (1) CNO

expressly asked the arbitrators to award security pursuant to the Security Statutes, (2) the arbitrators expressly found that the Security Statutes were applicable to the arbitration, and (3) the arbitrators then ordered Beechwood to post $5 million of security. (Ex. 8; Ex. 11, at 2; Ex. 12, at 1.)

- CNO contends that "the Panel itself noted that it could at any time increase or decrease the amount" of Security. (ECF No. 436, at 21.) But no such increase or decrease has occurred, and this contingency is therefore hypothetical. Moreover, CNO does not challenge the validity of the current Security Orders, which are reduced to judgment and therefore entitled to *res judicata* effect under the authorities cited above.

- CNO complains that the $5 million awarded in the Security Orders was grounded in the amount of CNO's attorney's fees. (*Id.* at 20.) CNO's argument misses the mark because the reason the arbitrators set security based on attorney's fees was because CNO failed to establish a rational basis for its $137 million request. Notably, CNO did not seek to vacate the Security Orders under Section 10 of the FAA on the grounds that the arbitrators exceeded their powers by misapplying the Security Statutes. CNO instead confirmed the Security Orders and reduced them to judgment. As such, CNO cannot now complain about the way the arbitrators calculated the security amount.

- CNO contends that "the world has changed" since the Security Orders were entered because, among other things, Beechwood is now in liquidation. (ECF No. 245, at 21.) CNO is wrong because the arbitrators were well aware of Beechwood's precarious financial state when the parties litigated the security issue. (*See* Ex. 8, at 10 & n.2 (CNO points to the appointment of controllers for Beechwood as demonstrating that "security is particularly warranted here").) Indeed, Beechwood was placed into liquidation in November 2018—two months before the

arbitrators issued their final Order regarding security, which Order was subsequently confirmed by this Court and serves as the basis for Beechwood's *res judicata* defense. (Ex. 11.) In any event, CNO fails to provide any legal authority suggesting that "changed circumstances" are sufficient to trump the preclusive effects of the arbitrators' Security Orders.

B. Collateral Estoppel Bars CNO's Motion.

Collateral estoppel prevents a party from relitigating "an issue of fact or law" in a subsequent proceeding "that was fully and fairly litigated in a prior proceeding" where: "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003) (citation omitted); *see Dundon v. Komansky*, 15 F. App'x 27, 29 (2d Cir. 2001) ("[I]t is clear that issue preclusion or collateral estoppel does apply to arbitration decisions." (citation omitted)). All requirements are again satisfied and preclude CNO from relitigating its request for security under the Security Statutes.

First, as addressed above, the previous arbitration considered identical issues to that currently before this Court—CNO asked the arbitrators to award it security under the same Security Statutes based on the same alleged misconduct.

Second, as addressed above, the security issue was actually litigated and decided in the arbitration, where the arbitrators entered the Security Orders after receiving extensive briefs, affidavits, and oral argument from the parties. Those Security Orders were later confirmed by this Court and reduced to a judgment.

Third, as addressed above, CNO had a full and fair opportunity to litigate its demand for security in the arbitration, as evidenced by the sheer volume of the submissions CNO gave to the arbitrators on security.

Fourth, as addressed above, resolution of the issue was necessary to support the arbitrators' award granting CNO security. The arbitrators could not have entered the Security Orders without making a determination that the Security Statutes applied, as CNO asserted those Statutes as a basis for the security award. The arbitrators further made an express determination that the Security Statutes applied.

Based on all of the above, all requirements for collateral estoppel are satisfied, providing independent grounds to bar CNO's Motion.

III. Beechwood Has Already Satisfied The Security Statutes.

CNO's Motion should be resolved on the grounds addressed above. If the Court nevertheless reaches the issue, the $5 million of security awarded by the arbitrators was unquestionably reasonable, and CNO is not entitled to a penny more under the Security Statutes. As discussed below, (A) the Reinsurance Agreements provided for security, and CNO has already recaptured that security and more, and (B) CNO's demand for $250 million of security is untethered to any potential final judgment.[6]

A. The Reinsurance Agreements Provide For Security, And CNO Has Already Recaptured That Security And More.

The Reinsurance Agreements provide the precise security to which CNO is entitled, *i.e.,* Beechwood was required to deposit 107% of the statutory reserves into the trust account—100% to fund the expected liabilities and 7% to+erve as collateral. (Ex. 1, at B013, 15, 203, 205.) [redacted]

[redacted]

[6] The following provides just a sketch of the evidence the arbitrators reviewed in advance of their determination that CNO was entitled to only $5 million of security under the Security Statutes. If the Court decided to consider the merits of the parties' respective positions, Beechwood requests the opportunity to present evidence at a live hearing.

[redacted]

[redacted]

B. CNO's Request For $250 Million Security Is Untethered To Any Final Judgment.

CNO contends that this Court must blindly accept its $250 million damages estimate. (ECF No. 436, at 17–18.) This position does not square with the Security Statutes, which only permit security as "sufficient to secure payment of any final judgment which may be rendered in the proceeding . . . ." N.Y. INS. LAW § 1213(c)(1)(A) (emphasis added); *see* IND. CODE § 27-4-4-4(a)(1) (same). Where the amount of the final judgment is contested—as it is here—courts must analyze the facts and circumstances of the case to set an appropriate amount of security, not just accept the full amount of damages alleged by plaintiffs.

"The New York Court of Appeals has stated that 'calculating the amount of the bond that Insurance Law §1213(c) requires' involves 'the full task of fixing the amount and necessarily falls within the trial court's discretion." *In re MF Glob. Holdings Ltd.*, 569 B.R. 544, 555–56 (S.D.N.Y. Bankr. 2017) (citations and internal marks omitted). Without such review by the courts, nothing "would prevent a plaintiff from requesting a gargantuan bond based on a hypothetical payday, which may nevertheless have no basis in reality." *Id.* at 556 (awarding bond of $15 million where plaintiff sought $60 million under New York Security Statute); *see Dombrovski v. Sirius Int'l Ins. Corp.*, No. 1:07CV0379, 2007 WL 2624804, at *3 (N.D. Ohio Sept. 6, 2007) (ordering pre-answer bond of $800,000 despite plaintiff's request for security of $2.3 million); *Signal Capital Corp. v. E. Marine Mgmt., Inc.*, 899 F. Supp. 1167, 1171 & n.7 (S.D.N.Y. 1995) (rejecting request for $2,000,000 and setting bond at $1,000,000 "because the record on this issue is scant and plaintiff has not yet met its burden of showing that the policy limit is as it claims").

CNO's request for $250 million of security is the "gargantuan" "hypothetical payday" with "no basis in reality" warned of by the New York courts. CNO "calculates" the $250 million in two parts, claiming that it is entitled to: (1) $70 million in security for its contribution/indemnity

claim because the PPCO Receiver seeks not less than $70 million from CNO, and (2) $180 million in security for its breach of contract claim based primarily on alleged deficiencies in the trust assets. (ECF No. 436, at 6.) CNO offers no actual evidence to support any of these amounts.

First, Beechwood is not and cannot be responsible for any of the $70 million sought from CNO by the PPCO Receiver. This is because the Receiver's claims against CNO are not "derivative" of claims against Beechwood—they seek damages from CNO based on CNO's own alleged misconduct. (*See* ECF No. 209, ¶¶ 336–39.) Moreover, CNO's claim for indemnity has not yet even accrued. *See, e.g.*, *Prudential Lines, Inc. v. Gen. Tire Int'l Co.*, 440 F. Supp. 556, 558 (S.D.N.Y. 1977) ("It is well settled that a cause of action for indemnification accrues not when the damage to the third party occurs, but when the judgment or settlement has been paid." (citations omitted)); 41 Am. Jur. 2d *Indemnity* § 23 ("[i]ndemnification obligations generally accrue only on an event fixing liability rather than on preliminary events that eventually may lead to liability but have not yet occurred.").

In addition, CNO provides no basis to support the $70 million, which appears to be an estimate it accepts wholesale from the PPCO Receiver. *See, e.g.*, *Morgan v. Am. Risk Mgmt., Inc.*, No. 89 CIV 2999, 1990 WL 106837, at *8 (S.D.N.Y. July 20, 1990) (rejecting requested security amount that was based on estimates). Neither CNO nor the Receiver describe their calculation for the $70 million number. As such, there is no reasonable basis to conclude that a "final judgment" would be rendered against Beechwood on the indemnity/contribution claim, whether in the amount of $70 million or otherwise.

Second, in the arbitration, Beechwood provided a mountain of evidence to the arbitrators showing why CNO's asserted damages based on alleged trust deficiencies were unreliable. The

arbitrators found Beechwood's evidence raised genuine questions surrounding CNO's alleged damages, finding in the Security Orders that:

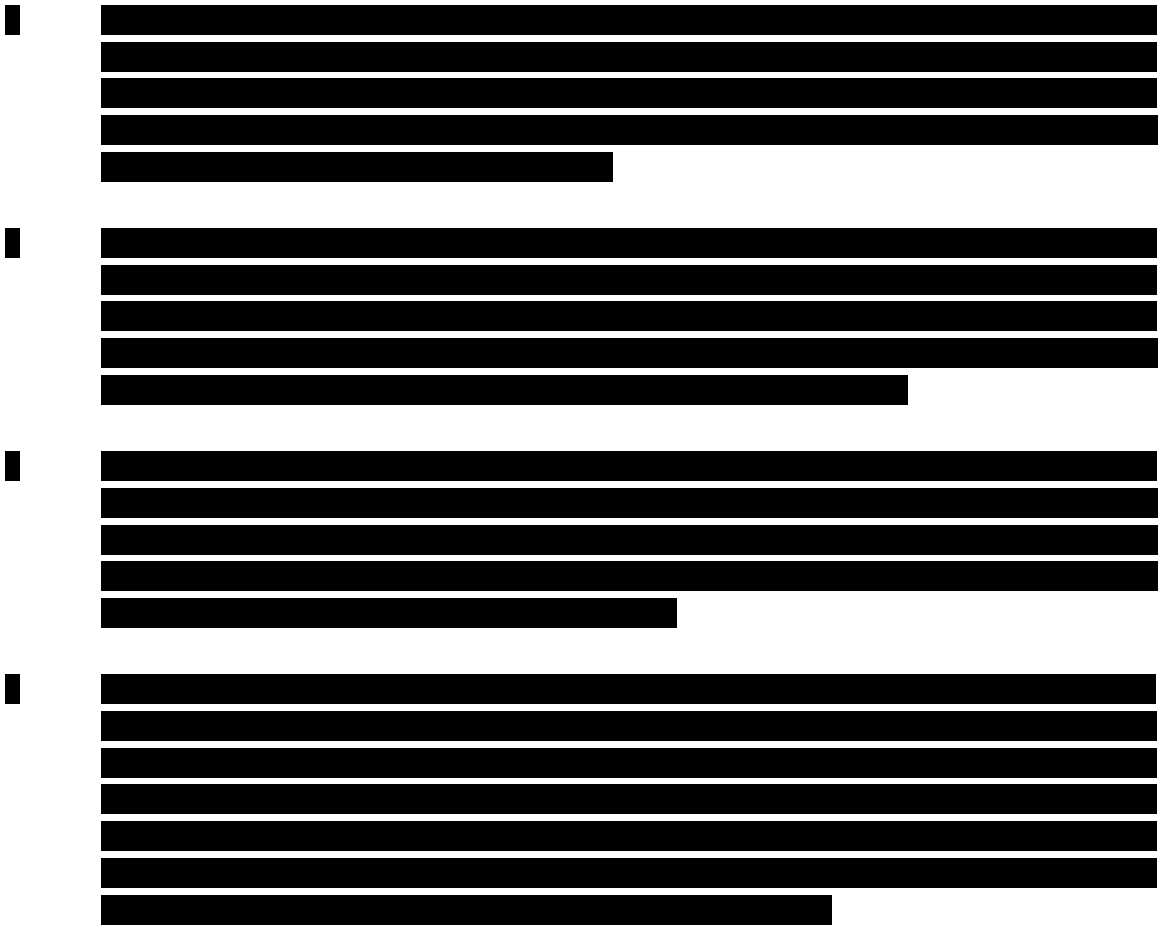
> While Claimants suggest they have suffered loss exceeding $137 Million, Beechwood suggests that the losses, if any are $25 Million and that CNO holds security for nearly twice that amount. In reality, assets continue to be liquidated and a difference in discount rates is likely to be the largest determining factor with respect to damages, if any. One view of the discount rate supports Claimant's request and the other view suggests that CNO is currently over-collateralized;
>
> . . . The Panel is not convinced that either party has sufficiently made their case, and they are not required to at this point in time, which is why the Panel believes that justice requires a full hearing on this matter rather than a default judgment with a determination of damages . . . .

(Ex. 13, ¶¶ 5–6.) Based on the above, the arbitrators awarded CNO just $5 million under the Security Statutes, an appropriate result given the arbitrators' finding that CNO had not "sufficiently made [its] case" to establish the reasonableness of its alleged damages. *See, e.g.*, *Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 566 (S.D.N.Y. 2006) ("[T]he burden is on the party seeking security to establish a rational basis for the amount of the proposed bond."), *aff'd*, 246 F. App'x 73 (2d Cir. 2007).

This Court should likewise determine that CNO's asserted damages are not credible and that they are untethered to any reasonable final judgment amount. Among other reasons:

[redacted]

[redacted]



Before the arbitrators, CNO responded to each of these points. After reviewing the submissions of both sides, however, the arbitrators were "not convinced that either party has sufficiently made their case," and on that basis determined that the $137 million of security requested by CNO would "not afford a just result as too many questions remain open." (Ex. 13, at 2.)[7]

All of the above examples demonstrate that CNO's calculations for the $250 million in security are both unreliable and unsupported. *See, e.g.*, *Swift Indus., Inc. v. Botany Indus., Inc.*,

[7] Other elements of CNO's alleged damages of $180 million are likewise incredible, including the following: (1) CNO seeks $10 million of alleged "recapture" expenses, but CNO's recapture violated the terms of the Reinsurance Agreements, and CNO cannot recover the expenses it incurred from its own breach; and (2) CNO seeks $42.2 million for the so-called negative cede but, as noted above, that negative cede was only to be returned to CNO in the event of a proper termination of the Reinsurance Agreements, and here CNO's termination was improper. (*See* Ex. 1, at B212–13.)

466 F.2d 1125, 1134–35 (3d Cir. 1972) (setting aside bond award entered in "irrational" amount); *Int'l Equity Invs., Inc.*, 441 F. Supp. 2d at 566 ("In fixing the amount of security required, a court is not required to order security in respect of claimed economic damages that are no more than speculative."); *INSCO Ltd. v. Meadows Indem. Co., Ltd.*, No. 902935, 1993 WL 328376, *1, 4 (C.D. Cal. June 1, 1993) (only awarding pre-hearing security in an amount confirmed by independent experts who reviewed the accuracy and methodology of the petitioners' security calculations).

C. Beechwood Asserts A Meritorious Counterclaim.

Any security award must consider the practical reality that Beechwood has asserted a meritorious counterclaim against CNO in the arbitration. [redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted] CNO's demand for $250 million in collateral fails to account for its substantial exposures for these and other counterclaims asserted by Beechwood against it.

Moreover, CNO knows that Beechwood does not have the funds to satisfy any additional security ordered under the Security Statutes because Beechwood is in liquidation. The true

objective behind CNO's demand is to default Beechwood so that CNO never has to face the arbitrators' adjudication of Beechwood's counterclaim. CNO does not "seek to uphold" the objective of the Security Statutes: it seeks to use the Security Statutes as a weapon to default the meritorious counterclaim of its opponent. (ECF No. 436, at 12.)

In sum, the Court should not award any additional security to CNO because (1) the Reinsurance Agreements already provide CNO security, (2) Beechwood posted the $5 million of security ordered by the arbitrators, (3) CNO's alleged damages are unreliable, and (4) Beechwood has asserted a meritorious counterclaim against CNO.

IV. The Security Statutes Do Not Apply To Foreign Insurers In Pending Foreign Liquidation Proceedings.

Finally, courts in this District have specifically disregarded the Security Statutes when the unauthorized foreign or alien insurer that filed (or plans to file) a pleading is in liquidation in its respective country. *See In re Laitasalo,* 193 B.R. 187, 193–94 (Bankr. S.D.N.Y. 1996); *In re Rubin*, 160 B.R. 269, 279–81 (Bankr. S.D.N.Y. 1993). As the *Laitasalo* Court explained:

> Since section 1213 is primarily a long-arm statute, it should not be used in a bankruptcy proceeding to allow one creditor to gain a preference over other similarly situated creditors. . . . It is philosophically inconsistent with New York Insurance Law that [the Re-Insurance Companies] should be required to post security to defend [themselves] against [the Commissioner's] claim. In essence, that security would transform her unsecured claim into a secured claim to the detriment of the other U.S. creditors who are solvent or insolvent insurance companies, some of which are being liquidated by state insurance commissioners. [The Commissioner], however, may continue the prosecution of her claim in the New York Supreme Court, without requiring the Re-Insurance Companies to post security.

In re Laitasalo, 193 B.R. at 193–94 (emphasis added).

This is exactly what CNO is trying to do through its Security Motion. Knowing that Beechwood is unable to post the $250 million in additional security, CNO is trying to, in one

punch, eliminate its potential significant liability under the counterclaim, obtain a default judgment against Beechwood and secure the $5 million posted for security in the CNO Arbitration (which, depending upon the outcome of the CNO Arbitration, could undermine any possibility of distribution by Beechwood in the Cayman Proceedings). CNO would be using this long-arm statute to effectively advance its interests and claims—all to the detriment of all other creditors of Beechwood's estate. Such an approach runs contrary to established law.

CONCLUSION

For all of the above reasons, Beechwood respectfully requests the Court deny CNO's Motion to enforce the Security Statutes in its entirety because (I) the arbitrators must decide the preclusive effect of their Security Orders, (II) the doctrines of *res judicata* and collateral estoppel bar CNO from relitigating its claim under the Security Statutes, (III) CNO is already fully secured, and (IV) CNO's request for security is untethered to any final judgment.

Dated: June 26, 2019

LIPSIUS BENHAIM LAW LLP

/s/ Ira S. Lipsius

Ira S. Lipsius
80-02 Kew Gardens Rd., Suite 1030
Kew Gardens, New York 11415
Tel: (212) 981-8440

Attorney for Cross-Claim Defendant Beechwood Re (In Official Liquidation) s/h/a Beechwood Re Ltd.

CERTIFICATE OF SERVICE

I, Ira S. Lipsius, an attorney, do hereby certify that, on June 26, 2019, I caused the foregoing to be served through the Court's Case Management/Electronic Case Files (CM/ECF) system upon all persons and entities registered and authorized to receive such service.

/s/ Ira S. Lipsius

Ira S. Lipsius
80-02 Kew Gardens Rd., Suite 1030
Kew Gardens, New York 11415
Tel: (212) 981-8440