

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

----- X
In re :
: Chapter 15
Petition of David McGuigan, as foreign :
representative of : Case No. 11-[_____] (____)
:
Tokio Marine Europe Insurance Limited :
:
Debtor in a Foreign Proceeding. :
:
:
----- X

**MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION UNDER CHAPTER 15 FOR RECOGNITION
OF A FOREIGN PROCEEDING AND MOTION FOR PERMANENT INJUNCTION**

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**MEMORANDUM OF LAW
IN SUPPORT OF VERIFIED PETITION UNDER CHAPTER 15 FOR RECOGNITION
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David McGuigan (the “Petitioner”), as the duly appointed and authorized foreign representative, as defined in section 101(24) of title 11 of the United States Code (the “Bankruptcy Code”), of Tokio Marine Europe Insurance Limited (the “Scheme Company” or “Debtor”), which is subject to an adjustment of debt proceeding (the “English Proceeding”) and bound by that certain scheme of arrangement pursuant to Part 26 of the Companies Act 2006 (the “Scheme”) ¹ sanctioned by the High Court of Justice of England and Wales (the “English Court”) on April 15, 2011, by his U.S. counsel, Sidley Austin LLP, respectfully submits this Memorandum of Law in Support of the Verified Petition Under Chapter 15 For Recognition Of A Foreign Proceeding And Motion For Permanent Injunction (the “Verified Petition and Motion”) pursuant to sections 105, 1502, 1504, 1515, 1517, 1520 and 1521 of the Bankruptcy Code and Rule 65 of the Federal Rules of Civil Procedure as made applicable by Rule 7065 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

¹ All capitalized terms not defined herein shall have the meanings ascribed to them in the Scheme or the Verified Petition and Motion.

I. PRELIMINARY STATEMENT

The Scheme Company is an insurance company. It is incorporated under the laws of England and Wales and maintains its registered office in England.

The business with which the Scheme is concerned (the “Scheme Business”) is all reinsurance business. The Scheme Company underwrote non-life insurance and reinsurance business in the London insurance market under the name The Tokio Marine & Fire Insurance Company (U.K.) Limited (between 1970 and 2002) and, from 2002 onwards, under its present name. The Scheme relates to only part of the Scheme Company’s business. The Scheme Business includes certain of the reinsurance business written by the Scheme Company from 1970 onwards, as set forth in more detail at Appendix A to the Scheme at pages 71 to 74 and in the Explanatory Statement at page 9. The Scheme Business was mainly non-marine and included traditionally long-tail policies exposed to asbestos, pollution and health hazard type risks emanating principally from Europe and the United States.

In addition, the Scheme Business also includes all the reinsurance business transferred to the Scheme Company in 1994 by The Tokio Reinsurance Company Limited (also known as Tokio Rückversicherungs-Gesellschaft AG and Tokio Compagnie De Reassurance SA) (“Tokio Re”). Tokio Re was incorporated in Switzerland and operated a branch office in the United Kingdom. The business transferred to the Scheme Company from Tokio Re consisted of:

- (a) all of the policies entered into by Tokio Re through its registered branch in the United Kingdom. These policies related to facultative and treaty reinsurance of general business; and
- (b) all of the policies entered into by Tokio Re through its head office in Switzerland. These policies related to treaty reinsurance of general business.

For the avoidance of doubt, the Scheme Business does not include the following:

- (a) in the case of underwriting stamp T0502, liabilities arising from Engineering and CAR insurances or reinsurances with policy reference numbers commencing “3500”;
- (b) liabilities arising from the business assumed by TMEI as a participating company in the Willis Faber Underwriting (“WFUM”) Pools, which was subject to a separate scheme of arrangement;
- (c) save to the extent provided for in a Scheme Reinsurance Contract, Liabilities in respect of fees, costs and expenses (including any tax thereon), in respect of services or advice, payable to service providers, excluding brokers, but including, without limitation, lawyers and loss adjusters; and
- (d) liabilities in respect of “compulsory insurance” under the laws of the United Kingdom, for example, employers’ liability policies and the compulsory element of motor policies under the laws of the United Kingdom.

The Scheme Business has been in solvent “run-off” since 2004. The run-off involves the management of liabilities arising from the Scheme Business. In the normal course, it is estimated that it would take at least another 30 to 40 years to run-off the remaining liabilities which are included in the Scheme

Accordingly, to bring the run-off of the Scheme Business to a close, the Scheme Company proposed a “cut off” scheme of arrangement. The Scheme will enable Scheme Creditors to be paid early by providing for all claims (including contingent and unliquidated claims) to be valued and paid as soon as possible. The key objectives of the Scheme are the crystallization and payment of Scheme Claims in an orderly fashion.

The Scheme Company is solvent and anticipates that all claims addressed by the Scheme will be paid in full in accordance with the Scheme. Discounting for the time-value of money will not be applied to Scheme Claims.

In the English Proceeding, on December 2, 2010, the English Court approved the application of the Scheme Company for permission to convene a meeting of its Scheme

Creditors to consider and, if thought appropriate, approve the Scheme. See Exhibit G to the Verified Petition and Motion. Under the Scheme, the value of all Scheme Claims will be estimated and full and final payments will be made to Scheme Creditors holding such claims, considerably sooner than if the run-off of the Scheme Company continued in the ordinary course without the Scheme. On April 7, 2011, the requisite majorities of the Scheme Creditors of the Scheme Company voted in favor of the Scheme. Indeed, the Scheme was unanimously approved. On April 15, 2011, the English Court, upon notice and a hearing, entered an order (the “Sanction Order”) sanctioning the Scheme. See Exhibit B to the Verified Petition and Motion. The Effective Date of the Scheme is April 15, 2011, the date on which a copy of the Sanction Order was delivered to the Registrar of Companies for England and Wales (the “Registrar of Companies”). See Exhibit C to the Verified Petition and Motion.

The Scheme bars any actions from Scheme Creditors (who, pursuant to the Scheme, are subject to the jurisdiction of the English Court) against the Scheme Company or its property to enforce Scheme Claims unless the Scheme Company has failed to perform any obligation to make payment to a Scheme Creditor in respect of a Net Ascertained Claim and then only in respect of such failure. To prevent U.S. based creditors of the Scheme Company from pursuing actions against it in connection with Scheme Claims, the Scheme Company has filed the Verified Petition and Motion seeking, pursuant to chapter 15 of the Bankruptcy Code, the ancillary assistance of this Court to aid in the implementation of the Scheme and an order that will, inter alia, give full force and effect to the Scheme in the United States. Chapter 15 of the Bankruptcy Code, among other things, authorizes this Court to: (i) grant recognition of a foreign proceeding upon the commencement of a case under chapter 15 by a foreign representative; and (ii) grant assistance in the United States to such foreign representative in connection with the

foreign proceeding, including by granting appropriate relief pursuant to section 1521 of the Bankruptcy Code.

The Verified Petition and Motion satisfies all the requirements set forth in section 1515 of the Bankruptcy Code. Moreover, the relief requested herein is necessary to give effect to the Scheme in the United States and is appropriate under chapter 15 of the Bankruptcy Code. Absent this relief, the Scheme Company and its creditors may be subject to individual creditor actions, rather than collective action. Such a situation could put at risk the validity and effect of the English Court's Sanction Order, and indeed, the Scheme itself. Granting recognition to the Scheme and the relief requested herein is consistent with the goals of international cooperation and assistance to foreign courts embodied in chapter 15 of the Bankruptcy Code.

II. FACTS

This Court is respectfully referred to the facts and circumstances as set forth before this Court in the Verified Petition and Motion, and the Declaration of David McGuigan in Support of the Petition Under Chapter 15 for Recognition of a Foreign Proceeding and Motion for Permanent Injunction and Order (the "McGuigan Declaration"), each filed contemporaneously herewith and incorporated in their entirety by reference as fully set forth herein.

III. JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.), dated July 10, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

The Petitioner respectfully submits that venue in this District is consistent with the interests of justice and the convenience of the parties with respect to the relief sought by the

Verified Petition and Motion pursuant to 28 U.S.C. § 1410(3). Accordingly, venue is properly located in this District pursuant to 28 U.S.C. § 1410.

IV. ARGUMENT

A. This Chapter 15 Case Has Been Properly Commenced Under Chapter 15

This chapter 15 case (the “Chapter 15 Case”) was duly and properly commenced in accordance with sections 1504 and 1509 of the Bankruptcy Code by filing a petition for recognition of a foreign proceeding pursuant to section 1515(a), accompanied by all documents and information required by section 1515(b) and (c).² In addition, a duly Verified Petition and Motion was filed contemporaneously with the Official Form 1 Chapter 15 Petition, along with the list required by Rule 1007(a)(4) of the Bankruptcy Rules and the Statement of Foreign Representative required by 11 U.S.C. § 1515(c).

To comply with the requirements of section 1515 of the Bankruptcy Code, clear and objective standards must be satisfied by the Petitioner, and the Petitioner respectfully submits that those requirements have been satisfied by the Verified Petition and Motion as more fully addressed below.

² Moreover, chapter 15 expressly recognizes “foreign insurance companies” as eligible to seek assistance in the United States in connection with a foreign proceeding. See 11 U.S.C. § 1501(c)(1). Although the provisions of chapter 15 became effective through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 only as of October 17, 2005, this Court has recognized several solvent schemes of arrangement of foreign insurance companies in run-off, such as the instant Scheme, as foreign proceedings entitled to recognition and ancillary relief, including injunctive relief. See, e.g., In re Allianz Global Corporate & Specialty (France) et al., Case No. 10-14990 (Bankr. S.D.N.Y. 2010) (SMB); In re Greyfriars Insurance Company Limited, et al., Case No. 07-12934 (Bankr. S.D.N.Y. 2007) (JMP); In re Oslo Reinsurance Co. (UK) Ltd and Oslo Reinsurance Co. ASA, Case No. 07-12211 (Bankr. S.D.N.Y. 2007) (RDD); In re NRG Victory Reinsurance Ltd, Case No. 06-11052 (Bankr. S.D.N.Y. 2006) (JMP); In re La Mutuelle du Mans Assurances IARD UK Branch MMA Account, Case No. 05-60100 (Bankr. S.D.N.Y. 2005) (BRL).

B. This Chapter 15 Case Was Commenced in Accordance with Section 1515(a)

Section 1515(a) establishes two principal requirements: (i) the Petitioner must qualify as a “foreign representative”; and (ii) in this case, the English Proceeding must qualify as a “foreign proceeding.”

1. This Chapter 15 Case Was Commenced by a Foreign Representative

This Chapter 15 Case was commenced by the duly appointed and authorized “foreign representative” as that term is defined under section 101(24) of the Bankruptcy Code. Section 101(24) defines a “foreign representative” as:

a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.

11 U.S.C. § 101(24). The Petitioner is David McGuigan. As has been declared, affirmed and certified by the English Court in paragraph 29 of its Convening Order (as defined below), Mr. McGuigan has been duly appointed by the Scheme Company to represent the Scheme Company as its foreign representative for the purpose of carrying out and implementing the Scheme and, specifically, to commence this Chapter 15 Case on behalf of the Scheme Company in accordance with the Scheme. See Convening Order at ¶ 29 attached as Exhibit G to the Verified Petition and Motion. Furthermore, the Scheme expressly contemplates the commencement of the Chapter 15 Case, by the foreign representative, for the Scheme Company to effectuate the purposes of the Scheme in relation to the U.S. assets of the Scheme Company and its Scheme Creditors. See Explanatory Statement, at p. 5 and pp. 52-55, attached to the Verified Petition and Motion as Exhibit A. From the face of the evidence submitted in connection with the Verified Petition and Motion, the Petitioner has standing and authority to represent the Scheme Company as its “foreign representative” in this proceeding.

2. The English Proceeding Concerns a Foreign Proceeding

Section 101(23) defines a “foreign proceeding” as:

a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23). As more fully described in the Verified Petition and Motion, the Scheme is a collective agreement for the expeditious, economical and equitable agreement or determination, and ultimately payment, of Scheme Claims. On November 29, 2010, the Scheme Company filed an application with the English Court seeking permission to convene a creditors’ meeting (the “Creditors’ Meeting”) for the purpose of allowing Scheme Creditors to vote on the Scheme pursuant to Part 26 of the Companies Act 2006 (England) (the “Companies Act”).

On December 2, 2010, the English Court, determining it had jurisdiction over the Scheme Company, conducted a hearing and entered an order (the “Convening Order”) authorizing the Scheme Company to convene the Creditors’ Meeting to consider and, if thought appropriate, approve the Scheme. See Exhibit G to the Verified Petition and Motion. Pursuant to the Convening Order, at least 56 calendar days prior to the Creditors’ Meeting, a cover letter approved by the English Court (the “Covering Letter”) containing copies of (a) the notice convening the Creditors’ Meeting (the “Notice”); (b) the Explanatory Statement; and (c) the Proxy and Voting Form (the “Voting Form”), was required to be sent to those persons or entities known to have claims within the scope of the Scheme (the “Notice Parties”). Specifically, the Notice Parties were: (i) each person or entity which Pro Insurance Solutions Limited of Bruton Court, Bruton Way, Gloucester, GL1 1DA, United Kingdom (“Pro”)³ was aware and which it

³ Pro, a company incorporated in England, is a provider of (re)insurance outsourcing and consultancy services. Among other activities, Pro specializes in managing and administering the run-off of (re)insurance businesses.

believed was or might be a Scheme Creditor and for which it had a current address; and (ii) to each existing broker or successor to a broker known by Pro to have claims falling within the scope of the Scheme and for which it has a current address, in each case to what Pro reasonably believed to be its last known address.

On April 7, 2011, the requisite majorities of Scheme Creditors voted unanimously in favor of the Scheme. On April 15, 2011, the English Court, upon notice and hearing, entered the Sanction Order sanctioning the Scheme. See Exhibit B to the Verified Petition and Motion. The Effective Date of the Scheme is April 15, 2011, the date on which a copy of the Sanction Order was delivered to the Registrar of Companies. See Exhibit C to the Verified Petition and Motion.

The English Proceeding respecting the Scheme constitutes a collective judicial proceeding in a foreign country under a law relating to adjustment of debt in which the assets and affairs of the debtor is subject to the control or supervision by a foreign court for the purpose of liquidation of such debts. Accordingly, this Chapter 15 Case concerns a foreign proceeding within the meaning of 11 U.S.C. § 101(23).

a. The English Proceeding with Respect to Scheme Company is a “Foreign Main Proceeding” under 11 U.S.C. § 1502(4)

Under section 1517(b)(1), a foreign proceeding shall be recognized as a foreign main proceeding if it is pending in the country where the debtor has the “center of its main interests” (the “COMI”). 11 U.S.C. § 1517(b)(1). In the absence of evidence to the contrary, a foreign debtor’s registered office is presumed to be the center of the debtor’s main interests. See 11 U.S.C. § 1516(c).

The Petitioner believes that the foreign proceeding in respect of the Scheme Company should be recognized as a “foreign main proceeding” because, among other reasons, the Debtor’s registered office is in the United Kingdom. See H.R. Rep. 109-31, pt.1, 109th Cong. 1st Sess. at 112-113 (2005) (noting that “[t]he presumption that the place of the registered office is also the center of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy”). In the absence of any evidence to the contrary, this Court should find the United Kingdom is the Scheme Company’s COMI as such is the place of its registered office.

Although the Bankruptcy Code does not provide factors for determining where a debtor’s COMI is located, Courts have considered various factors, including, without limitation:

the location of the debtor’s headquarters; the location of those who actually manage the debtor (which, conceivably, could be the headquarters of a holding company); the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

See In re Sphinx, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006).

Additionally, courts also consider where the creditors of the company and other third parties think or have thought the company’s COMI is located. See Shierston v. Vlieland–Boddy [2005] 1 WLR 3966 (confirming that in making its determination as to a debtor’s COMI a court must have regard to the need for the COMI to be ascertainable by third parties, in particular creditors and potential creditors).

All of the evidence set forth herein and in the McGuigan Declaration supports the finding that the Scheme Company’s COMI is in the United Kingdom.

Each of the COMI Factors Support The Scheme Company’s COMI being in the United Kingdom

The Scheme Company has significant connections with the United Kingdom. The Scheme Company was incorporated in the United Kingdom on September 15, 1970 under the name of The Tokio Marine & Fire Insurance Company (U.K.) Limited, which was changed to its present name on June 17, 2002. The Scheme Company's registered office is at 150 Leadenhall Street, London, EC3V 4TE, England. The Scheme Company conducts its business operations from its offices in the United Kingdom and employs approximately 170 employees in the United Kingdom.

The Scheme Company's balance sheet as of December 31, 2010 shows total unconsolidated assets of approximately \$724 million (using the exchange rate \$1:0.62(GBP) published in the Financial Times as of June 28, 2011), substantially all of which is held in or connected to the United Kingdom. The Scheme Company estimates that approximately 65% of its total assets are located in the United Kingdom and approximately \$136 million of its total liabilities is owed to policyholders in the United Kingdom.

The Scheme Company underwrote non-life insurance and reinsurance business in the London insurance market under the name The Tokio Marine & Fire Insurance Company (U.K.) Limited (between 1970 and 2002) and, from 2002 onwards, under its present name. The Scheme Business is all London market reinsurance business written through the use of brokers in the United Kingdom. The Scheme Company estimates that it has approximately 97,000 policyholders worldwide in respect of all business written by it. In the United Kingdom, there are 237 policyholders with claims subject to the Scheme. Moreover, the Petitioner has been informed by Pro that the vast majority of the policies that could give rise to Scheme Claims are governed by English law.

The Scheme Business has been in run-off since 2004. Pro, an English corporation, was appointed to manage the run-off in 2005. Specifically, the Scheme Business was administered in the United Kingdom by Pro on behalf of the Scheme Company. Further, policyholders of the Scheme Company have dealt with Pro in the United Kingdom and received communications from Pro in the United Kingdom on behalf of the Scheme Company. Accordingly, policyholders of the Scheme Company also have the expectation that the Scheme Company's COMI is in the United Kingdom.

Thus, not only does the presumption under section 1516(c) provide that the Scheme Company's COMI is in England, the location of the Scheme Company's registered office, but each of the factors considered by this Court in In re Sphinx support the finding that the Scheme Company's COMI is in England.

In addition, on October 23, 2007, this Court previously recognized, as a foreign main proceeding, an English proceeding commenced in the United Kingdom in connection with a separate scheme of arrangement (the "WFUM Pools Scheme") sanctioned by the English Court with respect to a separate line of business of the Scheme Company. See In re Greyfriars Insurance Company Limited, et al., Case No. 07-12934, Docket No. 25 (Bankr. S.D.N.Y. 2007) (JMP). In granting recognition of the WFUM Pools Scheme as a foreign main proceeding with respect to the Scheme Company, this Court necessarily determined that the Scheme Company's COMI is in the United Kingdom. See id. Since that time, nothing has changed that would have the effect of shifting the Scheme Company's COMI.

b. In the Alternative, the English Proceeding with Respect to the Scheme Company is a "Foreign Nonmain Proceeding" under 11 U.S.C. § 1502(5)

Alternatively, if the Court were to find that the English Proceeding is not a "foreign main proceeding," the Court should recognize the English Proceeding as a "foreign nonmain

proceeding” as defined in section 1502(5) of the Bankruptcy Code. 11 U.S.C. § 1502(5). Under section 1517(b) of the Bankruptcy Code, a foreign proceeding shall be recognized as a foreign nonmain proceeding if it is pending in a country where the debtor has an establishment. See 11 U.S.C. § 1517(b)(2). Section 1502 of the Bankruptcy Code defines an “establishment” as “any place of operations where the debtor carries out a nontransitory economic activity.” See 11 U.S.C. § 1502(2). The “establishment” requirement is satisfied by conducting business locally. See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd, 2007 WL 2479483, *7 (Bankr. S.D.N.Y. Aug. 30, 2007) (noting that, in reference to two other chapter 15 cases, “[t]he debtors conducted business there, thus meeting the ‘establishment’ requirement”).

As set forth above, in the Verified Petition and Motion and the McGuigan Declaration, the Scheme Company conducts, in relation to the Scheme Business and otherwise, pertinent nontransitory economic activity locally in the United Kingdom where the foreign proceeding is pending. Specifically, the Scheme Company conducts its business operations from its offices in the United Kingdom and employs approximately 170 employees in the United Kingdom. The Scheme Company underwrote non-life insurance and reinsurance business in the London insurance market since 1970. The Scheme Company estimates that it has approximately 97,000 policyholders worldwide in respect of all business written by it through the London insurance market. Accordingly, the Scheme Company conducts pertinent nontransitory economic activity locally (in England) and therefore has an establishment in the foreign country in which the foreign proceeding is located in accordance with section 1502(2).⁴ Thus, the English Proceeding and the Scheme also could be recognized as “foreign nonmain proceedings” pursuant to section 1517(b)(2) of the Bankruptcy Code.

⁴ This assertion is not intended as, nor should it be construed as, an admission for any purpose or proceeding other than for satisfying the requirements of having an “establishment” as defined in section 1502(2) of the Bankruptcy Code.

c. English Law Governs and Interprets the Scheme, and the Scheme Creditors Submit to the Exclusive Jurisdiction of the English Courts

In addition, the Scheme is to be implemented and construed in accordance with English law and the vast majority of the policies that could give rise to Scheme Claims are governed by English law. Pursuant to the Scheme, the Scheme Creditors agree (i) that the English Court shall have exclusive jurisdiction to hear and determine any dispute or proceedings arising out of the Scheme; and (ii) to submit to the exclusive jurisdiction of the English Court for such purposes. See Exhibit A to the Verified Petition and Motion, at ¶ 8.9.

Furthermore, it should weigh heavily on this Court's determination of whether the English Proceedings should be recognized as foreign main proceedings that the English Court, upon notice and a hearing, authorized the convening of a Creditors' Meeting and sanctioned the Scheme so as to make the Scheme binding upon all Scheme Creditors. For purposes of Part 26 of the Companies Act 2006, a "company" is defined as "any company liable to be wound up under the Insolvency Act 1986 (c 45) ...". As a company incorporated in the United Kingdom, the Scheme Company is a company liable to be wound up under the Insolvency Act 1986 and the English Court therefore had jurisdiction to sanction the Scheme proposed by it (and, indeed, has previously exercised jurisdiction over the Scheme Company in relation to the WFUM Pools Scheme referred to below). Accordingly, this Court should find that the English Proceeding is a foreign main proceeding pursuant to 11 U.S.C. § 1502(4) of the Bankruptcy Code or, alternatively, that the English proceeding is a foreign nonmain proceeding pursuant to 11 U.S.C. § 1502(5) of the Bankruptcy Code.

In light of the evidence set forth, the Petitioner submits that the center of main interests of the Scheme Company in respect of the Scheme Business and otherwise is in the United

Kingdom, and as such, the English Proceeding in respect of the Scheme should be recognized as a foreign main proceeding.

Alternatively, should the Court determine that the foreign proceeding in respect of the Scheme Company is not a “foreign main proceeding,” the Petitioner respectfully requests that the Court treat the Scheme Company’s Chapter 15 Petition as one requesting recognition and relief as a “foreign nonmain proceeding,” as defined in section 1502(5) of the Bankruptcy Code, as the foreign proceeding was conducted in the United Kingdom where the Debtor clearly carries on a nontransitory economic activity and, therefore, has an “establishment” within the meaning of section 1502(2), thereby entitling it to recognition as a foreign nonmain proceeding pursuant to section 1517(b)(2) of the Bankruptcy Code.

C. This Chapter 15 Case was Commenced in Accordance with Section 1515(b)

To establish a basis for recognition under chapter 15, it is mandated that the petition be supported by documentation on which this Court may grant recognition. Section 1515(b) of the Bankruptcy Code provides:

A petition for recognition shall be accompanied by –

- (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
- (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
- (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.

11 U.S.C. § 1515. Here, the Verified Petition and Motion is accompanied by: (i) the Convening Order of the English Court authorizing the Scheme Company to convene a Creditors’ Meeting to vote on the Scheme which is the subject of the foreign proceeding; (ii) the Sanction Order of the English Court sanctioning the Scheme; (iii) evidence of the filing of the Sanction Order with

the Registrar of Companies rendering the Scheme effective; (iv) the list required by Bankruptcy Rule 1007(a)(4); and (v) the Statement of Foreign Representative required by 11 U.S.C. § 1515(c).

The Convening Order also declared, affirmed and certified that, as the designated foreign representative of the Scheme Company, the Petitioner was entitled to commence this Chapter 15 Case in implementation of the Scheme. See Exhibit G to Verified Petition and Motion, at ¶ 29. The Verified Petition and Motion is further accompanied by the Explanatory Statement, which expressly states that a chapter 15 case shall be commenced to implement the Scheme. See Exhibit A attached to the Verified Petition and Motion, pp. 49-53. Each of these accompanying documents is supportive of recognition and collectively satisfy the requirements of section 1515(b) of the Bankruptcy Code.⁵

D. This Chapter 15 Case Was Commenced in Accordance with Section 1515(c)

Section 1515(c) of the Bankruptcy Code provides that a “petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.” 11 U.S.C. § 1515(c). The Statement of Foreign Representative Pursuant to 11 U.S.C. § 1515(c) Identifying Foreign Proceedings (the “Section 1515(c) Statement”) was filed contemporaneously with the Verified Petition and Motion, and identifies all foreign proceedings with respect to the Scheme Company that currently are known to the Petitioner in satisfaction of the requirement of section 1515(c).

E. No Other Foreign Proceedings

Based upon the information provided to him by Pro, the Petitioner is not aware of any litigation involving the Scheme Company that has been commenced or is pending in the United

⁵ Section 1516(b) provides that “the court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.” 11 U.S.C. § 1516(b).

States and that is related to Scheme Claims (as defined in the Scheme) or the Scheme Business. For the sake of completeness, the Petitioner attests that the Scheme Company was subject to another scheme of arrangement (the “WFUM Pools Scheme”) in connection with a different line of business than that of the Scheme Business. The WFUM Pools Scheme was sanctioned by the English Court on September 17, 2007 and was granted chapter 15 recognition on October 23, 2007. The WFUM Pools Scheme was declared complete on November 19, 2010. See Section 1515(c) Statement (as defined above).

F. This Case Promotes the Best Interests of the Scheme Creditors and There is No Forum Shopping

This is not a case where the Debtor is looking to advantage one party in interest over another by forum shopping and choosing a favorable jurisdiction over another. Rather, this Chapter 15 Case has been commenced for the purpose of obtaining the assistance of this Court to ensure the effective and economical administration of the Scheme in a unified collective process that was properly heard before the English Court and provides a fair and efficient mechanism under the laws of England where the majority of the policyholders in respect of the Scheme Business are domiciled.

G. The Debtor is Entitled to the Relief Requested Upon Recognition of Foreign Proceeding

1. Relief under Section 1520

Upon recognition of the English Proceeding as a foreign main proceeding, certain express relief is automatically granted as a matter of right. Section 1520(a) of the Bankruptcy Code provides that, upon recognition of a foreign proceeding that is a foreign main proceeding:

- (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

- (2) sections 363, 549, and 552 apply to a transfer of a debtor's interest in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
- (3) unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552; and
- (4) section 552 applies to property of the debtor that is within the territorial jurisdiction of the United States.

11 U.S.C. § 1520(a). Specifically, upon the Court's recognition that the English Proceeding is a foreign main proceeding, section 1520(a)(1) of the Bankruptcy Code requires that the automatic stay provisions of section 362 of the Bankruptcy Code apply to protect the Scheme Company from any claims as well as any acts to take possession of the Scheme Company's property. Such relief is consistent with the terms of the Scheme, which bars any actions against the Scheme Company or its property to enforce Scheme Claims unless the Scheme Company has failed to perform any obligation to make payment to a Scheme Creditor in respect of a Net Ascertained Claim and then only in respect of such failure.

2. Relief Under Section 1521(a) is Necessary and Appropriate

Upon recognition of a foreign main or nonmain proceeding, section 1521(a) authorizes the Court to grant certain relief at the request of the foreign representative. Where necessary to effectuate the purpose of chapter 15 and to protect the assets of the debtor or the interests of the creditors, section 1521(a) provides that the Court may grant an order, inter alia,

- (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities;
- (2) staying execution against the debtor's assets;
- (3) suspending the right to transfer, encumber or otherwise dispose of any of the debtor's assets; and

- (4) granting any additional relief that may be available to a trustee, except for the relief available under sections 522, 544, 545, 547, 548, 550 and 724(e).

11 U.S.C. § 1521(a)(1), (a)(2), (a)(3), (a)(7).

In addition to the relief as a matter of right provided by section 1520 of the Bankruptcy Code, the Petitioner requests relief under section 1521 to assist in the effective implementation of the Scheme. Should the Court determine that the foreign proceeding in respect the Scheme Company is not a “foreign main proceeding,” the Petitioner respectfully requests that this Court grant, pursuant to section 1521 of the Bankruptcy Code, the same relief against individual creditors that the Scheme Company would automatically enjoy under section 1520, including: (i) staying the commencement or continuation of any action or proceeding concerning the assets, rights, obligations or liabilities of the Scheme Company; (ii) staying execution against assets of the Scheme Company; (iii) suspending the right to transfer, encumber or otherwise dispose of any assets of the Scheme Company; (iv) requiring all persons and entities in possession, custody or control of property or the proceeds of such property in the United States of the Scheme Company to turnover and account for such property or proceeds to the Petitioner for administration in the United Kingdom in accordance with the Scheme; and (v) finding that the interests of the Scheme Creditors in the United States are sufficiently protected by such administration and that, under the law of the United States, such property and proceeds should be administered in the English Proceeding. Without the relief requested, the Scheme could not be administered in a fair and efficient manner that would protect the interests of all of the Scheme Company’s stakeholders, nor would the value of the Scheme Company’s assets be maximized.

The relief requested complies with the provision in the Convening Order (¶ 29) which declares, affirms and certifies that the Petitioner is entitled to seek injunctive relief

against U.S. based Scheme Creditors under chapter 15 for the Scheme Company. This additional relief will channel all claims of the Scheme Creditors against the Scheme Company into one collective proceeding in accordance with the Scheme and, in the process, protect the interest of creditors in having their claims valued and paid on a consistent and non-discriminatory basis, in accordance with section 1522(a) of the Bankruptcy Code.

In the absence of the relief requested under section 1521, including the permanent injunction, creditors in the United States could proceed to judgment without regard to the Scheme, leading to unequal treatment of creditors, dismemberment of the Scheme Company's estate and irreparable injury to the Scheme Company and Scheme Creditors. Indeed, without this relief, the orderly determination and settlement of Scheme Claims may be jeopardized and available resources may be forced to be extended to defend against collection and other self-help actions brought in the United States in contravention of the intent of the Scheme and the Sanction Order granted by the English Court. Accordingly, such relief is necessary to effectuate the purpose of chapter 15 and to protect the assets of the Scheme Company and the interests of all Scheme Creditors. Accordingly, section 1521 of the Bankruptcy Code expressly authorizes this Court to grant the requested relief.

H. The Petitioner Satisfies the Requirements for a Permanent Injunction in Accordance With Section 1521(e)

The standards, procedures and limitations applicable generally to an injunction also apply to relief sought under section 1521(a). See 11 U.S.C. § 1521(e). The relief sought in the Verified Petition and Motion is warranted under the standard applicable in the Second Circuit for granting a permanent injunction. That standard is essentially the same as the standard for a preliminary injunction, except rather than demonstrate a likelihood of success on the merits, the movant must actually succeed on the merits. See NextG Networks of New York, Inc. v. City of

New York, No. 03 CIV 9672 RMB/JCF, 2006 WL 538189 at *8 (S.D.N.Y. Mar. 6, 2006) (aff'd in part, rev'd in part on other grounds by NextG Networks of NY, Inc. v. City of New York, 513 F.3d 49 (2d Cir. 2008)). In addition, the movant must make a showing of the likelihood of irreparable harm, *i.e.*, an injury that cannot be redressed through financial compensation. See id. Irreparable harm must be likely and imminent, not remote or speculative. See id.; Civic Ass'n of Deaf of New York City, Inc. v. Giuliani, 915 F. Supp. 622, 631 (S.D.N.Y. 1996).

It has been consistently held that irreparable harm to an estate exists where the orderly determination of claims and the fair distribution of assets are disrupted. See, e.g., Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 (2d Cir. 1987); Cunard S.S. Co. Ltd. v. Salen Reefer Servs., AB., 773 F.2d 452, 458 (2d Cir. 1985) (“Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail.”) (citing Canada S. Railway Co. v. Gebhard, 109 U.S. 527, 539 (1883)); In re MMG, LLC, 256 B.R. 544, 555 (Bankr. S.D.N.Y. 2000) (“As a rule ... irreparable harm exists whenever local creditors of the foreign debtor seek to collect their claims or obtain preferred positions to the detriment of other creditors.”).

The risk of such irreparable harm is manifest here. The Scheme Company has approximately 53 Scheme Business policyholders based in the United States (in respect of which the Scheme Company has an estimated exposure of approximately \$244 million) who could bring actions in the U.S. to disrupt the orderly determination of claims and fair distribution of assets under the Scheme in the English Proceeding. Absent a permanent injunction, the Petitioner may be forced to expend significant resources of the Scheme Company in defense of claims in the United States.

This injunctive relief may be obtained without undue hardship or prejudice to the rights of Scheme Creditors who are based in the United States. As explained in the Verified Petition and Motion, and shown in the Explanatory Statement and Scheme, the Scheme contemplates a means of claimant participation similar to that contemplated by the Bankruptcy Code. The claims valuation process is applied uniformly to all creditors, regardless of domicile. Each Scheme Creditor was afforded adequate notice and an opportunity to be heard at (i) the hearing on December 2, 2010 (in which the English Court approved the Scheme Company's application for permission to convene the Creditors' Meeting, (ii) the Creditors' Meeting held on March 8, 2011 and re-convened on April 7, 2011 and (iii) at the subsequent hearing sanctioning the Scheme.

For the reasons earlier expressed, the relief requested is necessary to ensure that the Scheme process is protected from unilateral creditor action while at the same time preserving and protecting the rights of U.S. creditors to due process.

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V. CONCLUSION

The Petitioner respectfully submits that the Verified Petition and Motion satisfies the requirements for the recognition of the English Proceeding as a foreign main proceeding or, alternatively, as a foreign nonmain proceeding and for the injunctive and other relief sought therein. Unless the relief requested is granted, the Scheme and the English Proceeding will be undermined with the consequence of imminent and irreparable harm arising to the Scheme Company and its creditors through exposure to unilateral U.S. creditor actions in derogation of the collective interests embraced by the Scheme. In order to ensure equal and consistent treatment of all Scheme Creditors, each must be bound similarly and the assets of the Scheme Company similarly protected, irrespective of a diversity of domicile or location. For the foregoing reasons, the Petitioner respectfully requests that this Court grant the relief requested in the Verified Petition and Motion.

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