UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TPG GROUP and WILLIAM HUTCHISON,

Civ. Action No. 08-11244 (SHS)

Plaintiffs,

-against-

ALTERNATIVE RE HOLDINGS LIMITED, ALTERNATIVE RE LIMITED, and ARCH INSURANCE COMPANY

Defendants.

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MEMORANDUM OF LAW OF DEFENDANTS ALTERNATIVE RE HOLDINGS, LTD. AND ALTERNATIVE RE LTD. IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION AND STAY ACTION

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Defendants Alternative Re Holdings Limited ("ARH") and Alternative Re Limited ("Alt Re") by their attorneys, Mound Cotton Wollan & Greengrass, respectfully submit this memorandum of law in support of their motion to:

(1) compel Plaintiffs TPG Group ("TPG") and William Hutchison ("Hutchison) to submit their claims to arbitration pursuant to their binding agreement to arbitrate all disputes between Plaintiffs and ARH and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.C. No. 6997, 330 U.N.T.S. 38, as implemented at 9 U.S.C. §§ 201-208 (the "New York Convention"), a United States treaty; and

(2) stay the present action pursuant to Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §3, and the inherent discretionary powers of the Court, pending a final award in the arbitration.[1]

[1] As set forth in the Stipulation of Time to Answer/Respond to Complaint and Briefing Schedule, so ordered by the Court on January 21, 2009, ARH and Alt Re are moving to compel arbitration and stay the action in lieu of answering the Complaint. The moving defendants reserve the right to interpose any defenses including, without

PRELIMINARY STATEMENT

The dispute between Plaintiffs and the moving defendants simply does not belong in this Court. Plaintiffs entered into Shareholder Agreements with ARH, a Bermudian Corporation, in order to participate in the profits and losses of a reinsurance facility in which ARH's wholly-owned subsidiary, Alt Re, also incorporated in Bermuda, was the reinsurer. The parties agreed to arbitrate "all disputes" in Bermuda, and that their agreements would be governed by Bermuda law. More than fifteen months ago, following Plaintiffs' breach of those agreements, ARH commenced separate arbitrations against each of the Plaintiffs. Until the Complaint was filed in this action on December 24, 2008, neither Plaintiffs nor their attorneys ever questioned Plaintiffs' obligation to arbitrate this dispute. Indeed, they tacitly acknowledged that obligation by appointing arbitrators, insisting on a consolidated arbitration, and participating in extensive negotiations over a period of five months regarding modification of the arbitration clause contained in the agreements in respect of the procedure for selecting the third arbitrator.

Now, apparently hoping to further delay the arbitration and/or obtain discovery here that they are not entitled to in the arbitration, Plaintiffs have invoked the jurisdiction of this Court by concocting an utterly meritless "securities fraud" claim and bringing additional parties and contracts into what is a very straightforward dispute under the Shareholder Agreements.

The parties agreed that the law of Bermuda would govern the Shareholder Agreements. Under controlling Second Circuit case law, the arbitrability of Plaintiffs' claims must therefore be determined under Bermuda law, which dictates that the claims, including any and all claims challenging the existence or the validity of the agreements, must be heard by the arbitration panel.

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limitation, lack of personal jurisdiction, by way of answer, motion or otherwise in the event that they are required to appear in the action.

Alternatively, under United States federal law, all of the claims, including the claims alleging that Plaintiffs were fraudulently induced to enter into the agreements, are subject to arbitration. Indeed, in light of the incorporation of Article 21 of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules into the agreements, any attacks on the existence or validity of the agreements must be arbitrated. [2]

While Alt Re is not a signatory to the arbitration agreement, because of the relationship among the parties and the issues raised in the Complaint, the law is clear that this Court can and should compel Plaintiffs to arbitrate their claims against Alt Re along with their claims against ARH.

Of the many contracts to which the Complaint refers, all but the "Settlement Agreement" are subject to arbitration. The Settlement Agreement, however, is not truly at issue, as there is no dispute regarding the rights or obligations of the parties under that agreement which principally served to resolve ARH's dispute with another shareholder. Thus, Plaintiffs' request for rescission of that agreement is nothing more than a construct to gain access to this Court.[3] The only bona fide dispute between these parties involves Plaintiffs' funding obligations under the Shareholder Agreements. In essence, therefore, by seeking to enjoin the arbitration in favor of this action, Plaintiffs are urging this Court to permit the "tail to wag the dog." As set forth below, however, the law is clear that where, as here, arbitrable claims are included in a Complaint, the court "must" refer those claims to arbitration.

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[2] Article 21 of the UNCITRAL Arbitration Rules provides that "the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause" as well as "the existence or the validity of the contract of which an arbitration clause forms a part...."

[3] In addition to lacking any substance, because Plaintiffs failed to join nine of the twelve parties to the agreement, Plaintiffs' claim for rescission of the Settlement Agreement is subject to dismissal under Rule 19(b), Fed. R. Civ. P., for failure to join indispensable parties.

FACTUAL BACKGROUND

The transactions at issue originated in or about 2001 when the Plaintiffs and other shareholders entered into individual Shareholder Agreements with ARH ("Original Shareholder Agreements") (Collery Dec. ¶ 2, Exhs. A and B).[4] Under the terms of the Original Shareholder Agreements, Plaintiffs each agreed to participate in a segregated account reinsurance facility pursuant to which Alt Re and Arch Insurance Company ("Arch") entered into reinsurance agreements with respect to worker's compensation insurance written by Arch through National Benefits Group ("NBG"), its managing general agent.[5] (Id.) Pursuant to the Alternative Re Limited Act 1998, Separate Account 13B ("Account 13B") was created to retain the risks associated with the NBG program that were ceded to Alt Re. (Id. ¶ 3).[6] Certain individuals and entities, including Plaintiffs and NBG, acquired an interest in Account 13B by purchasing shares of ARH related to the account. (Collery Dec., Exhs. A and B, Art. 1).

By participating in Account 13B, Plaintiffs and the other shareholders had an opportunity to participate in the economic outcome of the account. (Id. ¶ 4). If the share book value was positive, they would realize a profit, and if it was negative, they would realize a loss. Id. All shareholders agreed to deposit collateral with ARH in the form of cash or acceptable security against which underwriting losses would be paid. (Id. ¶ 5). If the share value were to become negative (i.e., if liabilities in the account exceeded total assets), the shareholders were obligated to deposit additional collateral to be used as needed to bring the share values back to positive.

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[4] References to the "Collery Dec" are to the Declaration of Gavin P. Collery, dated February 6, 2009, submitted herewith.

[5] The insurance was initially written by First American Insurance Company. First American was renamed Arch Insurance Company in May 2001. (Collery Dec. ¶ 2). For purposes of this motion, First American shall be referred to as Arch.

[6] A Separate Accounts Company, or Private Act Company, such as Alt Re, is formed under Bermuda law for the purpose of retaining risk under a reinsurance arrangement. Each separate account or "cell" is funded through a combination of risk funding (premium less expenses and paid claims) and collateral security (provided in the form

(Id.) This indemnification requirement was triggered by notice from ARH of a negative balance in Account 13B.[7] (Id.)

By executing the Original Shareholder Agreement, Hutchison agreed to purchase twenty (20) shares related to Account 13B. (Id. ¶ 6). TPG executed the Original Shareholder Agreement and purchased twenty five (25) shares related to Account 13B. (Id.) All shares were recognized as non-voting preferred shares sold in a private placement. (Id.) They were to carry the appropriate legend indicating that they have not been registered under the Securities Act of 1933. (Id.)

The first year of the facility incepted April 15, 2001 and ran until April 15, 2002 when it was renewed. (Id. ¶ 7). On April 15, 2003, the program was renewed yet again, but was terminated on October 2, 2003. (Id.) In the first year of the facility, from 2001 to 2002, the Account 13B shareholders included Plaintiffs, Decker HIO and NBG. (Id. ¶ 8). In the second year of the facility, Decker HIO was no longer a shareholder, but the number of shareholders was increased to include Gordon Ogden and Henry DeFrancesco. (Id.) Only NBG renewed its participation in year three.[8] (Id.)

Although the program terminated in 2003 and no new business was written, claims under policies issued during its operation continued to be paid on a runoff basis with available funds from Account 13B. (Id. ¶ 10). On February 11, 2005, ARH advised the Account 13B

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of cash and letters of credit). The assets of the cell are kept separate from the general assets of the reinsurer and any other cell. (Collery Dec. ¶ 3).

[7] Profits and losses were allocated based upon the book value and number of shares owned by each shareholder. That calculation was based on the total earned reinsurance premiums, plus investment income, minus losses and expenses incurred. (Collery Dec. ¶ 5).

[8] As the shareholders were required to deposit acceptable security with ARH in the form of cash or letters of credit, Hutchison and TPG respectively deposited $200,000 and $250,000 in cash. All shareholders agreed that upon renewal each year they would deposit additional security as required by ARH. In year two, therefore, TPG, which had purchased ten (10) shares, deposited an additional $100,000 in cash and Hutchison, who in year two had purchased seventeen and a half (17.5) shares, secured a $175,000 letter of credit. The other shareholders also provided funding in proportion to their respective share ownership. (Collery Dec. ¶ 9).

shareholders, including Plaintiffs, that additional security would be necessary to ensure that the account was fully funded. (Id. ¶ 11).

At or about the same time, ARH learned that NBG was contending that it had never intended to be a shareholder in Account 13B or to provide collateral funding for the program. (Id.) Thus, contrary to the allegations in the Complaint, ARH's dispute with NBG had nothing whatsoever to do with NBG's performance as managing general agent for Arch.[9] (Id. ¶ 12). Although the Complaint suggests otherwise (Complaint ¶ 44), Plaintiffs, having been directly involved in the negotiations that resulted in the settlement with NBG, were well aware of the nature of the dispute and the settlement. (Id. ¶¶ 13-14). This dispute with NBG was eventually resolved by a Settlement Agreement among all of the shareholders, including Plaintiffs.[10] (Collery Dec. ¶ 16, Exh. E). The settlement included an agreement to reallocate NBG's shares among the remaining shareholders with the remaining shareholders agreeing to assume all of NBG's liabilities with regard to Account 13B. (Id.)

In connection with the settlement, ARH and the remaining shareholders on the first year of account, TPG, Hutchison, and Decker HIO, entered into a Shareholder Amendment Agreement memorializing those transactions relating to the first year of account. (Collery Dec. ¶ 18, Exh. F). Specifically, TPG and Hutchison agreed to acquire the shares previously allocated to NBG and Decker HIO. (Id.) Decker HIO was released from any liability in excess of $100,000 and agreed to receive ten (10) shares of Account 13B. Id. In addition, TPG and Hutchison were released from liability with regard to the third year of the program. (Id.)

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[9] ARH and Alt Re had no knowledge of any of the purported misfeasance on the part of NBG that Plaintiffs allege in the Complaint. (Collery Dec. ¶ 12).

[10] Pursuant to the Settlement Agreement, NBG agreed to pay $776,385.03 into Account 13B. In return, ARH and the remaining shareholders, including Plaintiffs, agreed to release NBG -- and its directors -- from any further liability with respect to the dispute over NBG's participation in the program or the program itself. (Collery Dec. ¶16).

Pursuant to another Shareholder Amendment Agreement, prepared in respect of the second year of account, shareholders DeFrancesco and Ogden agreed to terminate their participation in the program and to forego all rights and liabilities imposed by their ownership of shares in Account 13B. (Collery Dec. ¶ 19, Exh. G). These shares were in turn reallocated to the remaining shareholders. (Id.)

In addition to the two Shareholder Amendment Agreements and the Settlement Agreement, all of which were executed in the Plaintiffs' own hands, and were effective December 30, 2005, to effectuate the reallocation of shares to the Plaintiffs, new Shareholder Agreements were drafted and presented to TPG and Hutchison for review (the "Shareholder Agreements"). (Collery Dec. ¶ 21, Exhs. I and J). As they did with respect to the Original Shareholder Agreements, after reviewing the terms of the Shareholder Agreements, Hutchison and TPG executed Powers of Attorney nominating an attorney from the law firm of Conyers, Dill and Pearman as their agent to make, sign, or otherwise enter into the Shareholder Agreements. (Id. ¶ 22, Exhs. I and J). Accordingly, the Shareholder Agreements, effective December 30, 2005, were duly executed on behalf of the Plaintiffs.

Pursuant to the terms of the Shareholder Agreements, and as a result of the net book value of Account 13B being negative, on or about June 1, 2007 ARH notified Plaintiffs that they were required to provide additional collateral or cash funding in the amount of $519,810 from TPG and $533,089 from Hutchison. (Collery Dec. ¶ 23, Exh. K). Although duly requested, neither TPG nor Hutchison delivered the requested funding, nor did they provide any cogent explanation for their refusal to do so. (Id. ¶ 24).

On October 22, 2007, when it had become apparent that further efforts by ARH to persuade Plaintiffs to voluntarily provide the funding required under the Shareholder

Agreements would be in vain, ARH served separate Arbitration Demands on Hutchison and TPG pursuant to the Arbitration Clause in the Shareholder Agreements.[11] (Collery Dec. ¶ 26; Wilder Dec. ¶2, Exhs. A and B)[12].

Thereafter, Plaintiffs expressed a desire to audit the records of Arch and Alt Re concerning the NBG program and Account 13B, and suggested that, following the audit, the parties might be in a position to resolve their dispute without the necessity of arbitration. (Collery Dec. ¶ 27). Although the Plaintiffs have no right of inspection under the Shareholder Agreements, ARH nevertheless agreed to facilitate an audit and to stay the arbitration until it was completed and the parties had an opportunity to pursue a commercial resolution of their dispute. (Collery Dec. ¶27, Exh. L).

On December 14, 2007, Hutchison and TPG both selected Peter H. Bickford as their party-appointed arbitrator. (Collery Dec. ¶ 28, Exh. M). On December 18, 2007, ARH appointed Dale A. Diamond as its arbitrator in both arbitrations. (Id. ¶ 28, Exh. N).

Following completion of the claim audit and Plaintiffs' termination of the financial audit, it was mutually agreed in early July 2008 that there would be no commercial resolution of the dispute and it was necessary to proceed with the arbitration. (Collery Dec. ¶ 29; Wilder Dec. ¶ 4). Plaintiffs retained the firm of Wollmouth Maher & Deutsch LLP. Marc Abrams of that firm promptly entered into negotiations with ARH's counsel to set a protocol for selection of the third arbitrator (or umpire) in lieu of the ICC procedure set forth in the Arbitration Clause. (Wilder

[11] Like the Original Shareholder Agreements, the Shareholder Agreements contain an Arbitration Clause (Article 12) requiring "all disputes" to be arbitrated in Bermuda before a panel of three arbitrators, two to be appointed by the parties and the third to be selected by the two appointed arbitrators. The Arbitration Clause further provides that "[i]f the two appointed arbitrators fail to agree upon a third arbitrator after sixty days, the third arbitrator will be selected by the International Chamber of Commerce ("ICC")" and that matters of arbitral procedure are governed by the UNCITRAL Arbitration Rules. (Collery Dec., Exhs. I and J).

[12] References to the "Wilder Dec." are to the Declaration of Robert E. Wilder, dated February 12, 2009, submitted herewith.

Dec. ¶¶ 5-8). In connection with those negotiations, Mr. Abrams invoked a provision in the Shareholder Amendment Agreements which require disputes between ARH and both TPG and Hutchison to be resolved in a consolidated arbitration under the Shareholder Agreements. (Id. ¶ 6). ARH acceded to the demand for a consolidated proceeding. (Id. ¶ 7). At no time did Mr. Abrams suggest that the Plaintiffs were not obligated to arbitrate their dispute with ARH. (Id. ¶ 10).

In October 2008, Plaintiffs substituted their current attorneys, Thorp Reed & Armstrong, for Wollmouth Maher & Deutsch. (Id. ¶ 8). After reviewing the file and the relevant contracts, Robert Tomilson, a Thorp Reed attorney, continued the negotiations with ARH's counsel regarding an alternative protocol for umpire selection. (Id.) Frustrated by the slow pace of the negotiations, on November 21, 2008, ARH formally requested that the ICC act as appointing authority for the umpire pursuant to the Arbitration Clause. (Wilder Dec. ¶ 8, Exh. K). Nevertheless, Mr. Tomilson continued to express a strong interest in selecting an umpire by some other method, advising ARH that he was "certain that we can agree on an umpire and procedures". (Wilder Dec. ¶ 9, Exh. L). Plaintiffs' counsel ultimately suggested that the parties select an umpire from the ARIAS Umpire List.[13] (Id.) ARH promptly agreed to this proposal, provided that the candidates were limited to individuals who were attorneys. (Wilder Dec. ¶9, Exh. M). Much to ARH's surprise, Plaintiffs reneged on their offer without any explanation, and shortly thereafter, on December 24, 2008, filed the Complaint in this action. (Wilder Dec. ¶ 9, Exh. N). Like Plaintiffs' predecessor counsel, prior to filing the Complaint, Plaintiffs' current attorneys never once suggested that this dispute was not arbitrable. (Id. ¶10).

[13] ARIAS is an organization that serves the insurance and reinsurance industry by training and certifying reinsurance arbitrators.

Thus, more than a year and a half after the June 2007 funding request, and more than a year after ARH commenced arbitration, faced with the ICC's imminent appointment of an umpire, Plaintiffs have suddenly commenced this action and disavowed their previously acknowledged obligation to arbitrate this dispute. This straightforward contract dispute as to Plaintiffs' obligation to provide funding under the Shareholder Agreements is clearly subject to arbitration. As demonstrated below, under Bermuda law, which was selected by the parties, as well as United States federal law, notwithstanding Plaintiffs' allegation that they were fraudulently induced to enter into the Shareholder Agreements, and regardless of the fact that this allegation is pled as a purported violation of the securities law and under several different common law theories, all of the claims relating to the Shareholder Agreements, the Original Shareholder Agreements and the Shareholder Amendment Agreements (collectively, the "Agreements") must be referred to arbitration in Bermuda.

ARGUMENT

I

ALL DISPUTES RELATING TO THE AGREEMENTS ARE SUBJECT TO ARBITRATION

A. The Shareholder Agreements

The Shareholder Agreements, effective December 31, 2005, contain an Arbitration Clause requiring "all disputes" between the parties to be submitted to arbitration in Bermuda. Article 12 ("Arbitration") provides, in pertinent part:

> All disputes between the Company and the Shareholder which are not settled between the Parties will be submitted to arbitration in Bermuda by a panel of three arbitrators. One arbitrator will be appointed by the Shareholder and another by the Company. **In the event a party receiving notice of arbitration fails to appoint an arbitrator within 30 days of receipt of such notice, the International Chamber of Commerce ("ICC") will have the power to appoint that party's arbitrator.** The two appointed arbitrators will select the

> third. If the two appointed arbitrators fail to agree upon a third arbitrator after sixty days, the third arbitrator will be selected by the International Chamber of Commerce ("ICC").
>
> * * *
>
> The Shareholder and the Company may by express agreement determine the arbitral procedures to be followed; in the event the Parties do not agree, UNCITRAL Arbitration Rules in effect as of the date of this Agreement will govern all such matters of arbitral procedure. (Emphasis added).

The Shareholder Agreements also contain a choice of law provision (Art. 20) which provides:

> **Governing Law.** This Agreement shall be governed by and construed in all respects in accordance with the laws of the Islands of Bermuda.

B. The Original Shareholder Agreements

With the exception of the language quoted above in bold type, which was not included in the Original Shareholder Agreements, the Arbitration Clauses in both agreements are identical.[14]

C. The Shareholder Amendment Agreements

The Shareholder Amendment Agreements incorporate the Original Shareholder Agreements by reference. As such, they incorporate the arbitration clause in those agreements. (Collery Dec. Exh. F, Art. 2(b); Exh. G, Art. 2(b)). In addition, the Shareholder Amendment Agreements provide:

> **Applicable Law**. This Agreement shall be interpreted in accordance with the laws of Bermuda without giving effect to any choice or conflict of law provision or rule that would cause the application of the laws of any jurisdiction other than Bermuda. The parties hereto agree to consolidated arbitration proceedings in the event of any dispute under the terms of the Shareholder Agreements, as amended. (Collery Dec. Exh. F, Art 18; Exh. G, Art.19) (Emphasis added)

As noted above, Plaintiffs' predecessor counsel invoked the underscored language in this provision to assert the Plaintiffs' right to a consolidated arbitration. (Wilder Dec. ¶ 6).

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[14] The language in bold type is academic because the parties appointed their respective arbitrators in a timely manner.

Thus, it is absolutely clear that the Plaintiffs agreed that "all disputes" with ARH relating to the Agreements would be submitted to an arbitral tribunal in Bermuda and that, unless otherwise agreed, the proceeding would be governed by the UNCITRAL Arbitration Rules. In addition, Plaintiffs agreed that the Shareholder Agreements and the Shareholder Amendment Agreements would be governed by Bermuda law.

As we demonstrate below, under these circumstances, the Court must compel arbitration of all disputes relating to the Agreements.

II

THE COURT HAS JURISDICTION UNDER THE NEW YORK CONVENTION TO ENFORCE THE ARBITRATION AGREEMENTS

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. §201, et seq., "controls arbitration disputes in the international context." Todd's Point Marine v. Rojos, 96 Civ. 5827 (SHS), 1996 U.S. Dist. LEXIS 11811 (S.D.N.Y. Aug. 16, 1996) (Stein, J.) (quoting Jain v. Mere, 51 F.3d 686, 688 (7th Cir.), cert. denied, 116 S. Ct. 300, 133 L. Ed. 2d 206 (1995)).

The New York Convention sets out four requirements for enforcement of arbitration agreements under the Convention: (1) a written agreement; (2) that provides for arbitration in the territory of a signatory of the Convention; (3) the subject matter of which must be commercial; but (4) which cannot involve a dispute that is entirely domestic. Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, 198 F.3d 88, 92 (2d Cir. 1999) (citing Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F. 2d at 1012, 1018 (2d Cir. 1993)); Hughes, Hooker & Co., et al. v. American Steamship Owners Mutual Protection & Indemn. Assoc., Inc., et al., 04 Civ. 1859

(SHS), 2005 U.S. Dist. LEXIS 11381, *9 (June 9, 2005) (Stein, J). All four of these requirements are satisfied here.

First, the Shareholder Agreements (as well as the Shareholder Amendment Agreements and the Original Shareholder Agreements) contain a written arbitration agreement.[15] Second, all the agreements provide for arbitration in Bermuda. Bermuda, as a territory of the United Kingdom, is a signatory to the Convention. 9 U.S.C. § 201; Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992). The United States is also a signatory. Id. Third, "judged by any test," the subject matter of the various agreements at issue in this proceeding is "clearly . . . commercial." Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 13 (S.D.N.Y. 1973). Finally, the dispute is not purely domestic as ARH is a Bermudian corporation with its principal place of business in Bermuda. (Collery Dec. ¶2). Accordingly, the facts and circumstances of this case satisfy all four requirements for jurisdiction under the New York Convention.

Section 206 of the FAA provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for...." 9 U.S.C. §206. "To determine whether to compel arbitration pursuant to §206, courts inquire 'whether the parties agreed to arbitrate, and, if so, whether the scope of that agreement encompasses the asserted claims.'" Motorola Credit Corp., et al. v. Kemal Uzan, et al., 388 F.3d 39, 49 (2d Cir. 2004) (quoting David L. Threlkheld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249 (2d Cir. 1991)). "[S]o long as the parties are bound to arbitrate and the district court has personal jurisdiction over them, the court is under an unflagging, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the

[15] While the Plaintiffs assert that they were fraudulently induced to enter into the Shareholder Agreements, they do not and cannot claim that the arbitration agreement itself was procured by fraud.

New York Convention . . . even though the agreement in question calls for arbitration in a distant forum." Apple & Eve, LLC v. Yantai North Andre Juice Co., Ltd., 499 F. Supp. 2d 245, 248 (S.D.N.Y. 2007) (emphasis added).

Both the New York Convention and the Federal Arbitration Act, 9. U.S.C. § 1 et seq., manifest "a Congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 103 S. Ct. 927, 941, 460 US, 1, 11 (1983). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id.; accord, S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 194 (2d Cir. 1984). This strong policy favoring arbitration "applies with special force in the field of international commerce." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

III

ALL ISSUES OF ARBITRABILTY ARE GOVERNED BY BERMUDA LAW

In determining whether Plaintiffs' claims are arbitrable, including the issue of "who decides" arbitrability, the Court must apply Bermudian law. Where, as here, the parties have agreed that a contract containing an arbitration clause shall be governed by foreign law, foreign law applies to questions of arbitrability, including disputes about the existence or validity of the principal contract. See, e.g., Motorola, 388 F.3d at 50-51 (2d Cir. 2004) (citing Int'l Minerals & Res., S.A. v. Pappas, 96 F.3d 586, 592 (2d Cir. 1996) (applying English law to an issue of contract formation)); see also Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 32 n. 3 (2d Cir. 2001) (foreign law selected in choice of law clause applied to party's claim that it was not bound by arbitration agreement signed by its agent while allegedly acting outside the scope of its authority).

In Motorola, a case decided under the New York Convention, the Second Circuit held that a choice of law clause governs questions of contract validity where the ultimate issue is one of arbitrability. The court explained:

> [W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention.

388 F. 3d at 51.

Here, the Shareholder Agreements and the Shareholder Amendment Agreements contain choice of law provisions calling for the application of Bermuda Law.[16] Accordingly, any and all disputes regarding arbitrability of claims relating to those agreements are to be decided under Bermuda law.

IV

UNDER BERMUDA LAW, ALL DISPUTES RELATING TO THE AGREEMENTS ARE ARBITRABLE

As explained by Mark Chudleigh, Esq., the moving defendants' expert on Bermuda law, the governing statute is the Bermuda International Conciliation and Arbitration Act 1993 ("1993 Act"), which incorporates into Bermuda law the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Declaration of Mark Chudleigh dated February 12, 2009 ("Chudleigh Dec.") ¶ 10. The Model Law is applicable to international commercial arbitrations held in Bermuda, including the pending arbitration commenced by ARH against the Plaintiffs. (Id.) Article 16(1) of the Model Law provides: "The arbitration tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." (Id. ¶ 15). This provision authorizes the tribunal to hear objections to

the existence or validity of the principal agreement containing the arbitration clause as well as the arbitration clause itself. (Id. ¶ 16).[17] Mr. Chudleigh explains that "[i]t is a necessary consequence of the autonomy afforded by Article 16(1) that the jurisdiction of the courts of Bermuda (and elsewhere for that matter) is excluded (subject to the right of appeal) when the jurisdiction of the tribunal is challenged following an attack on the arbitration clause or principal contract imbedding the same...." (Id. ¶ 17).

Bermuda also recognizes the doctrine of "separability," which treats an arbitration clause as being independent from the contract in which it is contained for the purpose of determining the jurisdiction of the arbitral tribunal. (Id. ¶ 19).[18] A consequence of this doctrine is that an arbitral tribunal can determine that the principal contract was procured through misrepresentation, including fraudulent misrepresentation, without impugning its own jurisdiction. (Id. ¶ 21).[19]

Applying these principles of Bermuda law to the allegations in the Complaint (id. ¶¶ 33-36), Mr. Chudleigh concludes that "all the matters in dispute concerning the Original Shareholder Agreements, the Shareholder Agreements and the [Shareholder] Amendment Agreements...are arbitrable and within the competence and jurisdiction of the Bermuda arbitral tribunal." (Id. ¶ 33). Mr. Chudleigh further concludes that each cause of action is arbitrable

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[16] See Collery Dec. Exh. F, ¶ 18; Exh. G, ¶ 19; Exh. I, ¶ 20; Exh. J, ¶ 20.

[17] This principle is based on the German doctrine of "*Kompetenz-Kompetenz.*" Id.

[18] As discussed below, under Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967) and its progeny, courts apply this same approach in arbitrations governed by U.S. law.

[19] The doctrine of separability is inapplicable where there is a genuine issue as to whether the principal contract came into existence. (Id. ¶¶ 23-27). However, in such a case, because Bermuda recognizes the doctrine of *Kompetenz-Kompetenz*, the arbitral tribunal would nevertheless rule on that issue in the first instance, subject to a right of appeal. (Id. ¶¶ 24-25). The other qualification to the doctrine of separability is where there is a challenge to the validity of the arbitration clause itself. In that circumstance as well, however, the arbitral tribunal rules on the defense in the first instance. (Id. ¶ 28).

"even if the Plaintiffs should elect to challenge the tribunal's jurisdiction in any respect." (Id. ¶ 34).[20]

V

ASSUMING ARGUENDO THAT U.S. LAW APPLIES, ALL DISPUTES UNDER THE AGREEMENTS WOULD NEVERTHELESS BE ARBITRABLE

A. The Broad Arbitration Clause Encompasses All Of The Plaintiffs' Claims

Plaintiffs allege that (i) they were induced by the "Defendants'" misrepresentations and nondisclosures to purchase additional shares in Account 13B (Counts 1-4 and 6-8); and (ii) "Defendants" breached the Original Shareholder Agreements and breached fiduciary duties owing to Plaintiffs under those agreements and other unspecified "documents" (Counts 5 and 9).

The arbitration provisions in the Shareholder Agreements and the Original Shareholder Agreements provide that "[a]ll disputes between the Company and the Shareholder which are not settled between the Parties will be submitted to arbitration in Bermuda...." (emphasis added). These arbitration clauses are sufficiently broad to cover each of the causes of action in the Complaint. In determining whether claims are arbitrable, courts are instructed to "focus on the allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' agreement[], then those claims must be arbitrated, whatever the legal labels attached to them." Norcom Electronics Corp. v. Cim USA Inc., et al., 104 F. Supp.2d 198, 203-04 (S.D.N.Y. 2000) (Stein, J.) (citations omitted).

The claims for breach of the Original Shareholder Agreements and breach of fiduciary duties under those agreements (Counts 5 and 9) "warrant little discussion; they are clearly arbitrable." See Pompano-Windy City Partners, Ltd. v. Bear, Stearns & Co., Inc., 698 F. Supp.

[20] With specific regard to the Shareholder Amendment Agreements, Mr. Chudleigh explains that because they specifically incorporate the Original Shareholder Agreements, any disputes concerning the Shareholder Amendment

504, 510 (S.D.N.Y. 1988); see also Stevenson v. Tyco Int'l Inc., et al., Case No. 04-CV-4037, 2006 U.S. Dist. LEXIS 71852, *23-25 (S.D.N.Y. Sept. 26, 2006) (because factual basis of arbitrable breach of contract claim was identical to breach of fiduciary duty claim, court held breach of fiduciary duty claim must be submitted to arbitration.).

The claims alleging fraud or misrepresentation with respect to the Shareholder Agreements and the Shareholder Amendment Agreements (Counts 1-4 and 6-8), including the meritless "securities fraud" claim, are also clearly arbitrable. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270 (1967) (common law fraud claims arbitrable); ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 29-30 (2d Cir. 2002) (same); Shearson/American Express Inc. et al. v. McMahon et al., 482 U.S. 220, 238, 107 S.Ct. 2332, 2343, 96 L. Ed. 2d 185, 201 (1987) (claims of fraud under §10(b) of the Federal Exchange Act of 1934 may be subject of arbitration).

B. The Arbitration Clause Authorizes The Tribunal To Rule On Objections To The Existence Or Validity Of The Agreements

The parties incorporated the UNCITRAL Arbitration Rules into their arbitration agreements. Article 21 of the UNCITRAL Rules provides that "the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause" as well as "the existence or the validity of the contract of which an arbitration clause forms a part...."[21] (emphasis added).

It is well settled that parties can agree to arbitrate the arbitrability of particular claims or issues if there is "clear and unmistakable evidence" that they intended to do so. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Bell v. Cendant Corp., et al., 293 F.3d 563, 565-66 (2d Cir. 2002) (citing PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198-99 (2d Cir.

Agreements are subject to arbitration. (Id. ¶ 32).

1996)). The incorporation of Article 21 of the UNCITRAL Rules into the Shareholder Agreements provides the requisite "clear and unmistakable evidence" of the parties' intention to refer all issues regarding the existence or validity of the Agreements to the arbitral tribunal.

In Wal-Mart Stores, Inc. v. PT Multipolar Corp, et al., No. 98-16952, 98-17384, 1999 U.S. App. LEXIS 31578, *5 (Nov. 30, 1999), a case which is directly on point, the Ninth Circuit held that incorporation of the UNCITRAL Arbitration Rules into a contract served as sufficient evidence of the parties' agreement to submit the question of arbitrability of particular claims to the arbitrator. After quoting Article 21 of the UNCITRAL Rules, the court held that "the parties agreed to abide by a system in which the tribunal rules on objections to its jurisdiction and the arbitrator, rather than the district court, should decide whether the parties' disputes are arbitrable." Id.

Similarly in Contec Corp. v. Remote Solution Co., Ltd., 398 F.3d 205, 208 (2d Cir. 2005), the Second Circuit held that incorporation of the Commercial Arbitration Rules of the American Arbitration Association ("AAA") into an agreement served as "clear and unmistakable evidence" of the parties' agreement to submit questions of arbitrability to the arbitrator. Like Article 21 of the UNCITRAL Rules, Rule 7 of the AAA Rules provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (emphasis added); see also Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 125 (2d Cir. 2003) (broadly worded arbitration clause covering "all disputes" and incorporation of International Chamber of Commerce Rules, which assign arbitrator initial responsibility to determine issues of

[21] This language is very similar to the language in Article 16(1) or the UNCITRAL Model Law adopted in Bermuda.

arbitrability, served as clear and unmistakable evidence of parties' intent to arbitrate questions of arbitrability.)[22]

The incorporation of the UNCITRAL Arbitration Rules in the arbitration clause serves as clear and unmistakable evidence that the parties intended to arbitrate questions of arbitrability, including objections to the existence or validity of the principal agreements.

VI

THE COURT MUST COMPEL PLAINTIFFS TO ARBITRATE THEIR CLAIMS

"Because federal public policy strongly favors arbitration, a court presented with a valid agreement to arbitrate must 'compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Norcom, 104 F. Supp.2d at 203 (S.D.N.Y. 2000) (Stein, J.) (quoting Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16, 19 (2d Cir. 1995)) (internal quotations omitted) (emphasis added). "Arbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute." Duane Street Assoc. v. Local 32B-32J, et al., 00 Civ. 3861 (SHS), 2000 U.S. Dist. LEXIS 8609, *4 (June 21, 2000) (Stein, J.) (quoting Spear, Leeds, Kellogg v. Central Life Assurance Co., 85 F.3d 21, 28 (2d Cir. 1996)).

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[22] In Telenor Mobile Comm. AS v. Storm LLC., 524 F.Supp.2d 332, 351 (S.D.N.Y. 2007), the court distinguished arbitration agreements that incorporate the American Arbitration Association ("AAA") and International Chamber of Commerce ("ICC") Rules from agreements that incorporate the UNCITRAL Arbitration Rules, and ruled that the latter does not constitute sufficient evidence that the Parties agreed to "arbitrate arbitrability." Id. at 350-51 (distinguishing Contec, 398 F.3d at 208 (2d Cir. 2005) and Shaw, 322 F.3d at 123 (2d Cir. 2003)). The court called the ICC rules "more sweeping" than UNCITRAL and described the AAA rules as providing arbitrators with general, unrestricted authority to rule on their jurisdiction, while the UNCITRAL rules only allowed arbitrators to rule on objections to that authority. Id. We respectfully submit that the distinctions drawn by the court between the UNCITRAL rules and the ICC and AAA rules are of no significance, and that Telenor is at odds with Contec and Shaw. We respectfully request that the court decline to follow Telenor, choosing instead to follow the Second Circuit's decisions in Contec and Shaw, as well as the Ninth Circuit's decision in Wal-mart, and hold that the incorporation of the UNCITRAL rules into the arbitration clause in this case amounts to "clear and unmistakable evidence" that the parties intended to arbitrate issues of arbitrability.

As we demonstrated above, under both Bermuda and U.S. law, all of the claims in this action relating to the Original Shareholder Agreements, the Shareholder Agreements, and the Shareholder Amendment Agreements are arbitrable. Accordingly, Plaintiffs must be compelled to arbitrate.

VII

PLAINTIFFS SHOULD BE COMPELLED TO ARBITRATE THEIR CLAIMS AGAINST ALT RE, DESPITE THE FACT THAT IT IS NOT A SIGNATORY TO THE ARBITRATION AGREEMENTS

The Second Circuit had made it clear that, under certain circumstances, a non-signatory to an arbitration agreement (here, Alt Re) may compel arbitration of claims brought against it by signatories to that agreement (here, Plaintiffs). See JLM Industries, Inc., et al. v. Stolt-Nielsen SA, et al., 387 F.3d 163, 177 (2d Cir. 2004); Smith/Enron, 198 F.3d at 98 (2d Cir. 1999); see also Birmingham Assoc. Ltd. v. Abbott Laboratories, 547 F.Supp.2d 295, 301 (S.D.N.Y. 2008). Under a theory of estoppel, a signatory will be estopped to "avoid[] arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." Smith/Enron, 198 F.3d at 98 (2d Cir. 1999). Where, as here, there is a "tight relatedness of the Parties, contracts and controversies," the bound parties (here, Plaintiffs) will be estopped from avoiding arbitration. See JLM Indust., 387 F.3d at 177 (quoting Choctaw Generation Ltd. v. American Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001)). Alt Re is a wholly-owned subsidiary of ARH. (Collery Dec. ¶ 2). Because the claims against Alt Re directly implicate agreements with its parent, ARH, that contain arbitration clauses, Alt Re has the right to compel Plaintiffs to arbitrate. See Smith/Enron, 198 F.3d at 98 (2d Cir. 1999) (non-signatory had right to compel arbitration of

claim that it fraudulently induced signatory to enter into agreement with affiliated companies containing arbitration clause).

Plaintiffs should be compelled to arbitrate their claims against Alt Re for an additional, independent reason. The Second Circuit has recognized that

> where a party to an arbitration agreement attempts to avoid that agreement by suing a "related party with which it has no arbitration agreement, in the hope that the claim against the other party will be adjudicated first and have preclusive effect in the arbitration. Such a maneuver should not be allowed to succeed...."

Id. at 98 (quoting IDS Life Ins. Co. v. Sunamerica, Inc., 103 F.3d 524, 530 (7th Cir. 1996) (Posner, C.J.))(emphasis added). Here, the Plaintiffs have attempted to employ just such a "maneuver," i.e., suing Alt Re, a party with which it has no arbitration agreement, in the hope that it can gain some tactical advantage in the arbitration and/or obtain discovery in this action that would not be available in the arbitration. The Court should not permit such tactics to succeed.

VIII

THE COURT SHOULD STAY THIS ACTION PENDING THE FINAL AWARD IN THE ARBITRATION

Any claims that are referred to arbitration by the Court must be stayed pursuant to Section 3 of the FAA. WorldCrisa Corp., et al. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997). In addition, the Court should stay any claims that are found not to be arbitrable pursuant to its inherent power to control the disposition of the cases on its docket "with economy of time and effort for itself, for counsel, and for litigants." Id. at 76 (citations omitted); Genesco, Inc. v. T. Kakiuchi & Co., Ltd. et al., 815 F.2d 840, 856 (2d Cir. 1987); Hughes, 2005 U.S. Dist. LEXIS, at *17-18 (S.D.N.Y. June 9, 2005) (Stein, J.); Trade Arbed Inc. v. M/V Kandalasksha, et al., 02

Civ. 5121 (SHS), 2003 U.S. Dist. LEXIS 19928 at *15 (June 18, 2003) (Stein, J.). Broad stay orders are considered "particularly appropriate if the arbitrable claims predominate the lawsuit and the non-arbitrable claims are of questionable merit," Genesco, 815 F.2d at 856 (2d Cir. 1987); accord Norcom, 104 F.Supp.2d at 206-07 (2000) (Stein, J.), or if the stay will "promote judicial economy, avoidance of confusion and possible inconsistent results" without working an undue hardship or prejudice against the plaintiff. Acquaire v. Canada Dry Bottling, 906 F. Supp. 819, 838 (E.D.N.Y. 1995); Moore v. Interacciones Global, Inc., No. 94 Civ. 4789 (RWS), 1995 U.S. Dist. LEXIS 971 at *20 (S.D.N.Y. Jan. 27, 1995) (stay is appropriate when non-arbitrable and arbitrable claims involve common questions of law and fact or when arbitration is likely to dispose of issues common to claims of arbitrating and non-arbitrating defendants). The Second Circuit has also found a broad stay of non-arbitrable claims appropriate where continuation of a litigation "would involve significant expense and inconvenience and might adversely affect the outcome of [the] arbitration." WorldCrisa, 129 F.3d at 76 (2d Cir. 1997).

Here, ARH and Alt Re would suffer significant and unnecessary expense and inconvenience if the Court were to permit Plaintiffs to proceed with any of their claims while the arbitration is proceeding in Bermuda. Further litigation could also interfere with the outcome of the arbitration. Id. at 76. Moreover, arbitrable claims clearly predominate and the claim to rescind the Settlement Agreement is, at best, "of questionable merit." It is clearly dismissable for failure to join nine indispensable parties and, in any event, that claim is merely a construct to invoke the jurisdiction of this court.

In addition, the outcome of the arbitration will very likely moot any of Plaintiffs' remaining claims against Alt Re and ARH, making a stay particularly appropriate. The facts underlying the claims against all defendants in this action are identical. Indeed, the Complaint

does not make separate allegations against the defendants. Therefore, "arbitration will potentially dispose of all of Plaintiff[s'] claims, and should be allowed to go forward without the unnecessary duplication and risk of inconsistent results that might ensue" if the non-arbitrable claims are not stayed. Moore, 1995 U.S. Dist. LEXIS 971 at *20 (S.D.N.Y. Jan. 27, 1995).

In Acquaire, the court granted a broad stay of non-arbitrable claims finding that most of those claims would be resolved with reference to the claims in arbitration "and many will lose their foundation if the [arbitrable] claims... are found to be without merit." 906 F. Supp. at 838. In further support of the stay, the court noted that "at the very least... significant insight will be afforded the Court and the parties by the conduct and result of the arbitration... and that this insight will prove valuable in resolving the remaining claims." Id.

Plaintiffs can and undoubtedly will seek to persuade the arbitration panel that they were fraudulently induced to enter into the Shareholder Agreements and the Shareholder Amendment Agreements. If Plaintiffs are successful in this regard, the tribunal will find that Plaintiffs have no funding obligation under the Shareholder Agreements. If the tribunal rejects the fraud claims, however, Plaintiffs will be estopped from attempting to prove in this Court that they were fraudulently induced to obtain additional shares in ARH with respect to Account 13B. In either case, it is unlikely that there will be any issues to litigate following the arbitration or, at a minimum, the result of the arbitration "will prove valuable in resolving the remaining claims." See id. Under these circumstances, a stay of any and all claims not referred to arbitration should be granted.

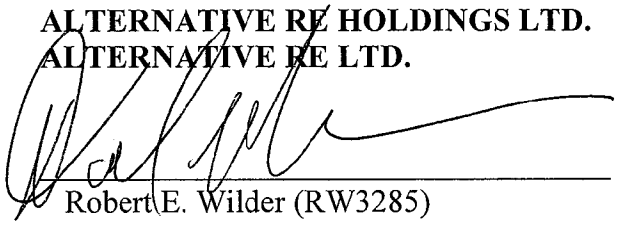
CONCLUSION

For the foregoing reasons, Defendants ARH and Alt Re respectfully request that the Court issue an order: (i) compelling Plaintiffs to arbitrate their claims against ARH and Alt Re in

the pending Bermuda proceeding; (ii) staying this action pending the final award in the arbitration; and (iii) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 13, 2009

ALTERNATIVE RE HOLDINGS LTD.
ALTERNATIVE RE LTD.



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