Milmar Food Group II, LLC v Applied Underwriters, Inc.

Annotate this Case

[*1] Milmar Food Group II, LLC v Applied Underwriters, Inc. 2017 NY Slip Op 27397 Decided on December 5, 2017 Supreme Court, Orange County Bartlett, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the printed Official Reports.

Decided on December 5, 2017
Supreme Court, Orange County

Milmar Food Group II, LLC, MILMAR FOOD GROUP, LLC and MILMAR LLC, Plaintiffs,

against

Applied Underwriters, Inc., APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., APPLIED RISK SERVICES, INC., APPLIED RISK SERVICES OF NEW YORK, INC., NORTH AMERICAN CASUALTY COMPANY, CONTINENTAL INDEMNITY COMPANY, and CALIFORNIA INSURANCE COMPANY, Defendants.

EF003101-2017

For Plaintiffs: Andrew S. Lewner, Esq., Westerman Ball Ederer Miller Zucker & Sharfstein LLP, Uniondale, New York

For Defendants: Shand S. Stephens, Esq., Anthony P. Coles, Esq., Joseph Alonzo, Esq., DLA Piper LLP (US), New York, New York
Catherine M. Bartlett, J.

The following papers numbered 1 to 9 were read on Defendants' motion to compel arbitration and stay proceedings in this action, and Plaintiffs' cross motion to compel Defendants to post security pursuant to Insurance Law §1213:

Notice of Motion - Affirmation / Exhibits - Memorandum 1-3

Notice of Cross Motion - Affirmation / Exhibits - Memorandum 4-6

Affirmations in Opposition (3) / Exhibits - Reply Memorandum 5-8

Reply Affirmation / Exhibit 9

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Plaintiffs (collectively, "Milmar") are affiliated New York companies, engaged in the production and distribution of food products, which are required by New York law to provide workers compensation insurance for their employees. Defendants provide products and services in connection with workers compensation insurance coverage. Beginning in 2013, Milmar was covered under a workers compensation program (the "Equity Comp Program") created, patented and implemented by Defendants. There are essentially three components to this Program:

(1) Standard workers compensation insurance policies issued to Milmar by defendants Continental Indemnity Company ("Continental") and California Insurance Company ("California"), with rates and forms approved by New York's Department of Financial Services or its predecessor, the New York Insurance Department;(2) A reinsurance agreement (the "Reinsurance Treaty") between defendant Applied Underwriters Captive Risk Assurance Company, Inc. ("AUCRA") and affiliates of defendant Applied Underwriters, Inc. ("AU"), including Continental and California; and(3) A "Reinsurance Participation Agreement" ("RPA") between AUCRA and Milmar.

Paragraph "13" of the RPA between AUCRA and Milmar contains an arbitration agreement, which provides in pertinent part as follows:

(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to sub-paragraph (B) of Paragraph 13 arising out of or related to this agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.(B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein...All disputes arising with respect to any provision of this Agreement shall be fully subject to the terms of this arbitration clause.

Milmar commenced this action, complaining that the RPA is illegal and fraudulent, and seeking inter alia a declaratory judgment that the RPA is void and unenforceable under the New York Insurance Law, equitable rescission of the RPA and money damages for sums paid under [*2]the RPA in excess of premiums due under the Continental and California insurance policies.

Defendants assert that all of Plaintiffs' claims are subject to binding arbitration under the broad arbitration agreement in the RPA, and accordingly move pursuant to the Federal Arbitration Act, 9 U.S.C. §1 et seq., to compel arbitration and stay proceedings in this action.

Citing Paragraph "16" of the RPA, which provides that "[t]his Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska," Plaintiffs assert that (1) the arbitration agreement in the RPA, including the delegation of "arbitrability" issues to an arbitrator, is invalid under Nebraska Revised Statutes §25-2602.01 ("Validity of arbitration agreement"); (2) the Supreme Court of Nebraska has held that §25-2602.01 regulates the business of insurance, and hence by virtue of the federal McCarran-Ferguson Act it "reverse preempts" the Federal Arbitration Act; (3) the parties' arbitration agreement notwithstanding, this court and not an arbitrator must determine the threshold question of the arbitrability of the claims in Plaintiffs' complaint; and (4) since the arbitration agreement in the RPA is by virtue of §25-2602.01 invalid and unenforceable, Defendants' motion to compel arbitration and stay proceedings in this action should be denied, and those Defendants which are unauthorized foreign insurers should be required to post security pursuant to Insurance Law §1213.

I. DEFENDANTS' MOTION TO COMPEL ARBITRATION / STAY ACTION

A. The Federal Statutory Scheme 1. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract." 9 U.S.C. §2.

As the Court of Appeals explained in Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 26 NY3d 659 (2016):

The FAA was enacted by Congress "in response to widespread judicial hostility to arbitration" [cit.om.], and it aims to "ensure judicial enforcement of privately made agreements to arbitrate" [cit.om.]. "[9 U.S.C. §2] reflects the overarching principle that arbitration is a matter of contract" and, "consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms" [cit.om.]. Typically, "the FAA

preempts state laws [that] 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration'" [cit.om.].

Id., 26 NY3d at 665.

2. The McCarran-Ferguson Act

The McCarran-Ferguson Act ("MFA") endows states with plenary authority over the regulation of insurance and, in certain instances, exempts state laws from FAA preemption. It provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b).

As the Court of Appeals explained in Monarch Consulting, Inc., supra:

"[W]hen Congress enacts a law specifically relating to the business of insurance, that law [*3]controls," but the McCarran-Ferguson Act precludes application of — or, in other words, reverse preempts — a federal law in the face of a state law regulating the business of insurance where "the federal measure does not 'specifically relate to the business of insurance,' and would 'invalidate, impair or supersede' the State's law" [cit.om.].

Id., 26 NY3d at 666.

3. The Interaction Between the FAA and the MFA

To determine whether the McCarran-Ferguson Act reverse preempts the FAA, courts apply a three-part test:

[T]he McCarran-Ferguson Act applies if: (1) the federal statute in question does not specifically relate to insurance; (2) the state law at issue was enacted to regulate the business of insurance; and (3) the federal statute at issue would invalidate, impair, or supersede the state law (see 15 U.S.C. §1012[b]).

Monarch Consulting, Inc., supra, 26 NY3d at 670. The Court of Appeals therein recognized that "[t]he clearest example of a scenario in which reverse preemption occurs is where state law expressly prohibits arbitration of insurance related disputes (see e.g. McKnight v. Chicago Tit. Ins. Co., Inc., 358 F.3d 854, 857-859 [11th Cir. 2004]; Standard Sec. Life Ins. Co. of NY v. West, 267 F.3d 821, 823 [8th Cir. 2001]; Mutual Reins. Bur. v. Great Plains Mut. Ins. Co., Inc., 969 F.2d 931, 934-935 [10th Cir. 1992]...[cit.om.]." Monarch Consulting, Inc., supra, 26 NY3d at 671.

B. Neb. Rev. St. §25-2602.01

Section 25-2602.01 (Validity of arbitration agreement) of the Nebraska Uniform Arbitration Act ("NUAA") provides in pertinent part:

(a) ...(b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.(c) ...(d) Contract provisions agreed to by the parties to a contract control over contrary provisions of the act other than subsections (e) and (f) of this section.(e) ...(f) Subsection (b) of this section does not apply to:(1) A claim arising out of personal injury based on tort;(2) A claim under the Nebraska Fair Employment Practice Act.(3) Any agreement between parties covered by the Motor Vehicle Industry Regulation Act; and(4) ..., any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract.

Construing §25-2602.01, the Supreme Court of Nebraska in Kremer v. Rural Community [*4]Ins. Co., 280 Neb. 591, 788 N.W.2d 538 (2010), held that "under §25-2602.01(f)(4), agreements to arbitrate future controversies concerning an insurance policy are invalid..." Id., 280 Neb. at 603. See also, Speece v. Allied Professionals Ins. Co., 289 Neb. 75, 78, 853 N.W.2d 169 (2014).

Going on to consider whether §25-2602.01(f)(4) was enacted for the purpose of regulating the "business of insurance" within the meaning of the McCarran-Ferguson Act, the Kremer Court referenced the test articulated by the U.S. Supreme Court in SEC v. National Securities, Inc., 393 U.S. 453 (1969):

Congress was concerned with the type of state regulation that centers around the contract of insurance....The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the "business of insurance." ...But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Kremer, 280 Neb. at 605 (quoting SEC v. National Securities, Inc., supra, 393 U.S. at 460). Applying that test, the Kremer Court concluded that "a statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship. Thus, it regulates the business of insurance. So we agree with federal courts that the FAA does not preempt such statutes. Specifically, we hold that the FAA does not preempt Nebraska's §25-2602.01(f)(4)." Kremer, 280 Neb. at 608.

The Kremer Court further held: "Under the McCarran-Ferguson Act, §25-2602.01(f)(4) regulates the business of insurance and reverse preempts the FAA." Id., 280 Neb. at 611. See also, Speece v. Allied Professionals Ins. Co., supra, 289 Neb. at 80-81.

C. Defendants' Preliminary Objections To Applying The Nebraska Statute

1. Mastrobuono and the Nebraska Choice-of-Law Provision

In Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), the parties entered into a "Client Agreement" with respect to a securities brokerage account. They agreed both (1) that any controversy arising out of their transactions would be settled by arbitration under NASD rules, which permitted an award of punitive damages; and (2) that the Client Agreement would be governed by New York state law, which prohibits arbitral awards of punitive damages. The Supreme Court resolved the conflict by applying the FAA's policy in favor of arbitration, writing:

At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards. As we point out in Volt,[FN1]when a court interprets such provisions in an agreement covered by the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." 489 U.S., at 476.... .....We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators....

[*5]Mastrobuono, supra, 514 U.S. at 62-64 (emphasis added).

Here, a conflict exists between (1) the RPA's arbitration agreement, and (2) the RPA's Nebraska choice-of-law provision, which renders the arbitration agreement invalid if it falls within the scope of Neb. Rev. St. §25-2602.01(f)(4). Defendants contend that per Mastrobuono the conflict should be avoided by applying the federal presumption in favor of arbitration, and concomitantly adopting a narrow construction of the Nebraska choice-of-law provision to uphold the arbitration agreement despite §25-2602.01(f)(4). However, Mastrobuono concerned only the scope of a valid arbitration agreement, and its analysis applies, as the opinion expressly states, only to "an agreement covered by the FAA." Id., 514 U.S. at 62. Here, however, the very point at issue is whether the FAA applies at all, or whether, to the contrary, the FAA is reverse preempted by virtue of the McCarran-Ferguson Act and the arbitration agreement invalidated by §25-2602.01(f)(4).

As the Supreme Court made clear in Granite Rock Company v. International Brotherhood of Teamsters, 561 U.S. 287 (2010), the FAA policy in favor of arbitration may not be employed to resolve a challenge like Milmar's here to the validity and enforceability of an arbitration agreement in the first place. Citing Mastrobuono, the Court in Granite Rock observed that "we have never held that this policy overrides the principle that a court may submit to arbitration 'only those disputes...that the parties have agreed to submit.' First Options, 514 U.S., at 943..."[FN2] Granite Rock, supra, 561 U.S. at 302. Critically, the Court continued:

We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass that dispute.

Id., 561 U.S. at 303 (emphasis added).

Inasmuch as it is precisely the validity of the agreement committing the parties' disputes to an arbitrator that Milmar contests, Mastrobuono is inapplicable to the issues here presented.[FN3]

2. "Extraterritoriality"

In Federal Trade Commission v. Travelers Health Association, 362 U.S. 293 (1960), a Nebraska insurance company solicited business by mail with residents of every state. The FTC [*6]issued a cease-and-desist order prohibiting certain representations it found to be misleading and deceptive in violation of the Federal Trade Commission Act. Travelers, citing the McCarran-Ferguson Act, argued that the Federal Trade Commission Act was reverse preempted by virtue of a Nebraska statute which inter alia prohibited "deceptive acts and practices in the conduct of the business of insurance in any other state..." The Supreme Court disagreed, stating that "[i]n our opinion the state regulation which Congress provided should operate to displace this federal law means regulation by the State in which the deception is practiced and has its impact", and that the McCarran-Ferguson Act was not intended to allow a state to "regulate activities carried on beyond its own borders." Id., 362 U.S. at 298-299, 300.

Defendants argue that Federal Trade Commission v. Travelers Health Association prohibits the "extraterritorial" application of Neb. Rev. St. §25-2602.01(f)(4) to AUCRA's

RPA with Milmar, a New York entity. Precisely this argument was rejected by the Court in Citizens of Humanity v. Applied Underwriters, Inc., — Cal.Rptr. &mdash, 2017 WL 5623555 (Cal. Ct. App., Nov. 22, 2017) because, as here, the parties had agreed in the RPA to the application of Nebraska law: The Nebraska statute at issue in Travelers Health sought, by its express terms, to regulate the conduct of an insurer in another jurisdiction. The NUAA by its terms does not seek to regulate activities carried on outside Nebraska. The NUAA applies in the instant case because the parties contractually agreed to its application.

Id., at *9. See also, Steingart v. Equitable Life Assur. Soc. of U.S., 366 F. Supp. 790, 793 (S.D.NY 1973) (distinguishing Travelers Health as a federal enforcement action, district court held that "[t]he scope of inquiry to determine whether the McCarran Act is

applicable in a private action is thus limited to matters directly affecting the complaining parties").

Section 25-2602.01(f)(4) of the NUAA applies here not because Nebraska thereby sought to regulate activities carried on beyond its own borders, but because the parties' RPA expressly provides that "[t]his Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska." Consequently, Federal Trade Commission v. Travelers Health Association, supra, has no bearing on this case.

D. Who Decides The "Gateway" Question Of Arbitrability?

In Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, supra, the Court of Appeals laid out the analytical framework for determining whether the threshold question of arbitrability should be resolved by the arbitrator or by the court:

"'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'" (AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648 ... [1986], quoting Steelworkers v. Warrior & Gulf Nav. Co., 3363 U.S. 574, 582 ... [1960]; see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 ... [1995]). As the United States Supreme Court has stated, "[c]hallenges to the validity of arbitration agreements ... can be divided into two types," namely, "challenges specifically [to] the validity of the agreement to arbitrate" and "challenges [to] the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid" (Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 ... [2006]). "[A]ttacks on the [*7]validity of the contract, as distinct from attacks on the validity of the arbitration clause[,] itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court'" (Nitro-Lift Technologies, LLC v. Howard, 568 U.S. &mdash, 133 S. Ct. 500, 503 ... [2012], quoting Preston, 552 U.S. at 349 ...; see Buckeye Check Cashing, Inc., 546 U.S. at 444 ...; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S.; 395, 403-404 ... [1967]).The Supreme Court has also held that arbitration agreements must be enforced according to their terms, and that "parties can agree to arbitrate 'gateway' questions of 'arbitrability'" (Rent-A-Center, West, Inc., 561 U.S. at 68-69 ...; see Nitro-Lift Technologies, LLC, ... 133 S. Ct. at 503; Buckeye Check Cashing, Inc., 546 U.S. at 445...). Such "delegation clauses" are enforceable where "there is 'clear and unmistakeable' evidence" that the parties intended to arbitrate arbitrability issues (First Options of Chicago, Inc., 514 U.S. at 944 ..., quoting AT & T Technologies, Inc., 475 U.S. at 649 ...).....Further, "courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself" (Granite Rock Co. v. Teamsters, 561 U.S. 287, 301 ... [2010]; see Nitro-Lift Technologies, LLC, ..., 133 S. Ct. at 503; Rent-A-Center, West, Inc., 561 U.S. at 71 ...; Buckeye Check Cashing, Inc., 546 U.S. at 445 ...). The rule of severability extends to delegation clauses, which are severable from larger arbitration provisions (see Rent-A-

Center, West, Inc., 561 U.S. at 71-72 ...; Parnell v. CashCall, Inc., 804 F.3d 1142, 1146 [11th Cir. 2015]; Brennan v. Opus Bank, 796 F.3d 1125, 1133 [9th Cir. 2015]). Thus, where a contract contains a valid delegation to the arbitrator of the power to determine arbitrability, such a clause will be enforced absent a specific challenge to the delegation clause by the party resisting arbitrability (see Rent-A-Center, West, Inc., 561 U.S. at 71-72 ...).

Monarch Consulting, Inc., 26 NY3d at 674-676.

Paragraph "13" of the RPA states inter alia that "all disputes between the parties relating in any way to the...enforceability of this Agreement" are subject to binding arbitration "under the provisions of the American Arbitration Association." The AAA rules in turn provide:

The arbitrator shall have power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

Thus, the RPA provides clear and unmistakeable evidence that the parties intended to delegate arbitrability issues to the arbitrator. See, Zachariou v. Manios, 68 AD3d 539 (1st Dept. 2009).

The parties' delegation of "gateway" issues of arbitrability to the arbitrator is enforceable absent a specific challenge to the validity of the delegation clause by Milmar, the party resisting arbitration. See, Rent-A-Center, West, Inc. v. Jackson, supra, 561 U.S. 63, 68-72 (2010); Monarch Consulting, Inc., supra. In Rent-A-Center, the Supreme Court observed that per Section 2 of the FAA, a written provision to settle a controversy by arbitration is "valid, irrevocable, and enforceable" regardless of the validity of the contract in which it is contained, but:

If a party challenges the validity under §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that [*8]agreement under §4.

Id., 561 U.S. at 70, 71.

Three federal circuit courts have grappled with the application of Rent-A-Center in the context of challenges to arbitration under the RPA at issue here predicated on state laws prohibiting arbitration of insurance-related disputes. See, Milan Express Co., Inc. v. AUCRA, 590 Fed. Appx. 482 (6th Cir. 2014); South Jersey Sanitation Company, Inc. v. AUCRA, 840 F.3d 138 (3d Cir. 2016); Minnieland Private Day School, Inc. v. AUCRA, 867 F.3d 449 (4th Cir.2017).

1. Milan Express Co., Inc.

In Milan Express Co., Inc. v. AUCRA, supra, as here, the Court was faced with a challenge to arbitration under the RPA based on Section 25-2602.01(f)(4) of the Nebraska Uniform Arbitration Act. Citing Rent-A-Center, the Sixth Circuit acknowledged that "[a] court must first resolve any challenge to the validity of the arbitration agreement before it may order compliance with the agreement." Milan Express Co., Inc., 590 Fed. Appx. at 485 (italics in original). However, the Court continued:

Milan has not asserted such a challenge to the validity of the arbitrability agreement, specifically (or the Agreement as a whole), on grounds that would warrant revocation. Rather, Milan's challenge, to the arbitration clause as a whole, is limited to the argument that it is unenforceable under Nebraska law. Milan may be right about this, but enforceability is a question the parties expressly agreed to submit to arbitration, and agreement Milan has not challenged on fraud or unconscionability grounds. It follows that the claims asserted in Milan's complaint are, per the parties' express agreement, subject to resolution exclusively by settlement negotiation and binding arbitration, not by litigation. We thus conclude that the district court erred when it granted Milan's motion to stop arbitration.

Id., at 486 (emphasis added). This court is at a loss to understand the Sixth Circuit's reasoning, for a claim that the RPA's arbitration provision is unenforceable under §25-2602.01(f)(4) constitutes a challenge to the validity of the arbitrability agreement specifically on grounds that would warrant revocation.

First, in Kremer v. Rural Community Ins. Co., supra, the Nebraska Supreme Court expressly held that "under §25-2602.01(f)(4), agreements to arbitrate future controversies concerning an insurance policy are invalid" (Id., 280 Neb. at 603 [emphasis added]), so a "gateway" challenge predicated on the violation of that Nebraska statute does go to the validity of the arbitration agreement specifically.

Second, the illegality of the arbitration agreement under §25-2602.01(f)(4) would constitute grounds warranting revocation of that agreement under Section 2 of the FAA. See, Lewis v. Epic Systems Corporation, 823 F.3d 1147, 1157 (7th Cir. 2016); Gold v. New York Life Ins. Co., 153 AD3d 216, 222 (1st Dept. 2017) (concurring with Lewis, supra). In Lewis, the Seventh Circuit wrote:

As a general matter, there is "no doubt that illegal promises will not be enforced in cases controlled by the federal law." Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 ... (1982). The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. [*9]Illegality is one of those grounds. See Buckeye Check Cashing, Inc. v. Cardegna, 516 U.S. 440, 444 ... (2006) (noting that illegality is a ground preventing enforcement under §2).... Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement.

Lewis v. Epic Systems Corporation, supra, 823 F.3d at 1157 (emphasis added). See also, Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 NY3d 269, 276 (2011) (illegality is a traditional basis for invalidating and setting aside a written agreement).

Based on the foregoing, it appears that the Sixth Circuit's analysis in Milan Express Co., Inc. v. AUCRA, supra, was simply incorrect. Moreover, the Sixth Circuit's reasoning was not followed by Third Circuit, in South Jersey Sanitation Company, Inc., supra, or by the Fourth Circuit, in Minnieland Private Day School, Inc., supra. This court, too, declines to adopt it.

2. South Jersey Sanitation Company, Inc.

The Third Circuit in South Jersey Sanitation Company, Inc. v. AUCRA, supra, was likewise faced with a challenge to arbitration under the RPA based on Section 25-2602.01(f)(4) of the Nebraska Uniform Arbitration Act. Like the Sixth Circuit in Milan Express, the Third Circuit in South Jersey acknowledged the fundamental holding of Rent-A-Center that "[i]f a party challenges the validity under [FAA] §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under [FAA] §4." South Jersey Sanitation Company, Inc., 840 F.3d at 143. The Court further acknowledged that "South Jersey's contention that the RPA's arbitration provision is rendered unenforceable by the Nebraska Statute appears to target the arbitration provision alone, rather than the contract as a whole." Id., at 145. Nevertheless, for two reasons the Court brushed aside South Jersey's challenge and held that the enforceability of the arbitration provision was a matter for the arbitrator, not the courts, to decide. Id., at 145-146.

The Court held, first, that South Jersey had simply failed to carry its burden of showing that the RPA fell within the ambit of §25-2602.01(f)(4). Id. The Court's decision is in this respect unexceptionable. The question whether Milmar, unlike South Jersey, has successfully demonstrated that the RPA falls within the ambit of §25-2602.01(f)(4) is addressed in Section "E" hereinbelow.

However, the Court then misapplied Rent-A-Center's requirement that a party seeking to avoid arbitration must challenge the specific agreement to arbitrate, and not the contract as a whole, by erroneously conflating the nature of the party's challenge to the agreement and the nature of the inquiry necessary to resolve that challenge. The South Jersey Court wrote:

Faced with a disputed agreement whose fundamental nature remains obscure, we conclude that, by the clear and comprehensive arbitration provision in the RPA, it is for the arbitrator to determine what the precise nature of the RPA is and whether the RPA falls within Subsection (f)(4). This challenge, like the fraud challenge, implicates the RPA as a whole; like the fraud challenge, therefore, the question of whether the RPA's arbitration provision is enforceable under Nebraska law is a question for the arbitrator.

Id., at 146 (emphasis added).

The Court's analogy is wholly inapt. Since South Jersey asserted that the RPA in its entirety was the product of fraud but "allege[d] no arbitration-provision specific fraud" (id., at [*10]144), the "fraud challenge" did indeed implicate the RPA as a whole and was therefore per Rent-A-Center a matter for the arbitrator to decide. However, the challenge that §25-2602.01(f)(4) invalidates agreements to arbitrate future controversies concerning an insurance policy goes specifically to the arbitration provision and quite clearly does not implicate the RPA as a whole. To be sure, resolving that challenge may require a court to determine the nature of the RPA in order to decide whether it constitutes or includes an "agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract" within the meaning of Subsection (f)(4). However, that this inquiry implicates the RPA does not transform the §25-2602.01(f)(4) challenge into one implicating the RPA as a whole under Rent-A-Center. As noted above, the South Jersey Court's holding to the contrary erroneously conflates the nature of a party's challenge to an arbitration provision and the nature of the inquiry necessary to resolve that challenge.

Insofar, then, as South Jersey Sanitation Company, Inc. v. AUCRA holds that a challenge to arbitration based on §25-2602.01(f)(4) implicates the RPA as a whole and must therefore be decided by arbitration, this court concludes that such holding is in error and declines to follow it.

3. Minnieland Private Day School

In Minnieland Private Day School v. AUCRA, supra, the district court denied AUCRA's motion to compel arbitration under the RPA based on a Virginia law providing that "[n]o insurance contract ... shall contain any condition, stipulation or agreement ... [d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer," and that "[a]ny such condition, stipulation or agreement shall be void." Va. Code Ann. §38.2-312. On appeal, AUCRA argued:

...the district court improperly determined that Section 38.2-312 reverse preempts the arbitration provisions in the RPA because the RPA included a so-called "delegation provision," which expressly delegated the authority to resolve questions of arbitrability to the arbitrator. In particular, [AUCRA] asserts that the district court improperly concluded that the RPA constituted an "insurance contract" for purposes of Section 38.2-312, when the RPA left that question of arbitrability to the arbitrator.

Id., 867 F.3d at 454.

The Fourth Circuit recognized that "under Rent-A-Center, we first must decide whether Minnieland lodged a challenge against the delegation provision in the RPA, in particular." Id., at 455. The Court's ruling was as follows:

...[AUCRA] argues that Minnieland, like the plaintiff in Rent-A-Center, failed to specifically challenge the delegation provision in the RPA. But before the district court, Minnieland argued that Section 38.2-312 rendered void "any" arbitration provision in the RPA..., necessarily including the delegation provision, which is simply "an additional, antecedent agreement" to arbitrate, Rent-A-Center, 561 U.S. at 70....Accordingly, Minnieland "challenged the validity of that delegation with sufficient force and specificity" to satisfy Rent-A-Center.

Id., at 455-456 (emphasis added).

The Court accordingly determined that the "gateway" question of arbitrability was for the [*11]courts, not the arbitrator, to decide, and held that "Virginia's decision to treat delegation provisions in insurance contracts as void constitutes 'grounds as exist at law ...for the revocation of any contract'" per Section 2 of the FAA. Id., at 456-457. It therefore affirmed the denial of AUCRA's motion to compel arbitration, and remanded the case to the district court for a proper determination whether the RPA constitutes an "insurance contract" under Virginia law. Id., at 459.

4. Conclusion

On the strength of Minnieland Private Day School v. AUCRA, supra, the Court in Citizens of Humanity v. Applied Underwriters, Inc., — Cal.Rptr. &mdash, 2017 WL 5623555 (Cal. Ct. App., Nov. 22, 2017) concluded that a challenge — like Milmar's here — to the RPA "based on the preemptive effect of the McCarran-Ferguson Act and the [Nebraska Uniform Arbitration Act], is directed to the delegation provision as well as the arbitration provision as a whole." Id., at *5. The Court accordingly held that under Rent-A-Center the "gateway" arbitrability issue was for the court, not the arbitrator, to decide. Id.

This court concurs. In Rent-A-Center, the U.S. Supreme Court held that "[i]f a party challenges the validity under [FAA] §2 of the precise agreement to arbitrate at issue, the...court must consider the challenge before ordering compliance with that agreement under [FAA] §4." Id., 561 U.S. at 71. Milmar's challenge to arbitration under the RPA based on Neb. Rev. St. §25-2602.01(f)(4) implicates the validity of the arbitration agreement, including its "delegation clause," but not that of the RPA as a whole. See, Minnieland Private Day School v. AUCRA, supra; Citizens of Humanity v. Applied Underwriters, Inc., supra; Kremer v. Rural Community Ins. Co., supra. For the reasons stated above, neither Milan Express Co., Inc. v. AUCRA, supra, nor South Jersey Sanitation Company, Inc. v. AUCRA, supra, constitutes persuasive authority to the contrary. Therefore, pursuant to Rent-A-Center, this court is required to consider Milmar's challenge under §25-2602.01(f)(4) before ordering compliance with the arbitration agreement per Section 4 of the FAA.

E. Does The RPA Fall Within The Ambit Of §25-2602.01(f)(4) ?

Section 25-2602.01(b) of the Nebraska Uniform Arbitration Act provides:

(b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.

Subsection (f) carves out exceptions to the validity of arbitration agreements, including: (f) Subsection (b) of this section does not apply to ... (4) ... any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract.

Construing §25-2602.01, the Supreme Court of Nebraska in Kremer v. Rural Community Ins. Co., supra, held that "under §25-2602.01(f)(4), agreements to arbitrate future controversies concerning an insurance policy are invalid..." Id., 280 Neb. at 603.

AUCRA contends that the RPA falls outside the scope of §25-2602.01(f)(4), arguing that Subsection (f)(4) applies only to insurance policies, and further, that the RPA is not an insurance policy but an investment contract.

Milmar contends that the RPA falls within the ambit of §25-2602.01(f)(4) because the [*12]statute encompasses agreements "concerning or relating to an insurance policy," which includes the RPA, and in any event because the components of the Equity Comp Program — the workers compensation insurance policies and reinsurance agreement together with the RPA — are interrelated contracts which represent a single transaction.

1. The Meaning And Scope Of §25-2602.01(f)(4)

The Supreme Court of Nebraska has not had occasion to define the meaning and scope of the statutory language "any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract." See, Neb. Rev. St. §25-2602.01(f)(4). The Third Circuit, in South Jersey Sanitation Company, Inc. v. AUCRA, supra, cited dicta from the Nebraska Court's decision in Kremer v. Rural Community Ins. Co., supra, as "strongly suggest[ing] that Subsection (f)(4) of the Nebraska Statute applies only to insurance policies themselves, and that 'any agreement' must be read as an arbitration agreement or provision within such a policy, rather than a derivative investment contract." South Jersey, 840 F.3d at 146. The Court in Citizens of Humanity v. Applied Underwriters, Inc., supra, took umbrage at this, rejecting South Jersey's "advisory interpretation" of §25-2602.01(f)(4) as violative of fundamental principles of statutory construction and "inconsistent with the plain language of the statute, which broadly covers 'any agreement concerning or relating to an insurance policy.'" Id., 2017 WL 5623555 at *8.

South Jersey's interpretation, in this court's view, cannot be reconciled with the language and structure of §25-2602.01.

First, had the Nebraska legislature wished simply to prohibit arbitration agreements in insurance policies themselves it could have said so, directly. Instead, Subsection (f) carves out four types of cases / controversies / matters / disputes from the ambit of Subsection (b), which otherwise authorizes "provisions" in a written contract to submit future controversies to arbitration:

(1) A claim arising out of personal injury based on tort;(2) A claim under the Nebraska Fair Employment Practice Act.(3) Any agreement between parties covered by the Motor Vehicle Industry Regulation Act;[FN4]and (4) ..., any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract.

Subsection (f), subdivisions 1 and 2 clearly designate types of cases wherein arbitration provisions are prohibited. To construe the statutory term "agreement" in subdivisions 3 and 4 as referring not to types of agreement wherein arbitration provisions are prohibited, but instead to the prohibited arbitration provision itself, would plainly violate the symmetry of Subdivision (f).

Second, the South Jersey Court did not take account of the statutory language excepting "contract[s] between insurance companies including a reinsurance contract" from the scope of [*13]Subsection (f)(4). By implication, other types of contracts (including, potentially, a reinsurance contract other than one between insurance companies) and not just insurance policies are included within the ambit of Subsection (f)(4).

This court accordingly concludes that the Nebraska prohibition of "any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract" is not limited to arbitration provisions in the insurance policy itself. As the South Jersey Court noted, however, the question remains as to "what degree of 'concern' or 'relation' to an insurance contract is necessary to bring an agreement under Subsection (f)(4)." Id., 840 F.3d at 146. The Third Circuit therein suggested that its narrow construction of the statute "comports with the [McCarran-Ferguson Act], which permits reverse-preemption only by those state statutes 'regulating the business of insurance.' 15 U.S.C. §1012." Id., at 146 and n. 9. This concern is legitimate, because not all agreements "concerning or relating to an insurance policy" are part of the business of insurance. See, e.g., Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 213-214 (1979) (insurer's agreements with participating pharmacies to provide benefits to policyholders held not part of the business of insurance).

Stephens v. American International Ins. Co., 66 F.3d 41 (2d Cir. 1995) involved the liquidation of an insolvent reinsurer. Certain parties that had ceded risk to the insolvent reinsurer moved under the FAA to compel arbitration of their claims pursuant to broad arbitration clauses in the reinsurance contracts at issue. The Liquidator opposed, arguing that by virtue of the McCarran-Ferguson Act the FAA was reverse preempted

by a Kentucky statutory prohibition against compelling a liquidator to arbitrate. Id., 66 F.3d at 42-43. The Second Circuit addressed two questions: (1) Is reinsurance included within the "business of insurance"? (2) Is the Kentucky statute a law "regulating the business of insurance" per the McCarran-Ferguson Act ?

On the first issue, the Stephens Court concluded that reinsurance is a practice which falls within the "business of insurance". The Court wrote:

The Supreme Court has identified a three part test for determining whether a particular practice is a part of the "business of insurance": "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." Pireno, 458 U.S. at 129...[FN5](citing Royal Drug, 440 U.S. 205...[1979]). Reinsurance practices fall within this test. Any transaction between an insurer and a reinsurer is principally the same as a transaction between the original policyholder and an insurer, as both center around the transfer of risk. Furthermore, reinsurance is not merely "an integral part of the policy relationship between the insurer and insured," it is the policy relationship between the two parties. Finally, the practice of reinsuring insurers is a practice "limited to entities within the insurance industry."

Stephens, 66 F.3d at 44.

Concluding on the second issue that the Kentucky anti-arbitration provision was enacted [*14]to regulate the business of insurance, the Stephens Court observed that:

Fabe [FN6]states that "[s]tatutes aimed at protecting or regulating [the relationship between policyholder and insurer], directly or indirectly, are laws regulating the 'business of insurance,'" and that any law with the "end, intention, or aim of adjusting, managing, or controlling the business of insurance" is a law "enacted for the purpose of regulating the business of insurance." Fabe, 508 U.S. at [501, 505]....

Id., 66 F.3d at 44-45.

To the same effect is Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., 969 F.3d 931 (10th Cir. 1992). In that case, the Tenth Circuit held that a Kansas statute invalidating arbitration provisions in "contracts of insurance" applied "to reinsurance agreements as well as primary insurance contracts," and further, that "the McCarran-Ferguson Act precludes the application of the FAA to the reinsurance agreement at issue here." Id., 969 F.3d at 934-935.

Bearing these principles in mind, we consider whether the nature of the "Reinsurance Participation Agreement" (RPA) at issue here is such that per the McCarran-Ferguson Act Section 25-2602.01(f)(4) of the Nebraska Uniform Arbitration Act invalidates its arbitration provision.

2. The Nature Of The Reinsurance Participation Agreement

The nature of the RPA cannot be determined in isolation, but only in the context of the of Equity Comp Program of which it is an integral part. As noted above, the Program consists of (1) standard workers compensation insurance policies issued to Milmar by Continental and California, (2) a reinsurance agreement between affiliates of AU, including Continental and California, and AUCRA, and (3) the Reinsurance Participation Agreement (RPA) between AUCRA and Milmar.

Defendants contend that the RPA is not within the ambit of §25-2602.01(f)(4) because it is an investment contract, not an insurance policy. It argues:

The RPA is not an insurance policy. The RPA is a separate agreement by which Milmar can seek to share in the reinsurance proceeds from its workers' compensation policies. At most, the RPA may be related to an insurance policy, but it is clearly not itself an insurance policy. The Nebraska statute simply does not apply to the RPA.

Milmar has proffered a detailed analysis of the Equity Comp Program undertaken by the Insurance Commissioner of the State of California in a June 2016 Decision & Order in In re Shasta Linen Supply, Inc. v. California Insurance Company. While disagreeing with the Commissioner's characterization of the Program and the RPA, the Defendants on reply did not contest its relevance to these proceedings (except insofar as it deals with matters specific to California law), or present evidence contradicting the findings and conclusions set forth in the Commissioner's decision, which include the following:

(1) AU is the parent company of both Continental and California, the primary workers compensation insurers, and of AUCRA, an insurance company serving as the "reinsurance arm" for entities within the organization.

(2) The primary workers compensation policies are "guaranteed cost policies" wherein [*15]the annual premiums charged for a policy year are not impacted by the actual losses incurred during that same year.

(3) The Equity Comp Program, implemented through the RPA, is a "profit-sharing loss sensitive program" in which the premium for the policy year is impacted by the actual cost of claims incurred during the policy year.

(4) In essence, the guaranteed cost workers compensation policies are superseded by the terms of the RPA:

"Premium owed under the guaranteed cost policies is replaced by premium paid for Equity Comp under the RPA." "[T]he RPA modifies a number of guaranteed cost policy provisions, namely, the rates charged, the choice of law and dispute resolution requirements, non-renewal penalties and early cancellation fees. In fact, where the RPA and the guaranteed cost policy differ, the RPA terms supplant those of the guaranteed

cost policy.""[T]he Equity Comp program does not merely cede the risk under the guaranteed cost policy to a captive reinsurer, as is typical in a fronting arrangement. Instead, the RPA modifies the rates charged and premium paid, reallocates risk to the insured, alters the cancellation terms, forces binding arbitration of disputes and implements non-renewal penalties. These modifications do not describe a fronting arrangement, but rather a collateral agreement that modifies the guaranteed cost insurance policy."

(5) In essence, the insured policyholder becomes a party to the reinsurance agreement by virtue of the RPA:

"The parties stipulated in this proceeding that the RPA is not actually reinsurance. This stipulation by [California] is in direct conflict to the representations made to the Commissioner by [California] when the reinsurance treaty and addendums were filed and acknowledged by the Commissioner and the testimony offered at [the] hearing.The RPA itself is based upon and results from the reinsurance treaties filed by [California]. As noted in the testimony of Jeffrey Silver, General Counsel of [California], Shasta Linen was a 'party' to the reinsurance agreement between [California] and AUCRA by virtue of the RPA, and the RPA becomes part of and is based upon the reinsurance agreement between [California] and AUCRA..."

In sum, the Commissioner declined to exalt form over substance in discerning the essence of the Equity Comp Program / RPA because the RPA goes to the very heart of what the courts have consistently held to be the practice of insurance. First, the RPA is an integral part of the policy relationship between the insurer and the insured because it in effect constitutes a collateral agreement that modifies fundamental terms of the guaranteed cost workers compensation insurance policies. Second, the RPA transfers or spreads the policyholder's risk (back to the insured!) by effectively making the policyholder a party to the reinsurance agreement between the primary insurers and AUCRA. Third, but for the insured, the participants in the Program are all entities within the insurance industry. See, e.g., Union Labor Life Ins. Co. v. Pireno, supra; Stephens v. American International Ins. Co., supra.

In view of the foregoing, the court concludes that (1) the RPA falls within the ambit of Neb. Rev. St. §25-2602.01(f)(4) as an agreement so intimately "concerning" or so directly [*16]"relating" to an insurance policy as to modify the terms thereof, or as a reinsurance contract other than one between insurance companies, or both; and (2) that §25-2602.01(f)(4) thus construed falls comfortably within the protective envelope of the McCarran-Ferguson Act. See, Citizens of Humanity v. Applied Underwriters, Inc., supra, 2017 WL 5623555 at *8 -*9 (affirming trial court's finding that the RPA was an "agreement concerning or relating to an insurance policy" within the meaning of §25-2602.01(f)(4)).

F. Conclusion

By virtue of the McCarran-Ferguson Act, Section 25-2602.01(f)(4) of the Nebraska Uniform Arbitration Act reverse preempts the Federal Arbitration Act and invalidates the arbitration provision in the RPA. Therefore, Defendants' motion to compel arbitration and stay proceedings in this action is denied.

II. PLAINTIFF'S CROSS MOTION TO COMPEL DEFENDANTS TO POST BOND

Insurance Law §1213(c)(1) provides in pertinent part:

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

"The purpose of the preanswer security requirement is evident from the statute itself. Alien insurers must maintain sufficient funds in the State to satisfy any potential judgment arising from the policies of insurance (including reinsurance treaties) they issue." Curiale v. Ardra Insurance Company, Ltd., 88 NY2d 268, 275 (1996).

At oral argument, the parties stipulated that AU and AUCRA were the only party Defendants potentially subject to the security requirements of Insurance Law §1213(c)(1). However, Defendants assert, on two grounds, that no deposit or bond should be required.

First, Defendants claim that Section 1213 applies only to unlicensed foreign insurers, and the only Defendants who issued insurance to Milmar were Continental and California. However, the Court of Appeals has held to the contrary that Section 1213 also applies to foreignreinsurers. See, Levin v. Intercontinental Casualty Ins. Co.,95 NY2d 523 (2000) (unauthorized foreign reinsurer required to post Section 1213 bond); Curiale v. Ardra Insurance Company, Ltd., supra. Moreover, as set forth in Point I above, the evidence at this stage of the proceedings is sufficient to support the conclusion that the RPA constitutes a reinsurance contract.

Second, Defendants claim that no bond is required because Continental and California are licensed in New York, they have a Best Rating Service Inc. rating of A+ (Superior), and they are indisputably in a financial position to address any claims in this action. However, Section 1213 explicitly prescribes the circumstances wherein the court may

dispense with the deposit / bond [*17]requirement. With respect to any particular foreign insurer or reinsurer, the statute allows the court to dispense with the required security only if "the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding." Defendants have made no such showing. Moreover, the superior financial status of Continental and California provides no guarantee whatsoever that a final judgment against their co-Defendants arising from the RPA — to which Continental and California were not parties — will be satisfied.

Therefore, Insurance Law §1213(c) requires that AU and AUCRA post a deposit or bond "sufficient to secure payment of any final judgment which may be rendered in the proceeding." In Levin v. Intercontinental Casualty Ins. Co., supra, the Court of Appeals recognized that inasmuch as "[t]he calculation must be made at any early stage of the litigation, prior to the resolution of potentially complex factual and legal issues", the amount of the security "necessarily falls within the trial court's discretion." Id., 95 NY2d at 529. Here, Milmar seeks a monetary judgment money damages for sums paid under the RPA ($2,786,306) in excess of premiums due under the Continental and California insurance policies ($1,989,765), or approximately $800,000.00.

The court accordingly directs that AU and AUCRA post a deposit or bond in the amount of $800,000.00. A single deposit / bond posted by AU and AUCRA collectively is satisfactory, provided that the entire amount remain available to satisfy a judgment in Milmar's favor against either Defendant until the case is dismissed, discontinued or otherwise resolved against both Defendants.

It is therefore

ORDERED, that Defendants' motion to compel arbitration and stay proceedings in this action is denied, and it is further

ORDERED, that Plaintiffs' cross motion to compel Defendants to post security pursuant to Insurance Law §1213 is granted in part and denied in part, and it is further

ORDERED, that defendants Applied Underwriters, Inc. and Applied Underwriters Captive Risk Assurance Company, Inc. are directed to post a deposit or bond pursuant to Insurance Law §1213(c)(1) in the amount of $800,000.00 as set forth hereinabove.

The foregoing constitutes the decision and order of the court.

Dated: December 5, 2017

Goshen, New York

E N T E R

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HON. CATHERINE M. BARTLETT, A.J.S.C. Footnotes

Footnote 1:Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989).

Footnote 2:First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

Footnote 3:The result in Randazzo Enterprises, Inc. v. AUCRA, 2014 WL 6997961 (N.D. Cal., Dec. 11, 2014) is to the contrary. However, since the Randazzo Court fails to acknowledge the critical distinctions referenced hereinabove, its analysis is unpersuasive. Furthermore, the federal circuit courts that have confronted the RPA at issue here have not resorted to Mastrobuono to uphold the validity of the arbitration agreement contained therein. See, South Jersey Sanitation Company, Inc. v. AUCRA, 840 F.3d 138 (3d Cir. 2016); Milan Express Co., Inc. v. AUCRA, 590 Fed. Appx. 482 (6th Cir. 2014).

Footnote 4:The Nebraska Motor Vehicle Industry Regulation Act governs the distribution and sale of motor vehicles in Nebraska, and covers manufacturers, distributors and their representatives doing business in Nebraska, as well as the "buying public." Neb. Rev. St. §60-1401.01 et seq.

Footnote 5:Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982).

Footnote 6:United States Dept. of Treasury v. Fabe, 508 U.S. 491 (1993).