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PRELIMINARY STATEMENT

Plaintiff Gregory V. Serio, Superintendent of Insurance of the State of New York, as Rehabilitator of Frontier Insurance Company and Assignee of Platinum Indemnity, Ltd., respectfully submits this reply memorandum of law in further support of his motion for summary judgment on Count IV of the Complaint.

Scrambling to avoid its obligations under the Note, FSIM advances two arguments that are as predictable as they are unavailing. First, the Court is asked to believe that FSIM -- a sophisticated corporate entity and a recognized leader in its segment of the insurance industry -- somehow was duped into agreeing to the terms of the Note that FSIM itself proposed and then freely executed. Second, notwithstanding the fact that FSIM in the Note expressly acknowledged that it was promising to pay the principal amount in exchange "FOR VALUE RECEIVED," FSIM now reverses course and maintains that the Note was not supported by adequate consideration. These are nothing more than the standard-issue defenses routinely rolled out by parties who, having executed promissory notes when it was to their advantage to do so, later prove unable or simply unwilling to satisfy their obligations as set forth in the unambiguous and unequivocal terms of those agreements.

Here, the defenses set forth in FSIM's opposition papers do not withstand even mild scrutiny. Similarly, its attempt to manufacture the factual issues necessary to preclude summary judgment falls far short of the mark. The language of the Note is clear, as are the facts and circumstances surrounding its execution. There simply are no issues requiring a trial on this straightforward claim. Under the circumstances, the Superintendent respectfully requests that the Court enter summary judgment in his favor on the Note.

ARGUMENT¹

FSIM HAS IDENTIFIED NO GENUINE ISSUE OF MATERIAL FACT SUFFICIENT TO AVOID SUMMARY JUDGMENT

The Superintendent's burden on this motion is minimal. He has established a prima facie basis for summary judgment by demonstrating that FSIM executed the Note and has failed to pay the principal amount pursuant to its terms. See Superintendent's Opening Brief at 11-12. The burden now shifts to FSIM. As this Court has noted:

Once the moving party has made a properly supported showing sufficient to suggest the absence of any genuine issue as to a material fact, the non-moving party, in order to defeat summary judgment, must come forward with evidence that would be sufficient to support a jury verdict in his favor.

Gilliam v. Trustees of Sheet Metal Workers' Nat'l Pension Fund, Plan A, 2005 U.S. Dist. LEXIS 7904, at *8 (S.D.N.Y. May 3, 2005) (quoting Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)).

On a summary judgment motion, the non-movant "may not rest upon conclusory allegations or denials" to defeat the application; instead, it "must provide 'concrete particulars' in the form of supporting facts or arguments in opposition." National Union Fire Ins. Co. of Pittsburgh, PA v. Carlie, 1991 U.S. Dist. LEXIS 14767, at *6 (S.D.N.Y. Oct. 16, 1991) (citation omitted). This is particularly so where, as here, the non-movant attempts to defeat summary judgment by relying upon an affirmative defense such as fraudulent inducement. See Firemen's Fund Co. of Newark, N.J. v. Keating, 1994 U.S. Dist. LEXIS 648, at *7 (S.D.N.Y. Jan. 26, 1994).

¹ For the Court's convenience, copies of the Bermuda decisions and LEXIS decisions cited herein are attached hereto in alphabetical order.

FSIM has not satisfied its burden on this motion. As demonstrated below, its opposition articulates no valid defense and identifies no genuine issue of material fact sufficient to necessitate a trial of this straightforward claim.

A. The Fraudulent Inducement Defense

FSIM maintains that it should be relieved of its obligations under the Note because it was fraudulently induced into executing that document. FSIM contends that Andrew McComb of Platinum made two “misrepresentations” upon which it relied in executing the Note. First, FSIM focuses on Mr. McComb’s statement that there was a shortfall in the funds Platinum was supposed to have received in connection with the FSIM Program. Second, FSIM focuses on Mr. McComb’s statement that Bermuda authorities would commence legal proceedings against FSIM if that funding deficiency was not remedied.

Under Bermuda law, the facts supporting an allegation of fraudulent conduct “must be stated with `especial particularity and care.’” Wilson v. First Bermuda Secs., Ltd., Civil Jurisdiction 1997 No. 67 at 14 (1997) (quoting Vol. I, Supreme Court Practice at 308 (1997)). As the Supreme Court of Bermuda has instructed, “Fraudulent conduct must be distinctly alleged (and distinctly proved) and it is not allowable to leave fraud to be inferred from the facts. Id. (quoting Vol. I, Supreme Court Practice at 310 (1997)). The skeletal allegations FSIM makes in support of its fraudulent inducement defense fall far short of this heightened standard. Even if those allegations are deemed to be sufficiently particularized, for the reasons set forth below they still do not support the conclusion -- or even give rise to a fair inference -- that FSIM was fraudulently induced into executing the Note.

**1. The Alleged Misrepresentation
Regarding the Funding Deficiency**

FSIM's contention that Mr. McComb made a misrepresentation regarding the funding deficiency in its account with Platinum is absolutely baseless. As demonstrated in Mr. McComb's accompanying Reply Declaration, the statement attributed to him was accurate when made. As a matter of law and logic, it cannot provide the basis for a fraudulent inducement defense.²

The fact of the matter is that FSIM itself did owe money to Platinum in connection with Policy Year 1 (i.e., January 1, 1998 - December 31, 1998) of the FSIM Program. Nowhere does FSIM dispute this; instead, FSIM's president, Dwight Halvorson, focuses on a side deal he claims to have struck with FIC regarding who would make what contributions to Platinum for Policy Year 2.

The record clearly reflects that the Note was intended to address FSIM's obligations relating to Policy Year 1 only and had nothing whatsoever to do with Policy Year 2. FSIM's reliance on an agreement relating to Policy Year 2 as a means of avoiding its obligations under a promissory note relating to Policy Year 1 is grossly misplaced. Even if Mr. Halvorson's allegations with respect to this side deal with FIC are accepted as true for purposes of this

² Initially, FSIM contends at paragraph 8 of the Declaration of Dwight Halvorson that "Platinum never provided any proof that the amount stated in the Note was actually owed" This statement is demonstrably false and reflects the degree of FSIM's desperation on this motion. Platinum regularly forwarded to FSIM detailed financial reports with respect to the FSIM Program. These reports reflected data regarding such matters as gross written premium, investment earnings, losses paid, fees and expenses. Most significantly of all, these reports also reported on the collateral deficiencies in FSIM's account at Platinum. See Reply Declaration of Andrew McComb at ¶ 12. For example, on or about October 18, 2000 -- i.e., shortly before Mr. Halvorson executed the Note -- Platinum forwarded to FSIM a program financial report for the period ending June 30, 2000. Note number 7 set forth on the final page of this report reflects that FSIM's account had a negative collateral position for Policy Year 1 of \$469,515.00 or -- i.e., precisely the same figure as the principal amount of the Note that Mr. Halvorson ultimately executed. Id. ¶ 13, Ex. A.

motion, they raise no issue of fact -- material or otherwise -- with respect to FSIM's obligations under the Note.

For Policy Year 1, FSIM itself -- not FIC, or any other entity for that matter -- was obligated to forward the capital contributions in question to Platinum. See Reply Declaration of Andrew McComb at ¶ 15. Mr. Halvorson repeatedly acknowledges this critical fact in his Declaration. See Halvorson Decl., ¶¶ 14, 16, 26, 27.

The fact is that notwithstanding any direct capital contributions FSIM may have made to Platinum for Policy Year 1 -- the only policy year having any relevance to the Note -- a negative collateral position of \$469,515.00 remained in its account at the conclusion of that initial policy year. See McComb Reply Decl., Id., ¶ 20. It is this funding deficiency relative to Policy Year 1 that was at issue when FSIM and Platinum began discussions in the summer of 2000 that culminated in Mr. Halvorson's execution of the Note. The Note had nothing to do with Policy Year 2 or the purported agreement between Mr. Halvorson and FIC pursuant to which FIC allegedly agreed to assume responsibility for forwarding to Platinum FSIM's 4 percent capital contribution for that period. Id., ¶ 21. This is demonstrated clearly in the correspondence between FSIM and Platinum in the months leading up to his execution of the Note.

On or about May 22, 2000, for example, Mr. McComb forwarded to FSIM correspondence in which he addressed the deficiency in FSIM's account and clearly distinguished between Policy Year 1 (the 1998 underwriting year) and Policy Year 2, nor did it have anything to do with (the 1999 underwriting year). Id., ¶ 22, Ex. B. Therein, Mr. McComb acknowledged that "FSIM has provided the 4% of premium as additional capital for the 1998 underwriting year" Mr. McComb further noted that these contributions would have been sufficient had the scope of risk assumed in the FSIM Program remained consistent with Mr.

Halvorson's initial plans for the program. In fact, significantly higher than anticipated levels of premiums were written during Policy Year 1 and, as Mr. McComb confirmed in his May 22, 2000 correspondence to FSIM, the retention of funds to cover the expenses associated with claims made as part of the expanded program "is the cause for the unfunded [program risk] gap for the 1998 underwriting year." *Id.*, ¶ 23, Ex. B. (emphasis supplied).

Subsequent to his May 22, 2000 correspondence with FSIM, Mr. McComb met with FSIM representatives to discuss the unfunded program risk gap for Policy Year 1.³ Specifically, on or about June 19, 2000 Mr. McComb met with FSIM representatives to discuss this funding deficiency. It was at this meeting that Mr. Halvorson suggested that one means of remedying the unfunded risk gap (or Negative Balance) for Policy Year 1 was for FSIM to post a promissory note as collateral in lieu of making the actual cash contribution necessary to close that gap. *Id.*, ¶¶ 24-25.

Following up on this meeting, on or about July 3, 2000 Mr. McComb forwarded to FSIM correspondence in which he again distinguished between Policy Year 1 and Policy Year 2. *Id.*, ¶ 27, Ex. C. In the second numbered paragraph of his July 3, 2000 correspondence, Mr. McComb addressed "the 1998 underwriting year," or Policy Year 1. Therein, Mr. McComb advised FSIM that "Platinum will consider receipt of a note from FSIM and/or Dwight Halvorson Insurance as collateral for the unfunded risk gap on the 1998 underwriting year." *Id.*, Ex. C. (emphasis supplied).

³ In his initial Declaration, Mr. McComb refers to this unfunded risk gap as the Negative Balance. The two terms refer to one and the same concept -- i.e., the funds FSIM was required to contribute to its account at Platinum to ensure that, as Mr. Halvorson states at paragraph 14 of his Declaration, Platinum itself was not exposed to any risk on the FSIM Program. See McComb Reply Declaration, *Id.*, ¶ 24.

In the portion of the July 3, 2000 correspondence dealing with Policy Year 1, Mr. McComb further advised FSIM that, based on the most current information available, “the unfunded risk gap is \$496,860.00” -- i.e., roughly the same figure as the principal amount of the Note. Id. Further, Mr. McComb noted Platinum’s potential “acceptance of the note as an alternative to cash or letter of credit collateral for the 1998 underwriting year” Id. The third numbered paragraph of the July 3, 2000 correspondence addressed Policy Year 2, or the “1999 underwriting year.” The Note is not even mentioned with respect to Policy Year 2 because, as stated above, the Note was intended to address only the deficiencies relating to Policy Year 1. Id., ¶ 31, Ex. C.

Mr. McComb again wrote to FSIM approximately three weeks prior to Mr. Halvorson’s execution of the Note. Specifically, on or about October 18, 2000, Mr. McComb advised FSIM that “[f]ollowing our agreement on wording, amount and term of the Promissory Note, we advised our Board, auditors and authorities that we have collateral in place for the funding deficiency in respect of the first underwriting year of the FSIM program.” Id., ¶ 32, Ex. A. (emphasis supplied). Mr. McComb further advised FSIM that he had reviewed its request to revise the principal amount of the Note “and can confirm that a revised amount of \$469,515 which is detailed as the funding deficiency for Year 1 in the notes to the attached program financial statements is acceptable to us.” Id., Ex. A. (emphasis supplied).

The Superintendent respectfully submits that this correspondence between FSIM and Platinum makes clear that the parties intended for the Note to address only the funding deficiency relating to Policy Year 1. Thus, Mr. Halvorson’s extensive discussion of the oral agreement he claims to have reached with FIC with respect to funding obligations for Policy Year 2 is irrelevant both to the Note and this motion. For purposes of this motion, all that

matters is that for Policy Year 1, there was a deficiency in the funds FSIM was obligated to forward to Platinum. Mr. McComb's statement in this regard was entirely accurate. To the extent Mr. Halvorson relied on this statement in executing the Note, he relied on a truthful representation of the facts. Mr. McComb's truthful statement on this point certainly provides no basis for FSIM to dodge its obligations under the Note through some transparently bogus fraudulent inducement theory.

2. The Alleged Misrepresentation Regarding the Legal Consequences of the Funding Deficiency

Next, FSIM contends that Mr. McComb somehow misrepresented the legal consequences of its failure to remedy the funding deficiency. Specifically, at paragraph 6 of his Declaration, Mr. Halvorson contends that at the time the Note was executed, Mr. McComb represented that "the Bermuda regulatory authorities would bring legal action against FSIM" with respect to the deficiency and that "[b]y signing the Note . . . DHIS would avoid this."

Significantly, Mr. Halvorson does not even contend that this statement was false, nor could he do so credibly. As the October 18, 2000 correspondence attached as Exhibit A to the Mr. McComb's Reply Declaration states, FSIM's execution of the Note was necessary "to avoid any further regulatory complications." Id., ¶ 39, Ex. A. The reality is that the captive insurance industry in Bermuda is highly regulated. Deficiencies of the kind that had developed in FSIM's account by the end of Policy Year 1 had attracted the attention of Platinum's auditors -- as well as its regulators. Id., ¶ 40.

As a regulated entity, Platinum was required to file a business plan with its regulators. Therein, Platinum was described as rent-a-captive that operated on a "fully funded," or "risk-free," basis. Indeed, Platinum had secured from its regulators a number of critically important waivers from the Insurance Act on the condition that it would operate on a risk-free

basis. As Mr. McComb explained in his initial Declaration at paragraph 20, FSIM, as the entity maintaining the account with Platinum, was intended to assume all of the risk associated with the FSIM program. The serious funding deficiency that had developed in FSIM's account for Policy Year 1 in effect exposed Platinum to risk on the program, in direct contravention of its commitments to regulators regarding Platinum's risk-free business plan and model. *Id.*, ¶ 41. Throughout his discussions with FSIM regarding the deficiency, Mr. McComb repeatedly warned Mr. Halvorson that Platinum's auditors had advised that the funding deficiency was, from a regulatory standpoint, a very serious matter that had to be resolved immediately. *Id.*, ¶ 42.

In short, the statement attributed to Mr. McComb with respect to the Bermuda regulators was accurate when made. Once again, if Mr. Halvorson relied on this statement in executing the Note, he was relying on a truthful representation regarding the consequences that would flow from FSIM's failure to meet its funding obligations for Policy Year 1. There was no misrepresentation and this truthful statement cannot possibly be construed to have fraudulently induced Mr. Halvorson to execute the Note.

B. The Alleged Lack of Consideration

Finally, FSIM contends that the Note is unenforceable because it was not supported by adequate consideration. This assertion is entirely without merit. It is in direct conflict with the language of the Note, attached as Exhibit A to Mr. McComb's initial Declaration. Therein, Mr. Halvorson acknowledged that FSIM was committing to pay the principal amount of the Note in exchange "FOR VALUE RECEIVED."

Further, the contention that there was a lack of consideration because FSIM allegedly paid certain monies to FIC with respect to the risk gap for Policy Year 2 is baseless. As discussed above, the Note was provided to secure FSIM's funding obligation for Policy Year

1 and was independent of any payments FSIM may have made to FIC with respect to Policy Year 2. Id., ¶ 46.

Moreover, in arguing that there was a lack of consideration, Mr. Halvorson ignores the fact that in return for the Note, Platinum agreed to continue participating in and facilitating the FSIM Program. Id., ¶ 47. McComb noted this in his initial Declaration at paragraph 31. Nowhere does Mr. Halvorson dispute the value of Platinum's continued involvement in the FSIM Program.

Finally, FSIM received consideration in the form of Platinum's agreement to forego legal proceedings against FSIM to resolve the funding deficiency. Id., ¶ 48. As Mr. McComb stated in his initial Declaration at paragraph 38, had FSIM refused to execute the Note, Platinum would have commenced legal proceedings to compel FSIM to remedy the funding deficiency. Once again, nowhere does Mr. Halvorson dispute that FSIM avoided this consequence by executing the Note.

