SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRANSATLANTIC REINSURANCE COMPANY and FAIR AMERICAN INSURANCE AND REINSURANCE COMPANY (f/k/a PUTNAM REINSURANCE COMPANY), Petitioners, -against- NATIONAL INDEMNITY COMPANY, Respondent.	**Index No.:**

TRC'S MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION TO COMPEL ARBITRATION

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Dated: March 19, 2014

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Petitioners, Transatlantic Reinsurance Company ("TRC" or "TransRe") and Fair American Insurance and Reinsurance Company (f/k/a Putnam Reinsurance Company) ("Putnam") (TRC and Putnam are collectively referred to as "TRC" unless the context requires otherwise), by and through their undersigned counsel, Crowell & Moring LLP, respectfully submit this memorandum of law in support of their Petition to Compel respondent, National Indemnity Company ("NICO") to arbitrate claims arising under a series of treaty reinsurance contracts (the "Treaties"). While not a signatory, NICO has knowingly exploited the benefits of the Treaties, each of which contains a binding arbitration provision, thereby obtaining tens of millions of dollars in direct benefits. Accordingly, NICO is estopped from denying the relevant arbitration provisions, and TRC respectfully requests that this Court issue an order, pursuant to CPLR §7503, compelling NICO to submit to arbitration.

PRELIMINARY STATEMENT

The dispute before this Court concerns NICO's attempt to evade its obligation to arbitrate TRC's claims under the Treaties, which were entered into decades ago between TRC and AIG.[1] NICO has refused to submit to arbitration by invoking the unavailing defense that it is not a signatory to the Treaties. NICO's overly simplistic argument glosses over the reality that, through a complex financial transaction, known as a Loss Portfolio Transfer ("LPT"), NICO has substituted itself for AIG in the on-going reinsurance relationship with TRC and is bound by the arbitration provisions contained in the Treaties.

[1] As used herein, "AIG" refers to those subsidiaries and affiliates of American International Group, Inc. whose liabilities are subject to the LPT and are reinsured by TRC.

Through the LPT, NICO expressly and broadly assumed the right to resolve policyholders' claims and liabilities, and to collect reinsurance recoveries – including under reinsurance contracts with TRC – with respect to losses that NICO assumed and pays. NICO was granted full power of attorney to act on behalf of AIG and, since entering into the LPT, NICO (by its affiliate, Resolute Management, Inc.["Resolute"]) has handled, as its own, and for its own benefit, the AIG business that it assumed. NICO directly bills reinsurers – including TRC – for the loss and loss expense that NICO pays with respect to those assumed liabilities. And NICO directly sues and initiates arbitration against TRC for unpaid reinsurance billings.

NICO has directly insinuated itself into the relationship between TRC and AIG, and it purports to assume AIG's respective rights under their applicable contracts with TRC. New York law is clear that "a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Belzberg v. Verus Inves. Holdings Inc.*, 21 N.Y.3d 626, 631 (2013) (internal citations and quotations omitted). Having purported to assume all of AIG's obligations and benefits under the Treaties, and having recovered tens of millions of dollars in direct benefits as a result, NICO cannot be permitted to pick and choose which provisions of the Treaties it deems enforceable. Rather, NICO must abide by the obligations set forth in the Treaties, including the obligation to arbitrate TRC's claims that arise out of the Treaties.

STATEMENT OF FACTS

In this proceeding, TRC seeks an ordering compelling NICO to submit to two arbitrations concerning the parties' rights and obligations under the Treaties, which reinsure several subsidiaries of American International Group, Inc. (collectively, "AIG"). Specifically, TransRe seeks to compel NICO to arbitrate disputes arising under 17 excess of loss reinsurance contracts, and

TransRe and Putnam seek to compel NICO to arbitrate certain disputes under 24 pro rata reinsurance contracts.[2] Subject to the terms and conditions of the Treaties, TRC has agreed to indemnify AIG for a portion of AIG's insurance risk on policies of direct insurance. The liabilities at issue in the Arbitrations principally arise out of insurance policies that AIG issued between 1978 and 1985.[3]

Over the ensuing decades, many of those AIG-insured companies have incurred substantial liabilities arising from their use or sale of asbestos containing materials. AIG has, under the insurance policies it issued, incurred loss and expense with respect to asbestos liabilities and, in turn, sought indemnification from TRC under the Treaties. As AIG's reinsurer, TRC and Putnam underwrote and relied on AIG's claims-handling and technical expertise for the effective, efficient handling and resolution of asbestos claims.[4] The Treaties' wording reflects this alignment of the parties' interests by requiring that AIG retain net a fixed percentage of liability under each of its policies, either from the first dollar paid (*i.e.*, a proportional treaty) or for all amounts below a specific threshold (*i.e.*, excess of loss treaty).

This alignment of TRC's and AIG's interests was shattered in April of 2011. Through the LPT, a complex, integrated multi-step financial transaction, AIG transferred most of the asbestos-related liabilities that TRC had reinsured under the Treaties to NICO.[5] AIG also transferred to NICO the obligation of handling the asbestos claims and the right to collect any rein-

[2] Affirmation of Michael Kuehn, dated March 19, 2014 ("Kuehn Aff."), Exs. A-B.

[3] Affidavit of Beth Levene, dated March 19, 2014 ("Levene Aff."), ¶ 6.

[4] *Id*., ¶¶ 5-7.

[5] Kuehn Aff., Ex. D ("NICO LPT").

surance associated therewith, including under the Treaties.[6] To that end, NICO now handles the underlying (putatively reinsured) asbestos liabilities.[7] NICO bills TRC for the loss and loss expense that NICO pays with respect to transferred asbestos liabilities.[8] And, both in the name of AIG, and in its own capacity, NICO sues and initiates arbitrations against TRC for unpaid reinsurance billings related to the transferred asbestos liabilities.[9]

REINSURANCE

"[R]einsurance is 'the insurance of one insurer [the 'reinsured' or 'cedent'] by another insurer [the 'reinsurer'] by means of which the reinsured is indemnified for loss under insurance policies issued by the reinsured to the public.'"[10] The nature of reinsurance is that a reinsurer receives a portion of the premium received by the insurer on the underlying policies in return for an agreement by the reinsurer to undertake a commensurate portion of the reinsured's potential insurance exposure under the same policies.[11]

Treaty reinsurance, such as that issued by TRC to AIG, traditionally requires a reinsurer to accept certain groups of insurance risks that the ceding company then underwrites or which occur. Treaty reinsurance is often used between long-term risk trading partners who build up a close business relationship over many years. Reinsurance treaties take two general forms – proportional and excess of loss – both of which are structured in different ways to align the interests

[6] *Id*., Ex. E, ("ASA"), ¶ 4.1.
[7] *Id*.; Levene Aff., ¶ 20.
[8] *Id*.
[9] *Id*.
[10] *Matter of Liquidation of Union Indem. Ins. Co. of N. Y.*, 89 N.Y.2d 94, 105-106 (1996) [internal citation omitted].
[11] Kuehn Aff., Ex. F, p. 40-7.

of the cedent and reinsurer.[12] Under a proportional treaty, the reinsurer indemnifies the ceding company for a specific percentage of the losses paid by the ceding company under its policies from the first dollar.[13] Under an excess of loss treaty, the ceding company pays all losses under the policy up to a specific amount and then is indemnified by the reinsurer only for losses incurred above that amount.[14] Both types of treaties create a unity of interest between the cedent and reinsurer by, among other things, requiring that the cedent retain a predetermined amount of loss under its policies (the "Retention").

The Treaties at issue here are all excess of loss and proportional treaties. Accordingly, AIG is required to retain a share of the reinsured risks (the "Net Retention"), to ensure that its interests remain aligned with TRC's in the outcome of claims arising under its policies – that is, to ensure that all parties have "skin in the game." In furtherance of the parties' joint business interests, TRC relies on AIG's claims-handling and technical expertise for the effective, efficient handling and resolution of underlying claims, and this is built into the framework of the agreements.[15]

Based on the typically long-term business relationship between a cedent and its reinsurer, treaties often require disputes arising out of or concerning the reinsurance contract to be submitted to arbitration.[16] That is the case here with respect to the Treaties.

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[12] *Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 588 (2001).

[13] *Id.*

[14] *Id.*

[15] Levene Aff., ¶ 7.

[16] In contrast, facultative reinsurance contracts, which concern only one insurance policy and do not form the basis of a long-term reinsurance business relationship, often do not contain arbitration provisions.

THE LPT

The Treaties were principally entered into between 1978 and 1985.[17] By 2011, the asbestos-related insurance risks that AIG had assumed under the reinsured insurance policies were swamping AIG's financial statements with liabilities and raising concerns in the financial markets. In fiscal year 2010, AIG was reporting net asbestos liabilities of $2.223BN.[18] At that time, there had been other changes as well. Nearly 80% of AIG's stock was then owned by the US Government,[19] and AIG was trying to convince itself and the public that its days of financial gambles and shenanigans were over by rebadging itself as "Chartis".[20] AIG decided to shed its asbestos-related liabilities[21] (to "de-risk", as AIG put it[22]) to increase the value of its stock for an anticipated secondary offering by AIG and the US Government.

To accomplish this de-risking AIG turned to Berkshire Hathaway and its insurance subsidiary NICO. Through the LPT, AIG transferred to NICO a single risk - AIG's asbestos liabilities. In April of 2011, NICO and AIG announced their entry into the LPT, effective as of January 1, 2011. To assume the bulk of AIG's net asbestos liabilities AIG paid to NICO approximately $1.67[23] BN.[24] The transaction was nominally structured as "reinsurance" with an aggregate limit of $3.5BN on all payments to be made by NICO.[25]

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[17] Levene Aff., ¶ 6.

[18] Kuehn Aff., Ex. G, p. 105.

[19] *Id.*, Ex. H (stating that after rescuing AIG with bailouts, the U.S. government had a "nearly 80% equity stake in the company" and began reducing its stake in 2011).

[20] "[AIG] renamed its insurance businesses [Chartis] to distance them from its U.S. bailout..." and the 2008 financial crisis, a major cause of which was attributed to AIG's business practices. *Id.*, Ex. I.

[21] *Id.*, Ex. J (noting Chartis's "ongoing strategy to de-risk").

[22] *Id.*, Ex. K.

[23] NICO and Berkshire-Hathaway derive substantial economic benefit from the $1.67BN LPT "premium" and the right to collect on AIG's third-party reinsurance for the transferred asbestos claims. In its 2011 annual report, Berk-

(continued…)

The LPT is comprised of 8 integrated documents structured to transfer to NICO the vast bulk of AIG's asbestos liabilities. The sequence of the multi-step transaction is set forth in the Master Transaction Agreement (the "MTA") which provides that:

> Pursuant to the terms of this Agreement [the MTA], the [AIG insurers], Eaglestone, and NICO desire to enter into loss portfolio reinsurance transactions, pursuant to which Reinsurers will amend and restate their cession of certain Subject Asbestos Liabilities and certain other liabilities to Eaglestone and Eaglestone will retrocede 100% of the Subject Asbestos Liabilities to NICO.[26]

The various LPT documents are integrated in every sense of the word, internally referring to each other, borrowing the definitions provided in one for use in others, etc., and all were negotiated and executed to effectuate the transfer to NICO of the rights and liabilities associated with AIG's legacy asbestos liabilities.

Along with the asbestos liabilities, AIG transferred to NICO the authority and control over the handling of the transferred asbestos liabilities.[27] Thus, pursuant to the ASA, AIG and NICO agreed that:

> In order to assist NICO in the performance of the Administrative Services hereunder, [AIG] shall deliver to NICO … an appropriate power of attorney that shall nominate, constitute, and appoint NICO and/or Resolute, as the case may be, as their attorney-in-fact with respect to the rights, duties and privileges and obligations of [AIG] in and to matters within the Scope of Service, with full power and authority to act in the name, placed and stead of [AIG] with respect thereto, in-

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(continued…)

shire-Hathaway described this income as "costless capital that funds a myriad of other opportunities. This business produces 'float'—money that doesn't belong to us, but that we get to invest for Berkshire's benefit." *Id*., Ex. L, p. 4.

[24] *Id.*, Ex. C at 13, ¶ 3.1.

[25] *See id.* at 9, ¶ 2.1(a)(ii).

[26] *See id*., Ex. L, at 1.

[27] *See id*. Ex. E, at 14, ¶ 4.1 & 15, ¶ 5.1 – 5.2.

> cluding the power, without reservation, to service and enforce Subject Contracts [defined as AIG underlying policies and third-part reinsurance, such as the Treaties] within the Scope of Service, to adjust, defend, to settle and to pay Subject Claims, and to take such other and further action as may be necessary to or desirable to effect the transactions contemplated by the LPT [Agreements] ….”[28]

As set forth more fully in the Petition, pursuant to the ASA, the services that NICO agreed to provide AIG with respect to the transferred asbestos claims and associated reinsurance were comprehensive.

Concerning the rights to administer and collect the associated reinsurance, the parties clearly articulated their “**express mutual intent . . . that NICO receive the full economic benefit of the Included Reinsurance Recoverables . . . .**”[29] Specifically, with respect to reinsurance associated with the transferred asbestos claims, NICO undertook the “right and obligation to,” among other functions:

> (i) administer and collect, on behalf of and in the name of the applicable Reinsureds, Included Reinsurance Recoverables and Other Recoverables due in respect of the Subject Asbestos Liabilities in accordance with the contractual terms of the applicable Third Party Reinsurance Agreements and Underlying Policies in a commercially reasonable manner;
>
> (ii) provide all necessary litigation management functions with respect to the Third Party Reinsurance Agreements;
>
> (iii) initiate Legal Proceedings in the name of the applicable Reinsured in those instances where such action is necessary in order for the applicable Reinsured to enforce or protect its rights under the Third Party Reinsurance Agreements in respect of the Subject Asbestos Liabilities.[30]

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[28] *Id*., ¶ 2.1(d) (emphasis added).

[29] *Id*., Ex. D at 14, ¶ 3.4(d)(emphasis added).

[30] *Id*., Ex. E, ¶ 6.1.

The asbestos-related liabilities that AIG transferred to NICO in the LPT are the same liabilities that TRC had reinsured under the Treaties. To that end, NICO now handles the underlying (putatively reinsured) asbestos liabilities.[31] NICO bills TRC for the loss and loss expense that NICO pays NICO and sues and arbitrates against TRC for unpaid reinsurance billings.[32]

The practical and economic consequence of the LPT is to make NICO the "real" owner of the transferred asbestos liabilities and AIG's reinsurance for those liabilities. For all practical purposes, the LPT has effectively substituted NICO for AIG in the on-going reinsurance relationship, including with TRC. This sea-change in the TRC/AIG relationship was done without consulting with or obtaining consent from TRC. To placate the investment community, AIG's SEC filings emphasized that AIG was completely handing-off to NICO the rights and liabilities – including reinsurance collection rights – associated with the transferred asbestos liabilities. [33]

TRC & NICO

TRC learned of the LPT (but not its details) from AIG in the late summer of 2011.[34] The transaction was presented to TRC *ex post facto* as if Resolute had been hired as a third-party claims administrator by AIG to handle claims on AIG's behalf (in such a relationship, the principal / reinsured, here AIG, controls the actions of the third-party claims administrator and remains

[31] Levene Aff., ¶ 20.

[32] *Id*.

[33] For example, the unaudited quarterly financial statements in AIG's May 2011 Form 10-Q () states:

> Chartis [has] entered into an agreement with [NICO] under which the majority of Chartis' U.S. asbestos liabilities will be transferred to NICO . . . . Chartis will cede the bulk of its net asbestos liabilities to NICO under a retroactive reinsurance agreement with an aggregate limit of $3.5 billion. Chartis will pay NICO approximately $1.65 billion . . . For those asbestos claims subject to the reinsurance from NICO, NICO will assume responsibility for claims handling. It will also assume collection responsibility and collectability risk for third-party reinsurance related to those claims. (Kuehn Aff., Ex. N at 88).

[34] Levene Aff., ¶ 9.

on the risk), and not, as was actually the case, as if AIG had transferred its asbestos liabilities to NICO and eliminated AIG's economic responsibility for those liabilities altogether. By the late winter/early spring of 2012, high-level AIG and TRC executives were undertaking discussions to resolve globally several issues that remained open between the companies after AIG's divestiture of its interest in TRC. Among these issues was AIG's asbestos liabilities.[35]

In May of 2012, TRC informed AIG that the LPT breached various provisions of the TransRe/AIG reinsurance contracts generally (including those Treaties identified in this action) and that TRC would not be paying liabilities that were subject to the LPT until the issues were resolved. AIG told TRC that any reinsurance "coverage" issues regarding the transferred asbestos liabilities would have to be addressed to NICO, not AIG, because NICO was now responsible for those liabilities.[36] These discussions all took place in New York. Shortly thereafter, TRC met with NICO in New York to discuss the transferred asbestos liabilities. Although no resolution was reached, NICO proposed that the companies follow a two track approach. As proposed by NICO, Track One would be continued discussions and exchange of information; Track Two would entail each party pursuing a more aggressive approach through litigation and arbitration.[37]

Within days, NICO immediately started down Track Two by initiating (in the name of several of TRC's reinsured counter-party AIG companies) a lawsuit in New York State Supreme Court, *Granite State Ins. Co. v. Transatlantic Reins. Co.*, Index No. 652506/2012 ("*Granite State I*"), concerning allegedly unpaid reinsurance billings, many of which were presented to TRC by

[35] *Id.*, ¶¶ 3-4, 10.
[36] *Id.*, ¶¶ 10-13.
[37] *Id.*, ¶ 14-16.

NICO. At the same time, NICO initiated a New York venued arbitration concerning reinsurance billings pursuant to an excess of loss treaty in place between TRC and various AIG companies.[38] Many of these billings were also presented to TRC by NICO.

Likewise, TRC initiated an action against several AIG companies in New York State Supreme Court seeking a declaratory judgment against three AIG companies that TRC had no obligation to indemnify AIG for asbestos liabilities transferred to NICO.[39] That action, *Transatlantic Reins. Co. v. Granite State Ins. Co.*, Index No. 152812/2013 (Sup. Ct. N.Y. Cnty.)("*Granite State II*"), is currently pending in New York State Supreme Court and, upon information and belief, NICO is controlling and directing the defense.

NICO has controlled and directed AIG's litigation and arbitration proceedings with respect to the transferred asbestos claims. NICO employees have participated extensively in the proceedings. For example, NICO employee, Joanne Caprice has attended the initial organizational hearings for the New York venued arbitrations and also participated in a discovery conference ordered by an arbitration Panel.[40] Ms. Caprice also offered an extensive Affidavit in *Granite State I* in support of AIG's motions to dismiss and for summary judgment of TRC's claims that the LPT breached TRC's facultative certificates with AIG (the motions were largely denied).[41] In *Granite State II*, NICO employee Julie Harnadek also submitted an Affidavit in support of AIG's motion to dismiss certain defenses.[42]

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[38] *Id.*, ¶¶ 16-17.
[39] *Id.*, ¶ 18.
[40] *Id.*, ¶ 19.
[41] *Id.;* Kuehn Aff., Ex. O.
[42] Kuehn Aff., Ex. P.

Most notably, in April of 2013, NICO sued TRC and its parent corporation, Allegheny, in Massachusetts State court alleging tortious interference in several of NICO's loss portfolio transfer transactions, the AIG LPT among them. The action, *Resolute Management Inc. v. Transatlantic Reins. Co.*, Civ. Act. No. 13-1597 (Mass. Sup. Ct. 2013), was dismissed based on NICO's failure to state a claim. In the Complaint, however, NICO made several binding admissions that: (1) NICO received direct economic benefit from money owed by TRC under Reinsurance Contracts; and (2) NICO suffers direct pecuniary harm if TRC does not pay under its reinsurance contracts. In particular, NICO alleged that:

> In retaliation for **National Indemnity's refusal to forego the economic benefit of money owed by Transatlantic under reinsurance contracts**, Transatlantic and Alleghany embarked on a scheme to tortiously interfere with Plaintiffs' contractual relationships with its various insurer-clients . . . Defendants' conduct has caused and is continuing to cause pecuniary damage to Plaintiffs which they seek to recover in this action."
> …
> Resolute and National Indemnity have suffered pecuniary and other loss . . . as a result of the Defendants' scheme and retaliatory conduct. These losses include but are not limited to the increased expense and burden on Plaintiffs to perform their obligations under ASA I, ASA II and ASA III, expenses incurred in attempting to collect the debt owed by Transatlantic, and the **loss of income to Plaintiffs resulting from Transatlantic's withholding of funds due.**[43]

THE DEMANDS & RELATED PROCEEDINGS

On March 3, 2014, TRC served the AIG companies, Eaglestone and NICO with two Arbitration Demands.[44] The Demands follow the format of the Demands that AIG and NICO have served on TRC and provide the same or more information regarding the contracts and issues involved. The Arbitration Demands fall squarely within the Treaties' arbitration provisions – they

[43] *Id*., Ex. Q, ¶¶ 4, 33 (emphasis added).
[44] *Id*., Exs. A-B.

concern the parties' rights and obligations under each Treaty as a result of the LPT. It is TRC's contention that the LPT and its on-going performance are material breaches of the Treaties, relieving TRC of any obligation with respect to the transferred asbestos liabilities.

The AIG insurers, Eaglestone and NICO have all commenced proceedings which seek a declaration that they cannot be compelled to arbitrate pursuant to the Demands. NICO filed a Complaint in Federal District Court of Nebraska (Omaha) on March 6, 2014 (the "Nebraska Action"), and moved for a preliminary injunction halting the arbitration on March 11, 2014.[45] Eaglestone and AIG each filed a Complaint against TRC in New York seeking similar relief. AIG and Eaglestone have also moved for a TRO to enjoin the arbitrations from proceeding.[46]

ARGUMENT

NICO is trying to have its cake and eat it too. As NICO well knows, the practical and economic consequence of the LPT is to make NICO the "real" owner of the transferred asbestos liabilities and AIG's rights to reinsurance under the Treaties. For all practical purposes, the LPT has effectively substituted NICO for AIG in the on-going reinsurance relationship with TRC, and NICO has made millions of dollars in the process. Having purported to assume all of AIG's obligations and benefits under the Treaties, NICO cannot be permitted to pick and choose which provisions of the Treaties it deems enforceable. Rather, NICO must abide by the obligations set forth under the Treaties, including the obligation to arbitrate TRC' claims.

[45] The case is captioned *National Indemnity Co. v. Transatlantic Reins. Co.*, Case No. 8:14-cv-00074 (D. Neb.).

[46] The cases are captioned as follows: (1) *Eaglestone Reins. Co. v. Transatlantic Reins. Co.*, Index No. 650808/14 (Sup. Ct. NY Cnty.); and (2) *American Home Assur. Co. v. Transatlantic Reins. Co.*, Index NO. 650811/14 (Sup. Ct. NY Cnty.).

Pursuant to CPLR § 7503, "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." TRC have served their arbitration demands on NICO, and NICO has responded by repudiating its obligation to arbitrate and filing the Nebraska Action (notably in a court lacking jurisdiction to hear its claim). Under well settled principles of "direct benefits estoppel," NICO must abide by its obligations to arbitrate; this Court should issue an order compelling NICO to do so.

I. NICO IS ESTOPPED FROM REFUSING TO ARBITRATE

While NICO is not a signatory to the Treaties, it is well settled that "a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Belzberg v. Verus Inves. Holdings Inc.*, 21 N.Y.3d 626, 631 (2013) (internal citations and quotations omitted); *see also MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2nd Cir. 2001) ("Under the estoppel theory, a company knowingly exploiting [an] agreement [with an arbitration clause can be] estopped from avoiding arbitration despite having never signed the agreement"); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2nd Cir. 1999) (A nonsignatory may be compelled to arbitrate when he "receives a 'direct benefit' from a contract containing an arbitration clause"). Because NICO has assumed AIG's rights and responsibilities under the Treaties, obtaining millions of dollars in the process, NICO is estopped from denying its obligations to arbitrate.

Application of direct benefits estoppel is particularly warranted where, as here, a nonsignatory completely assumes the rights and obligations of a signatory, thus becoming a "real party in interest." *HRH Constr. LLC v. Metro. Transp. Auth.*, 33 A.D.3d 568, 569 (1st Dep't 2006); *see also Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 96 A.D.3d 646, 650 (1st Dep't

2012) (stating that estoppel is warranted where non-signatories "assume performance of the [agreement]and [] derive a direct benefit therefrom"); *The Bowery Presents LLC v. Pires*, No. 653377/2012, 2013 WL 3214356, at *6 (Sup. Ct. N.Y. Cnty. June 24, 2013) (explaining that estoppel is warranted where a non-signatory "assume[s] performance of [a signatory]").

In *HRH*, closely analogous to this case, the Metropolitan Transit Authority ("MTA") brought an arbitration seeking damages from HRH Construction Interiors, Inc. ("Interiors") under a Construction Management Agreement ("CMA"). After the parties initiated arbitration, the MTA discovered that another entity, HRH LLC, "had taken over Interiors' performance of the CMA and, accordingly, was the real party in interest in the arbitration." *HRH*, 33 A.D.3d at 569. The MTA sought to add HRH LLC as a party in the arbitration, and HRH LLC commenced an action seeking to enjoin the arbitration on the grounds that it was not a signatory to the CMA.

In denying HRH LLC's petition and compelling it to arbitrate, the First Department held:

> A non-signatory to an agreement containing an arbitration clause that has knowingly received direct benefits under the agreement will be equitably estopped from avoiding the agreement's obligation to arbitrate. Under its . . . agreements with Interiors' parent company, HRH LLC undertook Interiors' CMA obligations and derived a direct benefit, receiving over $7,000,000 for its performance of the CMA. Accordingly, since HRH LLC knowingly assumed performance of the CMA and derived a direct benefit . . . it is estopped from avoiding arbitration . . . .

Id. (internal citations omitted).

Here, there is no question that NICO has usurped AIG's role as the real party in interest under the Treaties. Pursuant to the LPT, AIG paid NICO approximately $1.67 Billion to assume the bulk of AIG's net asbestos liabilities.[47] Pursuant to the AIG LPT, "NICO will assume re-

[47] *See* Kuehn Aff., Ex. D at 13, ¶ 3.1.

sponsibility for claims handling," and "assume collection responsibility and collectability risk for third-party reinsurance related to those claims."[48] The CEO of Chartis at the time described how AIG would benefit from the LPT because it "reduce[s] the risk of future adverse development of U.S. asbestos exposures, including the risk associated with the recoverability of related reinsurance."[49] NICO and AIG also entered into an Administrative Services Agreement establishing NICO's interest in AIG's reinsurance and ownership of AIG's asbestos liabilities.[50]

Importantly, NICO, not AIG, controls the communications with AIG's reinsurers (including TRC) regarding the transferred liabilities; NICO bills AIG's reinsurers (including TRC and Putnam) under the existing reinsurance agreements for loss and loss expenses paid by NICO with respect to the transferred liabilities; and NICO initiates and controls legal proceedings (be they judicial or arbitral) for all disputes arising under pre-existing reinsurance contracts with respect to the transferred asbestos liabilities.[51] Further, NICO has exclusive authority to decide whether or not to collect AIG's reinsurance for the transferred liabilities.[52] Thus, it is beyond dispute that NICO has "taken over [AIG's] performance of the [Treaties] and, accordingly, [is] the real party in interest in the arbitration." *See HRH*, 33 A.D.3d at 569.

But, even if NICO has not entirely replaced AIG as the real party in interest under the Treaties (and it has), NICO would still be estopped from refusing arbitration. New York courts routinely apply direct benefits estoppel in far less extreme circumstances, provided that a non-

[48] *Id*.
[49] *Id*., Ex. K.
[50] *See id*., Ex E. at 27, ¶ 13.1.
[51] *Id*. at 17, ¶ 6.1(a)(i)-(iii).
[52] *Id*. at 6.4.

signatory has knowingly "exploited" the contract containing an arbitration provision, thereby obtaining the direct benefits of that agreement. *In re SSL Int'l, PLC v. Zook*, 44 A.D.3d 429, 430 (1st Dep't 2007) (non-signatory to licensing agreement required to arbitrate because it "market[ed] products that utilized technology covered by the license agreement"); *Mark Ross & Co. v. XE Capital Mgmt., LLC*, 46 A.D.3d 296, 297 (1st Dep't 2007) (non-signatories required to arbitrate where they entered into a related "Services Agreement" providing them with a "monthly service fee"); *BP Air Conditioning Corp. v. Lasorsa*, 2010 WL 4567832 (Sup. Ct. N.Y. Cnty. Oct. 27 2010) (non-signatory bound by arbitration agreement "by virtue of their efforts to benefit from the restrictive covenants in the 1999 Plan . . ."); *Ryan, Beck & Co. v. Fakih*, 268 F. Supp. 2d 210, 220 (E.D.N.Y. 2003) (non-signatory to Client Agreement required to arbitrate where it derived benefits from customers' accounts, assets and customer relationships).

In *Alfa Laval U.S. Treasury Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 857 F. Supp. 2d 404, 414-15 (S.D.N.Y. 2012), an AIG underwriting subsidiary, National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), executed an indemnity agreement with plaintiff Tetra Laval U.S. Treasury Inc. ("Tetra Laval"). Under this indemnity agreement, which contained an arbitration provision, National Union would issue insurance policies to various entities and, in exchange, Tetra Laval would pay premiums to and reimburse National Union for certain claims paid out under those policies. Notably, none of the policies themselves contained arbitration provisions. Years into the parties' relationship, a dispute arose over the calculation of certain premiums and fees, and, as a result, National Union served an arbitration demand on both Tetra Laval, the signatory to the indemnity agreement, and each of the non-signatory policy holders. The non-signatory policy holders filed an action seeking a declaratory judgment that they were not required to arbitrate. Although they had received the benefit of in-

surance coverage from National Union, the non-signatories asserted that they could not be bound by the arbitration provision because they were not parties to the indemnity agreement. The District Court rejected this argument and held that:

> What the [non-signatory] plaintiffs fail to recognize . . . is that the Indemnity Agreements are the source of National Union's obligation to issue the insurance policies through which the non-signatory plaintiffs obtained coverage . . . The Indemnity Agreements thus require National Union to issue the insurance policies, and the non-signatory plaintiffs received insurance coverage . . . Accordingly, the non-signatory plaintiffs have received a direct benefit from the Indemnity Agreements and are estopped from denying their obligation to arbitrate . . . .

Id. at 414-15.

Here, too, NICO will no doubt assert that its rights to administer and collect reinsurance, handle the underlying claims, and bring arbitrations against TRC stem from the LPT and not the Treaties. But, just as in *Alfa Laval*, NICO fails to recognize that the Treaties "are the source" of its rights to pursue coverage from TRC, as well as any obligations TRC could possibly have to make payments to NICO and reinsure the results of its claims handling. *See id*. Indeed, NICO was more than willing to acknowledge this when it filed suit directly against TRC, alleging: (1) that NICO is entitled to the "**economic benefit of money owed by Transatlantic under reinsurance contracts";** and (2) that NICO is directly entitled to recover for its "loss of income . . . resulting from Transatlantic's withholding of funds due" under those contracts.[53] According to NICO's own pleading in the *Massachusetts Action*, NICO has "received a direct benefit from the

[53] *Id*., Ex. Q, ¶¶ 4, 33 (emphasis added).

[Treaties] and [should be] estopped from denying [its] obligation to arbitrate as the [Treaties] require." *See Alfa Laval,* 857 F. Supp. 2d at 415.[54]

The Southern District of Texas applied equitable estoppel principles in circumstances close to those presented here. In *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 208 (S.D. Tex. 2008), the reinsurer ("ACE") of a captive insurance company brought an arbitration against the underlying insured ("Hunstman"), seeking a declaration of its rights under reinsurance certificates. Huntsman sought to enjoin the arbitration because it was not a signatory to the reinsurance certificates, which had been signed instead by its direct insurer. The Court, however, compelled arbitration after finding that Huntsman had repeatedly performed its direct insurer's role under the certificates. The Court summarized the facts critical to its holding as follows:

> Huntsman has dealt directly with the Reinsurers, and the Reinsurers have issued non-allocated interim payments to Huntsman, []; '[the direct insurer] has routinely failed to participate in meetings between Huntsman and the Reinsurers . . . 'Huntsman has corresponded directly with the Reinsurers' representative regarding its claims and has made claims upon the Reinsurers directly . . . []; and "Huntsman has sought to directly receive and has directly received benefits under the Certificates, by requesting payment directly from the Reinsurers," [].

Id. at 205-06.

This summary of factual allegations is virtually identical to those set forth in the Petition. As of the LPT, NICO has completely supplanted AIG with respect to the Treaties.

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[54] Other jurisdictions also uniformly affirm the equitable principle that precludes "a non-signatory from embracing a contract, and then turning its back on the portions of the contract, such as an arbitration clause, that it finds distasteful." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3rd Cir. 2001); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000); *OSU Pathology Servs., LLC v. Aetna Health, Inc.*, 2:11-CV-005, 2011 WL 1691830 (S.D. Ohio May 4, 2011); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 132-33 (Tex. 2005); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295-97 (2012).

The law is clear that NICO cannot simultaneously exercise rights under the Treaties, obtain millions of dollars in benefits, and then simply turn its "back on the portions of the contract, such as an arbitration clause, that it finds distasteful." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d at 200. As the New York Court of Appeals has made clear, "a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Belzberg*, 21 N.Y.3d at 631. NICO has exploited the Treaties and obtained substantial benefits flowing directly from them. Accordingly, this Court should direct it to comply with the Treaties and submit to arbitration.

II. THE TREATIES, THE FAA, AND NY LAW MANDATE ARBITRATION

Through its Arbitration Demands, TRC seeks a declaration of the respective rights of NICO, AIG, Eaglestone, TRC and Putnam under the Treaties. TRC's arbitral request for a declaratory judgment falls squarely within the language of the Treaties' arbitration provisions, each of which contains substantively identical language specifying that: "All disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two Arbitrators, one to be chosen by each party, and in the event of the Arbitrators failing to agree, to the decision of an Umpire to be chosen by the Arbitrators."[55] There is nothing ambiguous about these provisions, which directly encompass TRC's requests concerning the impact of the LPT on TRC's rights.

[55] *See, e.g.*, Levene Aff., Exs. 1-34.

Both binding precedent and the strong presumption favoring arbitration require the Court to compel NICO to arbitrate these claims. As an initial matter, the FAA governs this suit, which involves reinsurance transactions implicating interstate commerce. *In re Diamond Waterproofing Co. v. 55 Liberty Owners Corp.*, 6 A.D.3d 101, 104 (1st Dep't 2004) ("FAA applies to any and all contracts involving interstate commerce"); *Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 878 (4th Dep't 2003) ("insurance transactions constitute commerce within the meaning of the Commerce Clause"); *Blimpie Int'l v. D'Elia*, 277 A.D.2d 69, 70 (1st Dep't 2000)(if "an agreement to arbitrate falls within the scope of the FAA, '[f]ederal law in the terms of the Arbitration Act governs [the] issue [of arbitrability] in either state or federal court.').

Under the FAA, written arbitration provisions in a contract "shall be valid, irrevocable and enforceable." 9 U.S.C.A. §2. New York Courts uniformly recognize that the FAA embodies an "emphatic national policy favoring arbitration which is binding on all courts, State and Federal." *In re Ayco Co., L.P*, 3 A.D.3d 635, 637 (3rd Dep't 2004) (internal quotations omitted). This policy derives from the recognition that arbitration is "a means of reducing the costs and delays associated with litigation." *Vera v. Saks & Co.*, 335 F.3d 109, 116 (2nd Cir. 2003).

Thus, Courts are required to "construe arbitration clauses as broadly as possible." *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2nd Cir. 1991). "[A]ny ambiguity in the applicable contractual language should be resolved in favor of arbitration." *DiBello v. Salkowitz*, 4 A.D.3d 230, 232 (1st Dep't 2004); *see also New York v. Oneida Indian Nation*, 90 F.3d 58, 61 (2nd Cir. 1996). As noted by the Second Circuit, arbitration is required "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *David L. Threlkeld & Co.*, 923 F.2d at 250; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

While the FAA preempts state law, it is entirely consistent with the law of New York, which provides, under CPLR §7503(a), that "[w]here there is no substantial question whether a valid agreement was made or complied with the court shall direct the parties to arbitrate." New York law, "favors and encourages arbitration" for the same reasons as federal policy, and "New York courts interfere as little as possible with the freedom of consenting parties' to submit disputes to arbitration." *In re Smith Barney Shearson Inc. v. Sacharow,* 91 N.Y.2d 39, 49-50 (1997) (internal quotations omitted). Finally, under New York law, a court must only address three threshold questions on a motion to compel arbitration: "(1) whether the parties made a valid agreement to arbitrate; (2) if so, whether the agreement has been complied with; and (3) whether the claim sought to be arbitrated would be time-barred if it were asserted in State court." *In re Smith Barney, Harris Upham & Co v. Luckie*, 85 N.Y.2d 193, 201-02 (1995).

Here it is undisputed that the Treaties constitute valid agreements to arbitrate, and, for the reasons set forth above, that NICO is bound by those agreements. It is further undisputed that TRC has complied with the Treaties, issuing demands for arbitration concerning the consequence of the LPT under the terms of the Treaties. And, finally, TRC's claims date back no further than 2011, when the LPT came into effect, which is well within the six year statute of limitations for claims sounding in contract. Accordingly, once this Court determines "that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and that there has been compliance with any agreed on conditions precedent to arbitration, judicial inquiry is at an end." *In re Cnty. of Rockland (Primiano Const. Co.),* 51 N.Y.2d 1, 8 (1980).

In sum, TRC's Arbitration Demands come squarely within the scope of the Treaties' arbitration provisions.[56] Whether considered under the FAA, the case law, or the CPLR, this Court should compel NICO to arbitrate TRC's claims in accordance with the Treaty language and the "emphatic national policy favoring arbitration which is binding on all courts, State and Federal." *Ayco Co., L.P*, 3 A.D.3d at 637 (internal quotations omitted).

III. NEW YORK IS THE PROPER JURISDICTION

New York is the proper jurisdiction for compelling NICO to submit to arbitration under the Treaties. The majority of the Treaties mandate that any arbitration be held in New York. For example, Treaties with AIG Nos. 5332, 6932, 7032, 7860, 8532, 8803, 8903, 9494, 9503, 9903, 7926, 8026, 9456, 9226, 7371, 9769 and 7274 each state "[t]he arbitration proceedings shall take place in New York City, New York."[57] Nonetheless, several of the Treaties list other jurisdictions as the venue for arbitration. It is to be expected that NICO will seek to avoid arbitration through an assertion that a single arbitration cannot address multiple contracts with conflicting venue provisions. NICO, however, is wrong as a matter of law. This Court should reject any such assertion.

First, most of the Treaties designate New York as the arbitral venue, imbuing this Court with the jurisdiction to compel NICO to submit to arbitration here in New York.

Second, in the decades since the Treaties were signed, the signatories (AIG and TRC) have held their arbitrations concerning the Treaties in New York, irrespective of the designated venue. For example, there are currently pending in New York five arbitrations between TRC

[56] *See, e.g.*, Levene Aff., Exs. 1, 22, 27.
[57] *See id.*

and AIG, each of which was brought by AIG and involves multiple treaties that stipulate an arbitral venue outside of New York.[58] Notably, most of these non-New York Treaties are the subject of TRC's arbitration demands in this Petition. NICO is not only bound by the terms of the Treaties but also the parties' established course of conduct thereunder. Thus, while the aforementioned Treaties may specify Boston, Bermuda, or Los Angeles as the site of arbitration, each is currently subject to arbitration in New York. And while NICO may seek to challenge TRC's agreed upon modification with AIG, "the issue of whether the parties' acts or conduct may have . . . modified or renewed the agreement is for the arbitrator." *L & R Exploration Venture v. Grynberg*, 22 A.D.3d 221, 222 (1st Dep't 2005).

Third, and finally, any effort by NICO to avoid arbitrating each of the Treaties in a single arbitration goes against the policy of courts and legislators alike in promoting arbitration: namely that arbitration provides "a means of reducing the costs and delays associated with litigation." *Vera*, 335 F.3d at 116 . Any effort to divide up such arbitrations, which involve identical parties and identical issues, achieves the exact opposite of this stated goal. Accordingly, should NICO

[58] The following arbitrations are currently being held in New York despite the involvement of treaties with arbitration provisions designating non-New York venues: (1)Lexington Ins. Co. ("Lexington") & National Union Fire Ins. Co. ("NUFIC") against TRC(Westinghouse), involving AIG Treaty Nos. 7957 and 7859, each of which has a Boston venue provision; (2) Lexington & NUFIC against TRC (Dynalectron), AIG Treaty Nos. 7957, 7958, 8057, and 8058, each of which has a Boston venue provision; (3) NUFIC v. TRC ("Landmark New Year's Arbitration"), involving AIG Treaty Nos. 8703, 8963, 9063, 9356, 9704, 7196, 7176, 9358, 9705, 7197, 9805, 7198, and 7178, all of which have Los Angeles venue provisions; (4) The Ins. Co. of the State of Pennsylvania ("ISCOP") v. TRC ("CV Starr New Year's Arbitration"), involving Treaties AIG 4138, 4387, 4907, all of which have Bermuda venue provisions; and (5) Lexington Ins. Co. ("Lexington") v. Transatlantic Reinsurance Co. ("TransRe") ("Lexington New Year's Arbitration") involving Treaties AIG 7956 and 8056, each of which has a Boston venue provisions. (Levene Aff., ¶ 21).

seek to argue against a consolidated arbitration, this Court may freely disregard such an argument. [59]

Conclusion

For all of the foregoing reasons, TRC respectfully requests that the Court issue an order compelling NICO to submit to arbitration pursuant to the Arbitration Demands.

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March 19, 2014

Respectfully submitted,

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[59] Any challenge that NICO may raise regarding consolidation is beyond the Court's purview; such procedural questions can only "properly [be] addressed by the arbitrator." *Blimpie Int'l, Inc.* 371 F. Supp. 2d at 469-70; *Safra Nat'l Bank of N.Y. v. Penfold Invs. Trading, Ltd.*, No. 10-civ-8255, 2011 WL 1672467, at *3 (S.D.N.Y. Apr. 20, 2011) ("joinder and consolidation remain distinct procedural issues of the sort parties would intend for the arbitrator to decide").