

Breakaway Courier Corp. v Berkshire Hathaway Inc.
2019 NY Slip Op 32393(U)
August 8, 2019
Supreme Court, New York County
Docket Number: 654806/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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BREAKAWAY COURIER CORPORATION d/b/a
BREAKAWAY COURIER SYSTEMS

Plaintiff,

Index No.: 654806/2016

– against –

DECISION/ORDER

BERKSHIRE HATHAWAY INC. et al.,

Motion Seq. Nos. 004, 007, 008

Defendants.

CURRENT LIGHTING & ELECTRIC, INC. et al.

Index No.: 652316/2017

Plaintiffs,

DECISION/ORDER

-against-

Motion Seq. Nos. 006, 007

BERKSHIRE HATHAWAY INC. et al.,

Defendants.

ALTERNATIVE FUELS TRANSPORTATION, INC.

Index No.: 652702/2017

Plaintiff,

DECISION/ORDER

-against-

Motion Seq. Nos. 005, 006

BERKSHIRE HATHAWAY INC. et al.,

Defendants.

These are three separate actions, all related, in which plaintiffs claim that defendants engaged in a scheme, in violation of the New York Insurance Law, to induce plaintiffs to enter into a Reinsurance Participation Agreement (RPA) as a condition of issuance to plaintiffs of workers' compensation insurance policies. (See Breakaway First Am. Compl., at 2-4; Current

Lighting First Am. Compl., at 2-4; Alternative Fuels First Am. Compl., at 2-4.) The defendants in the actions are Berkshire Hathaway Inc. (BHI) and BHI-affiliated companies—namely, California Insurance Company (California Insurance); Commercial General Indemnity Inc. (Commercial Indemnity); Applied Underwriters, Inc. (AUI); Applied Risk Services, Inc.; Applied Risk Services of New York, Inc.; ARS Insurance Agency, Inc.; North American Casualty Company; Continental Indemnity Company (Continental Indemnity); Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA); and AU Holding Company Inc.¹ The actions are consolidated for the purpose of these motions.

In the Breakaway Courier Corporation Action (the Breakaway Action) (Index No. 654806/2016), by decision and order dated July 17, 2017, this court ordered AUI, AUCRA, and Commercial Indemnity (collectively, the Bond Defendants) to post a bond in the amount of \$863,048.74. This order was based on the finding that the Bond Defendants were not licensed in New York and that Breakaway had sufficiently pleaded that the Bond Defendants were engaged in acts subjecting them to the requirements of Insurance Law § 1213 (c). (See Breakaway Courier Corp. v Berkshire Hathaway Inc., 2017 NY Slip Op 32751 [U], 2017 WL 3084991 [Sup Ct, NY County, July 19, 2017] [Breakaway I].) By decision and order dated August 24, 2017, the court ordered the Bond Defendants to post a bond in the amount of \$11,102,000.00 in the Current Lighting & Electric, Inc., MAS Electrical Maintenance, LLC, and First Quality Maintenance II, LLC Action (the Current Lighting Action) (Index No. 652316/2017) and to post a bond in the amount of \$2,825,950.92 in the Alternative Fuels Transportation, Inc. Action (the Alternative Fuels Action) (Index No. 652702/2017). (See Current Light. & Elec. Inc. v

¹ All of the defendants other than BHI are collectively referred to as the Applied Defendants. The Applied Defendants are all represented by the same counsel. BHI is represented by separate counsel.

Berkshire Hathaway Inc., 2017 NY Slip Op 31796 [U], 2017 WL 3638317 [Sup Ct, NY County, Aug 24, 2017] [Current Lighting I].)

In all of the Actions, non-party Pennsylvania Insurance Company (Pennsylvania Insurance) posted a bond as surety for the Bond Defendants.² (Breakaway Action, NYSCEF Doc. No. 167; Current Lighting Action, NYSCEF Doc. No. 142; Alternative Fuels Action, NYSCEF Doc. No. 118.)

In the Breakaway Action, counsel for plaintiff timely objected to the bond in a letter to counsel for the Bond Defendants, dated August 24, 2017. (See Aug. 24, 2017 Letter [Aff. of Raymond Dowd [Pls.' Atty] In Supp. of Motion to Justify Bond [Dowd Breakaway Bond Aff.], Exh. E – NYSCEF Doc. No. 191].) Counsel for the Bond Defendants rejected the objection in a letter dated August 25, 2017. (See Aug. 25, 2017 [Dowd Breakaway Bond Aff., Exh. F – NYSCEF Doc. No. 192].) Breakaway now moves (in Mot. Seq. No. 004) for an order compelling Pennsylvania Insurance to justify the bond pursuant to CPLR 2507 or, in the alternative, directing the Bond Defendants to file an additional undertaking pursuant to CPLR 2508. The Bond Defendants cross-move for an order pursuant to CPLR 2506 (a), setting aside Breakaway's exception to the sufficiency of the surety. Breakaway also moves, under a separate motion sequence number (Mot. Seq. No. 008), for leave to amend and supplement its first amended complaint to add Pennsylvania Insurance as well as Texas Insurance Company (Texas Insurance), and Illinois Insurance Company (Illinois Insurance), two other BHI-affiliated

² In a recent case brought against most of the same defendants based on similar allegations and RPAs, Justice Grays of the Supreme Court, Queens County, required the foreign unlicensed defendants to post a bond based on the pleadings. (See Energy Conservation Group, LLC v. Applied Underwriters, Inc., Short Form Order, dated Mar. 15, 2016, at 5 [Sup Ct, Queens County, No. 710762/2015, Grays, J.] [Queens County Applied Defendants Action or Queens County Action].) In that action, Pennsylvania Insurance posted the bond as surety for the foreign unlicensed defendants. (See Index No. 710762/2015, NYSCEF Doc. No. 168.) Plaintiffs in that action, who at the time the bond was posted were represented by the same counsel as the plaintiffs in these actions, did not except to the sufficiency of the bond.

companies as defendants, pursuant to CPLR 3025 (b), and to plead a cause of action for a constructive trust.

In the Current Lighting and Alternative Fuels Actions, counsel for plaintiffs timely objected to the bonds by email to the Bond Defendants' counsel, dated October 23, 2017. (See Oct. 23, 2017 Email [Aff. of Michael Hepworth [Applied Defs.' Atty] In Supp. of Motion to Set Aside Exception, Exh. 1 – Current Lighting Action, NYSCEF Doc. No. 157; Alternative Fuels Action, NYSCEF Doc. No. 133].) In response, the Bond Defendants move (Current Lighting Mot. Seq. No. 006; Alternative Fuels Mot. Seq. No. 005) for an order setting aside the exception to the sufficiency of the bond, and for an order justifying Pennsylvania Insurance as surety for the bond. Plaintiffs in the Current Lighting and Alternative Fuels Actions oppose the motion and seek an order compelling Pennsylvania Insurance to justify the bond and directing the Bond Defendants to file an additional undertaking. Plaintiffs in the Current Lighting and Alternative Fuels Actions also cross-move for leave to amend and supplement their respective first amended complaints to add Pennsylvania Insurance, Texas Insurance, and Illinois Insurance as defendants, and to plead a cause of action for a constructive trust.

In the three Actions, plaintiffs separately move (Breakaway Mot. Seq. No. 007; Current Lighting Mot. Seq. No. 007; Alternative Fuels Mot. Seq. No. 006) for an order increasing the security required to be posted for AUCRA and directing that a bond be posted for defendant Applied Risk Services of New York, Inc.³

³ These motions also seek to enjoin the Applied Defendants from commencing any arbitration or judicial action in Nebraska against Breakaway, and from prosecuting judicial actions commenced in Nebraska against Current Lighting and Alternative Fuels. This branch of the motion will be decided with the Applied Defendants' motions to dismiss, which require determination of the same issues as to the arbitrability of claims against Breakaway and the appropriate forum for hearing of the claims in these Actions.

Discussion⁴The Bond MotionsJustification of the Surety

Several provisions of the CPLR and of the New York Insurance Law must be considered in resolving the bond motions. CPLR 2502 (a) defines surety, in relevant part, as follows:

“Unless the court orders otherwise, surety shall be: [¶] 1. an insurance company authorized to execute the undertaking within the state.” CPLR 2502 (d) requires that “[t]he undertaking shall be acknowledged in the form required to entitle a deed to be recorded.”

CPLR 2506 (a) and CPLR 2507 (a) set forth the procedure for excepting to the sufficiency of the surety. CPLR 2506 (a) provides in pertinent part:

“(a) Exception to surety. If a certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law is not filed with the undertaking, a party may except to the sufficiency of a surety by a written notice of exception served upon the adverse party within ten days after receipt of a copy of the undertaking. . . . Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs.”

CPLR 2507 (a) provides in pertinent part:

“(a) Motion to justify. Within ten days after service of notice of exception, the surety excepted to or the person upon whose behalf the undertaking was given shall move to justify, upon notice to the adverse party. . . . The surety shall be present upon the hearing of such motion to be examined under oath. If the court find the surety sufficient, it shall

⁴ In the bond motions, the memoranda of law in the Breakaway Action will be referred to as follows: Breakaway Pl.’s Bond Memo. In Supp. [NYSCEF Doc. No. 193]; Breakaway Bond Defs.’ Memo. In Opp. [NYSCEF Doc. No. 195]; Breakaway Pl.’s Bond Memo. In Reply [NYSCEF Doc. No. 231]. In the Current Lighting and Alternative Fuels Actions, the memoranda of law were jointly briefed. The briefs will be referred to using the name “Current Lighting” and the NYSCEF Doc. No. in the Current Lighting Action only: Current Lighting Bond Defs.’ Memo. In Supp. [NYSCEF Doc. No. 159]; Current Lighting Pls.’ Bond Memo. In Opp. [NYSCEF Doc. No. 223]; Current Lighting Bond Defs.’ Memo. In Reply [NYSCEF Doc. No. 228].

In the motions for leave to amend, the memoranda of law in the Breakaway Action will be referred to as follows: Breakaway Pl.’s Amend Memo. In Supp. [NYSCEF Doc. No. 312]; Breakaway Applied Defs.’ Amend Memo. In Opp. [NYSCEF Doc. No. 320]; Breakaway BHI Amend Memo. In Opp. [NYSCEF Doc. No. 322]; Breakaway Pl.’s Amend Memo. In Reply [NYSCEF Doc. No. 327]. In the Current Lighting and Alternative Fuels Actions, the memoranda of law were jointly briefed. These briefs will be referred to as follows, using the name “Current Lighting” and the NYSCEF Doc. No. in the Current Lighting Action only: Current Lighting Pls.’ Amend Memo. In Supp. [NYSCEF Doc. No. 223]; Current Lighting Applied Defs.’ Amend Memo. In Opp. to Cross-Motion [NYSCEF Doc. No. 228].

make an appropriate indorsement on the undertaking. A certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law shall be accepted in lieu of a justification.”

Insurance Law § 1111 (a) sets forth the requirements for issuance of a certificate of qualification:

“Whenever by any law of this state any policy or contract of insurance is required, . . . the superintendent⁵ may, upon written request containing such information as he deems necessary, issue to any person a certificate of qualification, stating the qualification of any insurer authorized to do such business in this state if he finds that, as shown by the insurer’s last filed annual statement or last filed report on examination, whichever is later, the insurer is solvent, responsible and otherwise qualified to make policies or contracts of the kind required. . . .”

Insurance Law § 1113 sets forth the types of insurance authorized in New York.

Insurance Law § 1113 (a) (16) provides that “‘Fidelity and surety insurance,’ means: . . . [¶] (F) Becoming surety on, or guaranteeing the performance of, bonds and undertakings required or permitted in all judicial proceedings or otherwise by law allowed, including surety bonds accepted by states and municipal authorities in lieu of deposits as security for the performance of insurance contracts.”

Insurance Law § 1111 (b) (1) provides:

“Whenever by any law of this state a bond, undertaking, recognizance, guaranty or like obligation is required, permitted, authorized or allowed, or the performance of any act, duty or obligation, or the refraining from any act, is required, permitted, authorized or allowed to be secured or guaranteed, such bond or like obligation, or such security or guaranty, may be executed by any insurance company authorized to do in this state the business of executing such instruments and empowered by its charter to execute them. The insurer’s execution of such instrument by its officer, attorney-in-fact or other authorized representative shall be accepted as, and in all respects shall be, a full compliance with every law or other requirement, now or hereafter in force, that any such obligation be given or accepted or that it be executed by one or more sureties, or that such sureties be residents, householders or freeholders, or possess any other qualifications.”

Insurance Law § 1111 (c) provides:

⁵ Under the New York Insurance Law, “Superintendent” means the superintendent of financial services of this state. (See Insurance Law § 107 [a] [41].)

“The superintendent may refuse to issue any certificate pursuant to subsection (a) or (b) hereof if in his judgment refusal will best promote the interests of the people of this state. Such certificate, or a copy certified by the superintendent, shall be conclusive evidence, as of its date and thereafter until revoked, of either the insurer’s qualification to issue the policy, contract of insurance or surety bond, if issued pursuant to subsection (a) hereof, or the company’s qualification, and its sufficiency under any law of this state as surety or guarantor, and of the propriety of accepting and approving it as such, if issued pursuant to subsection (b) hereof, and this certification shall be in lieu of any justification required of the insurer by any law of this state or any requirement pursuant thereto.”

Insurance Law § 1102 (e) (1) (A) provides:

“Before licensing any such corporation organized under section one thousand two hundred one of this chapter, to do any insurance business, the superintendent shall: [¶] If such corporation be a stock corporation, cause an examination to be made into its affairs in accordance with the provisions of this chapter; and if it appears from the report upon such examination that the amount of capital and surplus required by law has been paid in and is possessed by the corporation in cash or in investments permitted by this chapter as minimum capital or minimum surplus to policyholder investments under section one thousand four hundred two of this chapter, the superintendent shall file such report in his office and notify the corporation thereof.”

In claiming that Pennsylvania Insurance is required to justify the bond, plaintiffs contend that CPLR 2507 (a) requires Pennsylvania Insurance to submit to a hearing because it did not provide a certificate of qualification at the time the bonds were filed. (See Breakaway Pl.’s Bond Memo. In Reply, at 4-7; Current Lighting Pls.’ Bond Memo. In Opp., at 11-12.) In response, the Bond Defendants seek costs and fees, under CPLR 2506 (a), claiming that Breakaway’s “motion is meritless, unnecessary, and vexatious.” (Breakaway Bond Defs.’ Memo. In Opp., at 2.) In the Current Lighting and Alternative Fuels Actions, the Bond Defendants argue that “[b]ecause Plaintiffs have not provided any evidence of any insufficiency in the surety or the Bond, the asserted exceptions to the Bonds are meritless and should be set aside pursuant to CPLR 2506 (a).” (Current Lighting Bond Defs.’ Memo. In Supp., at 8.)

The Bond Defendants contend that Pennsylvania Insurance is not required to justify the bonds because Pennsylvania Insurance is a licensed surety in New York pursuant to Insurance

Law § 1113 (a) (16) (F).⁶ They also rely on Insurance Law § 1111 (b) (1) in claiming that Pennsylvania Insurance is exempt from the justification requirement because Pennsylvania Insurance is licensed to do business as a surety in New York. (Current Lighting Bond Defs.’ Memo. In Reply, at 2-3.) The Bond Defendants further submit that because Pennsylvania Insurance is a licensed insurer and its filed financial statements show that it has “sufficient assets,” its bonds must be accepted. (See Current Lighting Bond Defs.’ Memo. In Reply, at 2-4.) Citing Insurance Law § 1102 (e) (1) (A), the Bond Defendants argue that “[t]o be licensed as an insurer in New York, New York’s Superintendent of Insurance had to examine the capital and surplus in cash or investments of Pennsylvania Insurance [] to determine that they were sufficient.” (Breakaway Bond Defs.’ Memo. In Opp., at 3.)

In general, when “a court orders the posting of an undertaking in a specified amount, . . . the posting of a surety company bond is sufficient. Indeed, that is the thrust of CPLR 2502 (a) (1). Problems arise . . . where a party questions the validity of the named surety. CPLR 2506 and 2507 provide a simple procedure . . . , which allows a test of whether the bond is sufficient.” (City of New York v Britestarr Homes, Inc., 150 Misc2d 820, 822 [Sup Ct, Bronx County 1991] [internal citations omitted] [Britestarr Homes]; see Weinstein, Korn & Miller, *New York Civil Practice*, §§ 2506.00, 2507.00.)

As noted above, Insurance Law § 1111 (c) expressly provides that (depending on the subsections of section 1111 [c] under which the certificate of qualification is issued), the certificate of qualification “shall be conclusive evidence . . . of either the insurer’s qualification

⁶ It is undisputed that Pennsylvania Insurance is licensed in New York State to provide fidelity and surety insurance. The Bond Defendants provide the URL to the website of New York’s Department of Financial Services, which “publicly posts the fact that Pennsylvania Insurance [] is licensed to conduct insurance business in this state” and “specifically confirms that Pennsylvania Insurance[’s] [] ‘current writing powers’ in New York include, among other things, ‘Fidelity and Surety’ insurance business under N.Y. Ins. Law § 1113 (a).” (Breakaway Bond Defs.’ Memo. In Opp., at 3; Current Lighting Bond Defs.’ Memo. In Supp., at 3.)

to issue the . . . surety bond . . . , or the company's qualification, and its sufficiency under any law of this state as surety. . . ." CPLR 2506 (a) further expressly provides that when a certificate of qualification is not filed with the bond, "a party may except to the sufficiency of a surety by a written notice of exception served upon the adverse party within ten days after receipt of a copy of the undertaking." (See Weinstein, Korn & Miller, *New York Civil Practice*, §§ 2506.00, 2506.01, 2507.05.) Consistent with these statutes, the limited case law on the justification procedure has overwhelmingly held that a certificate of qualification is "conclusive evidence of the insurer's qualification and sufficiency as surety, and relieves the insurer of the obligation of justifying the undertaking." (*Timal v Kiamzon*, 164 Misc2d 159, 163 [Sup Ct, Queens County, Feb. 7, 1995] [*Timal*]; see *Johanson Resources, Inc. v La Vallee*, 285 AD2d 761, 761 [3d Dept 2001] [rejecting defendant's claim "that Supreme Court abused its discretion in failing to permit an examination of the surety" and holding that "the court properly accepted the certificate of [qualification]," citing CPLR 2507 [a]; Weinstein, Korn & Miller, *New York Civil Practice*, § 2506.01; but see *Matter of Aetna Cas. & Sur. Co. [v County of Nassau]*, 221 AD2d 107, 110-112 [2d Dept 1996], appeal dismissed 88 NY2d 1015, lv denied 89 NY2d 804, rearg denied 89 NY2d 1031 [1997] [*Aetna*] [holding that, although a certificate of qualification had been issued to an insurer licensed in New York as a surety, local laws concerning the sufficiency of the surety were not pre-empted].)⁷

Here, the Bond Defendants have not provided a certificate of qualification for Pennsylvania Insurance. As a threshold matter, the court thus finds that Pennsylvania Insurance is not exempt as a matter of law from justifying the bonds pursuant to CPLR 2506 (a). The court

⁷ The *Britestarr Homes* decision (150 Misc2d at 823) noted that "the paucity of cases suggests[] [that] the notice of exception procedure is almost never invoked." The court in *Aetna* (221 AD2d at 110) similarly noted the "paucity of case law" on Insurance Law § 1111 (b) and (c). To date, there remains very little authority—at either the trial or the appellate levels—on the CPLR 2506 and 2507 notice of exception and justification procedure.

rejects the Bond Defendants' contention that the court may dispense with the justification requirement, notwithstanding the absence of a certificate of qualification, based solely on Pennsylvania Insurance's status as a licensed surety under Insurance Law § 1113 (a) (16) (F) or on its authorization as a licensed surety to execute bonds pursuant to Insurance Law § 1111 (b) (1).

Insurance Law § 1113 (a) (16) (F) qualifies Pennsylvania Insurance to execute an undertaking in New York, pursuant to CPLR 2502 (a) (1). By its terms, CPLR 2502 (a) provides that an authorized insurance company shall act as a surety, "unless the court orders otherwise." (emphasis supplied.) The Bond Defendants have not cited, and the court's own research has not located, any case which has held that the mere authorization of an insurance company to act as a surety and to execute an undertaking within this state exempts the surety from the requirement that it justify the bond if a certificate of qualification is not produced with the bond. Put another way, the Bond Defendants cite no authority in support of their contention that Insurance Law §§ 1113 (a) (16) (F) and 1111 (b) (1) exempt an insurance company authorized to do business as a surety in this state from the requirements of CPLR 2502 (a) and, if a notice of exception to the bond is served, from compliance with the justification procedure set forth in CPLR 2507.⁸

The court further rejects the Bond Defendants' apparent contention that the court may find as a matter of law on these motions that Pennsylvania Insurance is justified as surety

⁸ The Bond Defendants also cite no authority in support of their suggestion that a certificate of qualification is required to dispense with a justification hearing only in the case of an insurer that is not licensed in New York. (See Current Lighting Bond Defs.' Memo. In Reply, at 2 ["A 'certificate of qualification' . . . is an optional, but not required, certificate that is typically used only by insurance companies that are not licensed in New York and not covered by N.Y. Ins. Law § 1111 [b] [1]"]; Current Lighting Bond Defs.' Memo. In Reply, at 3 ["A 'certificate of qualification' may become an issue when a foreign or alien insurer, not licensed in New York, wants to issue a bond in New York"].) The cases on which the Bond Defendants rely, Britestarr (150 Misc2d 820, supra) and Centurifico Delveneto (USA) Ltd. v. Switzerland Gen. Ins. Co., Ltd., 180 AD2d 547 [1st Dept 1992] do not hold that, let alone discuss whether, a surety licensed in New York may avoid a justification hearing where a certificate of qualification has not been issued.

because “it is licensed by [the New York Department of Financial Services] and its filed financial statements show that it has sufficient assets.” (Current Lighting Bond Defs.’ Memo. In Reply, at 4.) In support of this contention, the Bond Defendants rely on Pennsylvania Insurance’s filing of its 2017 financial statement, which purportedly show “assets exceed[ing] its liabilities by more than \$47 million, . . .” (Breakaway Bond Defs.’ Memo. In Opp., at 5; Current Lighting Bond Defs.’ Memo. In Supp., at 5; see 2017 Quarterly Statement [Breakaway Action, NYSCEF Doc. No. 167, at 5-9; Current Lighting Action, NYSCEF Doc. No. 142, at 5-9; Alternative Fuels Action, NYSCEF Doc. No. 118, at 5-9.)

A certificate of qualification must state “the company’s capital and surplus as shown by its last annual statement or its last filed report on examination, whichever is later, and that such capital and surplus complies with the requirements of this chapter. The certificate shall further indicate the limitation upon the amount of a single risk which such company is authorized to assume.” (Insurance Law § 1111 [b] [2].) The issuance of a certificate of qualification, even to an insurer licensed in New York to issue surety bonds, thus requires a finding beyond a positive balance sheet. The Bond Defendants have not cited, and the court’s own research has not located, any authority to support their contention that a mere showing that assets exceed liabilities can suffice to justify a bond in the absence of a certificate for that bond.

The court accordingly holds that Pennsylvania Insurance must submit to a justification hearing pursuant to CPLR 2507 (a). On these motions, the parties have not provided legal authority on the standards that must be met to establish that the surety has the financial capability to meet its obligations under the bond and is “sufficient” within the meaning of CPLR 2507 (a). The parties will accordingly be required to comprehensively brief such standards prior to the

hearing. The hearing will, however, be dispensed with for any bond for which a certificate of qualification is produced at or prior to the hearing.⁹

Although, as discussed above, plaintiffs argue that Pennsylvania Insurance should be compelled to submit to a justification hearing, they also argue, in the alternative—albeit, without expressly so stating—that Pennsylvania Insurance should be found as a matter of law to be an insufficient surety. (See Breakaway Pl.’s Bond Memo. In Supp., at 5-6; Current Lighting Pls.’ Bond Memo. In Opp., at 12-17.)

The court rejects plaintiffs’ contentions that Pennsylvania Insurance “has failed to offer sufficient proof that the face amount of the [Pennsylvania Insurance Company] Bonds is sufficiently collateralized by identifiable assets in New York that are not subject to competing claims,” and that the Bond Defendants have therefore “failed in their burden of proof on this motion because the requirements of New York Insurance Law § 1213 (c) (1) (A) . . . have not been met.” (Current Lighting Pls.’ Bond Memo. In Opp., at 16.) This argument misapprehends the statutory framework. At least where, as here, the surety has come forward with potentially viable evidence of its sufficiency, this framework affords the surety an opportunity to be examined under oath at a hearing, after which “[i]f the court find the surety sufficient, it shall make an appropriate indorsement on the undertaking.” (CPLR 2507 [a].)¹⁰

⁹ The Bond Defendants’ failure to produce the certificate(s) of qualification to date does not mean that they cannot obtain them. (See Timal, 164 Misc2d at 165.)

¹⁰ CPLR 2507 (a) by its terms provides, without qualification, for a hearing to be held on a surety’s timely motion to justify after service upon it of a notice of exception. It thus states: “The surety shall be present upon the hearing of such motion to be examined under oath.” On these motions, however, this court need not decide whether an evidentiary hearing is always required on a motion to justify. The parties have not submitted legal authority on this issue. In any event, Pennsylvania Insurance’s submission of its 2017 Quarterly Statement, showing apparently substantial assets in excess of liabilities, although not sufficient to dispense with a hearing, is sufficient to meet any burden that may exist of coming forward with evidence sufficient to warrant a hearing. (See 2017 Quarterly Statement [Breakaway Action, NYSCEF Doc. No. 167, at 5-9; Current Lighting Action, NYSCEF Doc. No. 142, at 5-9; Alternative Fuels Action, NYSCEF Doc. No. 118, at 5-9].)

The court notes that plaintiffs claim that Pennsylvania Insurance has filed fraudulent financial statements. (Current Lighting Pls.’ Bond Memo. In Opp., at 8-10.) In support of this claim, plaintiffs assert that in its 2016

The court rejects plaintiffs' further contention that Pennsylvania Insurance should be "disqualified" as a surety because its assets are "intermingled" or "inextricably intertwined" with those of the Bond Defendants, and it "has no liquid assets of its own." (Breakaway Pl.'s Bond Memo. In Supp., at 3-6; Current Lighting Pls.' Bond Memo. In Opp., at 15.) In support of this contention, plaintiffs rely on the undisputed fact that Pennsylvania Insurance is a party to a pooling arrangement with Continental Indemnity and California Insurance, the two issuers of the workers' compensation policies at issue in these Actions. (Breakaway Pl.'s Bond Memo. In Supp., at 3; Current Lighting Pls.' Bond Memo. In Opp., at 5-6.) Plaintiffs also cite overlap between Pennsylvania Insurance's management and that of some of the other Applied Defendants, and its status as an "affiliate of [the] Bond Defendants" because it, along with the Bond Defendants and other defendants in these Actions, is a subsidiary in a group of companies whose ultimate parent is BHI. (See Breakaway Pl.'s Bond Memo. In Supp., at 3-6; see 2013 "Examination Report" of AUCRA, at 3 – organizational chart for the various defendants [Exh. 6 to First Am. Compl. (Breakaway Action, NYSCEF Doc. No. 174; Current Lighting Action, NYSCEF Doc. No. 118; Alternative Fuels Action, NYSCEF Doc. No. 99)].)

More particularly, plaintiffs Breakaway and Alternative Fuels each purchased workers' compensation policies from Continental Indemnity, while plaintiffs in Current Lighting purchased workers' compensation policies from both Continental Indemnity and California Insurance. (Breakaway First Am. Compl., ¶ 74; Current Lighting First Am. Compl., ¶ 73;

Annual Statement, Pennsylvania Insurance failed to account for "surety activity," notwithstanding its posting of a surety bond in the Queens County Applied Defendants Action (Index No. 710762/2015) during that year. (See supra, at 3, n 2 [discussing the bond in the Queens County Action].) Plaintiffs offer no support for their assertion that the 2016 Annual Statement contains a misstatement of fact. In contrast, Robert L. Stafford, Pennsylvania Insurance's Vice President of Finance, offers a plausible explanation that "the financial schedule [plaintiffs] quote from in the annual statement of [Pennsylvania Insurance] refers to premiums, and only reflects the fact that no premiums are due on the bond filed in [the Queens County Action]." (Stafford Aff. [Current Lighting Action, NYSCEF Doc. No. 229], ¶ 2.)

Alternative Fuels First Am. Compl., ¶ 73.) As alleged in the amended complaints, each of the plaintiffs, as a condition of purchase of the policies, was required to enter into a Reinsurance Participation Agreement (RPA) with AUCRA. (See Breakaway First Am. Compl., at 2-4; Current Lighting First Am. Compl., at 2-4; Alternative Fuels First Am. Compl., at 2-4.)

As recited in the RPAs, AUCRA “entered into a Reinsurance Treaty” with California Insurance and, “through its pooling arrangement, with other affiliates of Applied Underwriters, Inc., including, but not limited to Continental Indemnity Company. . . .” (Breakaway 2009 RPA, Whereas Clause 2 [Hepworth Aff. In Opp. to Motion to Justify Surety, Exh. 4 – NYSCEF Doc. No. 200]; Breakaway 2012 RPA, Whereas Clause 2 [Dowd Breakaway Bond Aff., [Exh. B] – NYSCEF Doc. No. 188] [substantially similar Whereas Clause but also listing California Insurance as an affiliate]; Current Lighting RPA, Whereas Clause 2 [Exh. 3 to First Am. Compl. – NYSCEF Doc. No. 115] [substantially similar Whereas Clause but also listing California Insurance and Illinois Insurance as affiliates]; Alternative Fuels RPA, Whereas Clause 2 [Exh. 3 to First Am. Compl. – NYSCEF Doc. No. 93] [same as Current Lighting].) The RPAs refer to the entities that are parties to the Reinsurance Treaty and the “pooling arrangement” as the “Issuing Insurers.” (See All RPAs, Whereas Clause 2.)

The pooling arrangement is set forth in a “Restated Reinsurance Pooling Agreement,” effective as of October 1, 2012 (Pooling Agreement), made between California Insurance, Continental Indemnity, Illinois Insurance, and Pennsylvania Insurance. (See Pooling Agreement, at 1 [Dowd Breakaway Bond Aff., Exh. C – Breakaway Action, NYSCEF Doc. No. 189]; Current Lighting Action, NYSCEF Doc. No. 81 (attached as an exhibit to an affidavit on a previous motion).) The Pooling Agreement provides that “the Pooled Companies have determined that the combined underwriting results of the Insurance Business should be shared

between them by means of mutual reinsurance on percentage bases as herein provided . . . so that each Pooled Company will have the same loss and allocated and unallocated loss adjustment expense (“LAE”) ratio and expense ratio on its share of the Pooled Insurance Business. . . .” (Pooling Agreement, Whereas Clause 2.) The “pooling percentage” shares provided in the Pooling Agreement are California Insurance – 75%; Continental Indemnity – 15%; Illinois Insurance – 5%; and Pennsylvania Insurance – 5%. (*Id.*, at Schedule 1.)

There is evidence in the record that the parties to the Pooling Agreement entered into a “Second Restated Intercompany Pooling Agreement” on January 1, 2015, in which “affiliate Texas Insurance Company (TIC) was added” and the shares were California Insurance – 70%; Continental Indemnity – 15%; Illinois Insurance – 5%; Pennsylvania Insurance – 5%; Texas Insurance – 5%. (See 2016 and 2015 Combined Statutory Financial Statements and Supplemental Schedules With Independent Auditor’s Report, at 20-21; 2016 Annual Statement of Continental Indemnity, at 14.7; 2016 Annual Statement of California Insurance, at 14.8 [all summarizing 2015 “Second Restated Intercompany Pooling Agreement,” which is not in the record, and stating that Texas Insurance was a party].)¹¹

The documentary evidence thus shows, and the Bond Defendants do not dispute, that Pennsylvania Insurance is an Issuing Insurer under the RPA, with a five percent share under the Pooling Agreements; that Bond Defendant AUCRA is a party to the RPAs; and that subsidiaries

¹¹ The “Dowd Consolidated Aff.” refers to the Consolidated Affirmation of Raymond Dowd, which was filed on the motion to increase the AUCRA security and for other relief, and which annexes documents referred to in the briefing of the numerous other motions that have been filed in these Actions.

The 2015 and 2016 Combined Statutory Financial Statements referred to in the above text are annexed to the Dowd Consolidated Aff. as Exh. J (Breakaway Action, NYSCEF Doc. No. 276; Current Lighting Action, NYSCEF Doc. No. 185; Alternative Fuels Action, NYSCEF Doc. No. 164). The 2016 Annual Statement of Continental Indemnity is annexed to the Dowd Consolidated Aff. as Exh. O (Breakaway Action, NYSCEF Doc. No. 281; Current Lighting Action, NYSCEF Doc. No. 190; Alternative Fuels Action, NYSCEF Doc. No. 169). The 2016 Annual Statement of California Insurance is annexed to the Dowd Consolidated Aff. as Exh. Q (Breakaway Action, NYSCEF Doc. No. 283; Current Lighting Action, NYSCEF Doc. No. 192; Alternative Fuels Action, NYSCEF Doc. No. 171).

of Bond Defendant AUI are parties to the Pooling Agreements. Berkshire Hathaway Inc. acknowledges, and the Applied Defendants do not dispute, that they are all subsidiaries of ultimate parent, Berkshire Hathaway Inc. (BHI Memo. In Supp. of Motion to Dismiss for Lack of Personal Jurisdiction, at 2 [Breakaway Mot. Seq. No. 006; Current Lighting Mot. Seq. No. 005; Alternative Fuels Mot. Seq. No. 004].)¹²

On these motions, however, neither party comprehensibly explains the meaning of each insurer's "share," or the extent to which, and circumstances under which, an insurer's share confers liabilities and/or benefits upon it. Moreover, plaintiffs provide no support for their assertion, apparently based on the fact that Pennsylvania Insurance is a party to the Pooling Agreements, that Pennsylvania Insurance has no independent assets, and that its "assets and liabilities consist of a mere share of the same asset and liabilities" as those of the Bond Defendants. (See Breakaway Pl.'s Bond Memo. In Supp., at 3-4.) Nor do plaintiffs make any showing that Pennsylvania Insurance is dominated or controlled by any of the defendants in these Actions or by its ultimate parent, BHI. Contrary to plaintiffs' contention (see *id.*, at 4, 6), the fact that Pennsylvania Insurance is an affiliate of the Bond Defendants and of the other Applied Defendants or shares management with them does not demonstrate that it is not an independent entity.

It has long been held that "[a] party cannot be his own surety." (Alex v Grande, 29 AD2d 616, 616 [3d Dept 1967] [citing Nichols v MacLean, 98 NY 458, 459 (1885)].) While there is scant case law addressing the circumstances under which a subsidiary may act as a surety, there is clear authority that where the assets of a subsidiary are "inextricably entwined" with those of a foreign parent company, the subsidiary may not act as a surety. (Centurifico Delveneto (USA)

¹² The court takes notice of the briefs filed on the separate motions.

Ltd. v Switzerland Gen. Ins. Co., Ltd., 180 AD2d 547, 547 [1st Dept 1992].) There is also limited but persuasive authority that a subsidiary may serve as a surety for its parent if the subsidiary has “an independent corporate existence,” and is “not an unknown and possibly irresponsible individual, but an insurance company, which is licensed, regulated, qualified and certified to be solvent by the State.” (Recon Car Corp. of New York v Chrysler Corp., 129 Misc2d 1087, 1087-1088 [Sup Ct, Queens County 1985] [citing Insurance Law § 1111].)

Here, as discussed above, plaintiffs make no showing that Pennsylvania Insurance does not have assets independent of those of the Bond Defendants, and thus that Pennsylvania Insurance’s assets are inextricably intertwined with those of the Bond Defendants based on the mere fact that it is a party to the Pooling Agreements or a subsidiary in the group of companies in which the Bond Defendants are also subsidiaries. The court holds that, as an independently incorporated insurance company which has been licensed and is regulated as a surety in New York, Pennsylvania Insurance may properly serve as a surety for the affiliated foreign Bond Defendants. The court further holds that Pennsylvania Insurance’s status as a co-defendant will not preclude it from serving as a surety. As discussed in a later section of this decision, the court will grant plaintiffs’ motion for leave to add Pennsylvania Insurance and two other affiliated insurers as defendants in these Actions, under the liberal amendment standard, based on the fact that these insurers are parties to the Pooling Agreements. Plaintiffs do not cite, and the court’s own research has not located, any authority that disqualifies an insurer from serving as a surety for a co-defendant affiliate, where the insurer, as here, is independently incorporated and is licensed and regulated as a surety in New York.

Although the court holds that Pennsylvania Insurance is not disqualified from serving as a surety, Pennsylvania Insurance will be required, at the justification hearing, to prove that it has

the financial capability to meet its obligations under the bonds and is therefore a “sufficient” surety. To be clear, the court will not entertain evidence at the hearing as to the alleged interrelationships between Pennsylvania Insurance and the Bond Defendants or other affiliated defendants or entities. Nor will the court entertain evidence as to Pennsylvania Insurance’s alleged participation in a purported scheme to commingle funds or siphon premiums to BHI entities through the RPAs and Pooling Agreements. In these Actions, all of plaintiffs’ causes of action are alleged against defendants collectively as members of the “Berkshire Hathaway Group.” These causes of action include, among others, violations of the Insurance Law and fraud based on defendants’ alleged wrongful scheme in requiring plaintiffs to enter into the RPAs as a condition of their purchase of workers’ compensation insurance. (Breakaway First Am. Compl., at 2-4, “Counts” I-IV, VI; Current Lighting First Am. Compl., at 2-4, “Counts” I-IV, VI; Alternative Fuels First Am. Compl., at 2-4, “Counts” I-IV, VI.) The court has rejected plaintiffs’ claims that Pennsylvania Insurance’s status as a subsidiary and party to the Pooling Agreement disqualifies it from serving as a surety. The justification hearing may not be turned into a pretext for hearing (or discovery) on the affiliated entities’ interrelationships or on the alleged unlawful reinsurance scheme—the issues which are at the core of plaintiffs’ claims in these Actions and are properly addressed if and when the Actions are ultimately resolved on the merits.¹³

¹³ Plaintiffs have advised the court in letters filed since submission of the motions that they seek leave to move to supplement the record to produce “newly discovered evidence.” This evidence includes that Applied Underwriters, Inc. is on the market (Letter from Pls.’ Atty., dated Mar. 4, 2019 [Breakaway Action, NYSCEF Doc. No. 373; Current Lighting Action, NYSCEF Doc. No. 280; Alternative Fuels Action, NYSCEF Doc. No. 256] [Mar. 4, 2019 Letter]), and that certain changes in ownership of the Applied Defendants have been made. (Letter from Pls.’ Atty., dated July 16, 2019 [Breakaway Action, NYSCEF Doc. No. 394; Current Lighting Action, NYSCEF Doc. No. 301; Alternative Fuels Action, NYSCEF Doc. No. 277] [July 16, 2019 Letter].) Plaintiffs argue that this evidence strengthens its claim that Pennsylvania Insurance is not an “independent surety.” (*Id.*, at 2.) In a separate decision and order of the same date, this court has denied plaintiffs’ request for leave to move to supplement the record, based on their failure to demonstrate reasonable justification for this request. Even if the evidence were considered,

Additional Undertaking

Plaintiffs request that the court order additional security pursuant to CPLR 2508. (Breakaway Pl.'s Bond Memo. In Supp., at 5-6; Current Lighting Pls.' Bond Memo. In Opp., at 15.) Plaintiffs do not, however, specify the amount by which the bonds should be increased and appear to request that the issue be addressed at the hearing. (Breakaway Pl.'s Bond Memo. In Supp., at 5-6; Current Lighting Pls.' Bond Memo. In Opp., at 15.) The arguments advanced by plaintiffs in claiming that the bonds are insufficient are the same arguments they advanced in claiming that Pennsylvania Insurance should be disqualified as a surety—namely, its status as a subsidiary and participation in the pooling arrangement or alleged intermingling of its assets with those of the affiliated defendants. (Breakaway Pl.'s Bond Memo. In Supp., at 3-6; Current Lighting Pls.' Bond Memo. In Opp., at 12-17.) This court has rejected these arguments for the reasons stated above. Plaintiffs also fail to explain how increasing the bonds to be filed by Pennsylvania Insurance could better protect plaintiffs, given their position that Pennsylvania Insurance should be disqualified as surety in the first place. Significantly also, in determining plaintiffs' prior motions to compel any defendants not authorized to do business in New York to post a bond before appearing in these Actions, this court, after extensive discussion, fixed the

however, plaintiffs do not offer a cogent explanation as to how the sale of AUI or change of ownership of any of the Applied Defendants has any effect on Pennsylvania Insurance's status as an independent entity.

In the above letters, plaintiffs also seek leave to offer supplemental evidence as to the allegedly illegal reinsurance scheme and defendants' roles in the scheme, including evidence as to which defendants have paid workers' compensation claims; how premiums have been calculated; and the making of asserted misrepresentations and falsification of claims. (Mar. 4, 2019 Letter, at 1.) In addition, plaintiffs seek to offer evidence that "dividends" are being paid by California Insurance to its direct parent, and that "similar 'dividends' are being siphoned out of the pool linked to the illegal RPA signed by Plaintiffs. . . ." (July 16, 2019 Letter, at 1-2.) Although the court has denied leave to move to supplement the record, the court notes that this evidence would be relevant (if at all) to the ultimate proof of the alleged illegal reinsurance scheme and, as held in the text above, would therefore not be properly considered on these motions or at a justification hearing.

Plaintiffs further seek to assert a new claim that Pennsylvania Insurance is not a valid surety under Insurance Law § 1106 (f) because a workers' compensation insurer may not also serve as a financial guaranty insurer. (Mar. 4, 2019 Letter, at 5.) Plaintiffs fail to demonstrate a legally sufficient basis for adding a new theory to a fully briefed motion. In any event, plaintiffs' theory ignores that Pennsylvania Insurance continues to be licensed by the New York Department of Financial Services as a surety.

bonds in the full amount each plaintiff had paid to defendants for their workers compensation policies and participation in the RPAs. (See Breakaway I, 2017 WL 3084991, at * 10; Current Lighting I, 2017 WL 3638317, at * 2.) In seeking an increase in these bonds, plaintiffs wholly fail to explain why this dollar-for-dollar undertaking is inadequate.

Additional Bond Requests

In their motion for an injunction restraining the Applied Defendants from commencing an arbitration against Breakaway or litigating against plaintiffs in Nebraska (see supra at 4, n 3), plaintiffs also seek an order increasing the security required to be posted for AUCRA and requiring Applied Risk Services of New York, Inc. (ARSNY) to post security. (Pls.' Memo. In Supp. of Injunction, at 17 [Breakaway Action, NYSCEF Doc. No. 303; Current Lighting Action, NYSCEF Doc. No. 212; Alternative Fuels Action, NYSCEF Doc. No. 191]; Pls.' Memo. In Reply, at 15 [Breakaway Action, NYSCEF Doc. No. 336; Current Lighting Action, NYSCEF Doc. No. 243; Alternative Fuels Action, NYSCEF Doc. No. 219].) Plaintiffs argue that this request is warranted because defendants unethically commenced litigation in Nebraska regarding the RPAs, in the face of this court's purported holding that AUCRA, which issued the RPAs, "was sufficiently alleged to be operating as an insurer in New York without a license. . . ." (Id.)

This court found merely that, under Insurance Law § 1213 (c) (1), given that AUCRA is not a licensed insurer in New York, it could not file any pleading contesting plaintiffs' allegations against it in these Actions without filing a bond or procuring a license. The court did not make any finding at the time the bonds were ordered as to the propriety of litigation in Nebraska. (See Breakaway I, 2017 WL 3084991, at * 8; Current Lighting I, 2017 WL 3638317, at * 1.) Nor is there any basis, under section 1213 (c) or otherwise, to increase AUCRA's bond,

or to order New York entity, ARSNY, to file a bond, in order to cover plaintiffs' potential damages in connection with litigation outside New York.

The court has considered plaintiffs' remaining contentions on the several motions pertaining to the bonds and finds them to be without merit.

Leave to Amend

In the Breakaway Action, Breakaway seeks leave to amend and supplement its first amended complaint to add Pennsylvania Insurance, Texas Insurance, and Illinois Insurance (collectively, the proposed additional insurance companies) as defendants pursuant to CPLR 3025 (b). Breakaway also seeks leave to add a cause of action for a constructive trust against the "Berkshire Hathaway Group."¹⁴ In the Current Lighting Action and in the Alternative Fuels Action, in response to the Bond Defendants' motion to set aside the exception to the sufficiency of the bond posted by Pennsylvania Insurance, plaintiffs cross-move for leave to amend and supplement their respective first amended complaints to add the proposed additional insurance companies as defendants and to add a cause of action for a constructive trust against the "Berkshire Hathaway Group."

It is well settled that leave to amend "'shall be freely given' absent prejudice or surprise resulting directly from the delay." (McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]; see CPLR 3025 [b].) The decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co., Inc. v City of New York, 60 NY2d 957, 959 [1983].) It is further settled that on a motion for leave to amend a pleading, the movant "need not establish the merit of its proposed new allegations, but

¹⁴ In all three actions, plaintiffs' proposed second amended complaint defines "Berkshire Hathaway Group" as "defendant Berkshire Hathaway, its principals and its affiliates. . . ." (Breakaway Proposed Second Am. Compl., at 2; Current Lighting Proposed Second Am. Compl., at 2; Alternative Fuels Proposed Second Am. Compl., at 2.)

[must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010] [internal citation omitted]; accord Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 505 [1st Dept 2011].)

The authorities in this Department have been in conflict as to whether, or to what extent, an evidentiary showing must be made in support of a motion for leave to amend. (See Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2016 WL 7475831, * 3 n 4 [Dec. 29, 2016] [this court’s prior decision discussing cases].) Recent authority has increasingly held that the party seeking leave to amend is “not required to submit an affidavit of merit or make any other evidentiary showing in support of [its] motion.” (Boliak v Reilly, 161 AD3d 625, 625 [1st Dept 2018], [citing Hickey v Steven E. Kaufman, P.C., 156 AD3d 436, 436 [1st Dept 2017]], lv denied 32 NY3d 905 [2018]; see Reyes v BSP Realty Corp., 171 AD3d 504, 504 [1st Dept 2019] [“An amendment is devoid of merit where the allegations are legally insufficient”].)

Here, plaintiffs argue that their claims against the proposed additional insurance companies mirror the claims in the first amended complaint and that they should be granted leave to amend to add these companies as defendants because these companies are “instrumentalities” of the allegedly illegal reinsurance scheme. (Breakaway Pl.’s Amend Memo. In Supp., at 3; Current Lighting Pls.’ Amend Memo. In Supp., at 17-18.) The Applied Defendants oppose the addition of the three companies on the grounds, among others, that plaintiffs fail to allege any “specific conduct” on the part of the companies and fail to make a sufficient showing of merit. (Breakaway Applied Defs.’ Amend Memo. In Opp., at 2-3, 5; Current Lighting Applied Defs.’ Amend Memo. In Opp. to Cross-Motion, at 9-11.) In addition, they appear to claim that because their motions to dismiss the first amended complaints are

meritorious, the addition of defendants on the same claims would be “futile.” (Breakaway Applied Defs.’ Amend Memo. In Opp., at 2, 5-6; Current Lighting Applied Defs.’ Amend Memo. In Opp. to Cross-Motion, at 7-9, 11; Breakaway BHI Amend Memo. In Opp., at 1 [arguing that the addition of the proposed companies cannot “change [the] fact” that plaintiff cannot establish personal jurisdiction over it].) Defendants also claim prejudice on the ground that motions to dismiss are pending and that the motion to amend may necessitate further briefing. (Current Lighting Applied Defs.’ Amend Memo. In Opp. to Cross-Motion, at 8; Breakaway BHI Amend Memo. In Opp., at 2-3.)

Here, even if an evidentiary showing is required in support of the motion for leave to amend, a sufficient showing has been made. As discussed in the section of this decision on the bond motions, the RPAs, which each plaintiff was allegedly required to sign as a condition of its purchase of workers’ compensation policies, refer to the entities that are parties to the Reinsurance Treaty and the Pooling Agreements as the “Issuing Insurers.” (See supra, at 14.) It is undisputed that the proposed additional insurance companies are all parties to one or both of the Pooling Agreements, with percentage shares of five percent each. (See supra, at 15.) The originally named Applied Defendants do not dispute that they are all subsidiaries of ultimate parent, Berkshire Hathaway Inc. (See supra, at 16.) There is also documentary evidence that the proposed additional insurance companies, like the original Applied Defendants, are subsidiaries of BHI. (See 2016 and 2015 Combined Statutory Financial Statements and Supplemental Schedules With Independent Auditor’s Report, at 7.)

As also held in the decision of the bond motions, all of plaintiffs’ causes of action are pleaded against the original Applied Defendants collectively, as members of the “Berkshire Hathaway Group.” In the proposed second amended complaints, the same causes of action are

pleaded against the proposed additional insurance companies as members of this Group. These causes of action for, among other things, violation of the Insurance Law and fraud, are all based on the allegations that the Applied Defendants, along with the proposed additional insurance companies, participated in an allegedly illegal reinsurance scheme to commingle funds or siphon premiums to BHI entities through the RPAs and Pooling Agreements.

Contrary to defendants' contention, the amendment is not barred by the absence of specificity as to the roles of the proposed additional insurance companies in the alleged scheme. Even where a cause of action must be pleaded with specificity, as is the case for fraud (see CPLR 3016 [b]), that requirement is satisfied where, as here, the pleading alleges sufficient facts to support an inference of the defendant's participation in the fraudulent scheme. (See Pludeman v. Northern Leasing Sys., Inc., 10 NY3d 486, 492 [2008].) Defendants' apparent claim that the finding of merit should await the determination of the pending motions to dismiss misapprehends the showing of merit required on a motion for leave to amend. Defendants claim of prejudice is also unpersuasive as the court will determine the motions to dismiss as briefed. To the extent that causes of action survive the motions to dismiss or personal jurisdiction over Berkshire Hathaway Inc. is found, defendants will be afforded an opportunity to serve additional motions to dismiss addressing any bases for dismissal specific to the three added defendants.

The court will not direct the posting of bonds at this time, as defendants have not yet been served and any unlicensed defendant should have the opportunity to comply with Insurance Law § 1213 (c) and thus to obviate the need for motions regarding a bond.

The court reaches a different conclusion as to the branch of plaintiffs' motions for leave to amend which seek to add a cause of action for a constructive trust. Plaintiffs' proposed cause of action alleges that "[t]he Berkshire Hathaway Group promised that it would provide legal

workers' compensation insurance to Plaintiff and Plaintiff paid consideration in reliance on those promises. ¶¶ In light of the fraudulent nature of the Program, it would defy equity for the Berkshire Hathaway Group to retain Plaintiff's monies under the Program. Therefore, the Court should impose a constructive trust." (See Breakaway Proposed Second Am. Compl., ¶¶ 296-297; Current Lighting Proposed Second Am. Compl., ¶¶ 290-291; Alternative Fuels Proposed Second Am. Compl., ¶¶ 292-293.) Plaintiffs first amended complaints pleaded 13 causes of action, all of which are based upon the alleged unenforceability of the RPAs and seek the return of plaintiffs' money from "the Berkshire Hathaway Group." Several of the causes of action, including the first and second for fraud and violations of the Insurance Law, specifically seek the return of premiums and profits. (Breakaway First Am. Compl., ¶¶ 175, 184; Current Lighting First Am. Compl., ¶¶ 164, 173; Alternative Fuels First Am. Compl., ¶¶ 166, 175.)

In order for a constructive trust to be imposed, it must appear that "the legal remedy of damages will be inadequate." (Evans v Winston & Strawn, 303 AD2d 331, 333 [1st Dept 2003]; Ashley MRI Mgt. Corp. v Perkes, 2006 NY Slip Op 51447 [U], 2006 WL 2050091, * 3 [Sup Ct, Nassau County].) The proposed second amended complaint does not allege that the equitable relief of a constructive trust is needed due to the inadequacy of the damages remedy.¹⁵ The branch of the motion to add this cause of action will accordingly be denied.

¹⁵ As noted in the section of this decision on the bond motions, plaintiffs have filed letters since submission of the motions in which they seek leave to move to supplement the record to produce "newly discovered evidence." This evidence purportedly includes evidence that "Defendants' planned transfer of ownership to a Cayman Islands entity will render this Court's jurisdiction over the controversy illusory as all of the money will be gone." (July 16, 2019 Letter, at 2.) The proffered evidence consists solely of an "Information Statement" by the President of California Insurance concerning an offer to acquire control of California Insurance from Applied Defendant entities that are intermediate parents of California Insurance. The Statement provides no support for the assertion that money will be dissipated. As also noted above, the court has denied plaintiffs' request for leave to supplement. Even if the court were to consider the evidence as to the change of ownership of California Insurance, it is patently insufficient to plead a need for a constructive trust.

Plaintiffs also seek to amend the first amended complaints to include additional allegations about the agreements that were entered into, and the premiums collected, in connection with the Applied Defendants' allegedly fraudulent scheme. They also seek to include allegations about the substance of court decisions or regulatory holdings regarding reinsurance programs offered by various Applied Defendants. (See e.g. Breakaway Proposed Second Am. Compl., at 2, 9 n 3.) The latter allegations are inappropriate.

In sum, the court will grant leave to add the proposed additional insurance companies as defendants and to serve the proposed second amended complaint annexed to the motions, provided that the constructive trust cause of action and the allegations as to court decisions or regulatory holdings are deleted.

ORDER

Breakaway Action

I. It is hereby ORDERED that the motion of Breakaway Courier Corporation (Breakaway) to compel Pennsylvania Insurance Company (Pennsylvania Insurance) to justify the bond it filed in this Action for Applied Underwriters, Inc., Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), and Commercial General Indemnity Inc. (collectively, the Bond Defendants), and for other relief (Mot. Seq. No. 004), is granted solely to the extent of directing Pennsylvania Insurance to appear at a justification hearing pursuant to the terms of this decision; and it is further

ORDERED that the date for the hearing and the schedule for the briefing required pursuant to the decision will be set in consultation with counsel for the parties; and it is further

ORDERED that the branch of the motion to compel the Bond Defendants to file additional undertakings pursuant to CPLR 2508 is denied; and it is further

ORDERED that the cross-motion of the Bond Defendants to set aside Breakaway's exception to the sufficiency of the surety on the bond is denied; and it is further

ORDERED that Breakaway's motion for leave to amend and supplement its first amended complaint (Mot. Seq. No. 008) is granted to the following extent:

Breakaway is granted leave to amend its first amended complaint to add Pennsylvania Insurance, Illinois Insurance Company (Illinois Insurance), and Texas Insurance Company (Texas Insurance) as defendants in this Action and to serve the proposed second amended complaint annexed to the motion, provided that the constructive trust cause of action and the allegations as to court decisions or regulatory holdings are deleted; and it is further

ORDERED that the aforesaid proposed second amended complaint shall be served on Pennsylvania Insurance, Illinois Insurance, and Texas Insurance within thirty (30) days after Notice of Entry of this Order; and it is further

ORDERED that the branch of Breakaway's motion (Mot. Seq. No. 007) for an order increasing the amount of security required to be posted by AUCRA and requiring security to be posted by Applied Risk Services of New York, Inc. is denied; and it is further

ORDERED that the branch of Mot. Seq. No. 007 for an injunction is held in abeyance and shall be decided with Mot. Seq. No. 005.

Current Lighting Action

II. It is hereby ORDERED that the Bond Defendants' motion (Mot. Seq. No. 006) for an order setting aside plaintiffs' exception to the sufficiency of the surety on the bond and justifying Pennsylvania Insurance as surety for the bond is denied. Provided that: Pennsylvania Insurance shall appear at a justification hearing as set forth in the above order in the Breakaway Action determining Mot. Seq. No. 004; and it is further

ORDERED that the cross-motion of Current Lighting & Electric, Inc., MAS Electrical Maintenance, LLC, and First Quality Maintenance II, LLC (collectively, Current Lighting) for leave to amend and supplement the first amended complaint is granted to the following extent:

Current Lighting is granted leave to amend the first amended complaint to add Pennsylvania Insurance, Illinois Insurance, and Texas Insurance as defendants in this Action and to serve the proposed second amended complaint annexed to the motion, provided that the constructive trust cause of action and the allegations as to court decisions or regulatory holdings are deleted; and it is further

ORDERED that the aforesaid proposed second amended complaint shall be served on Pennsylvania Insurance, Illinois Insurance, and Texas Insurance within thirty (30) days after Notice of Entry of this Order; and it is further

ORDERED that the branch of Current Lighting's motion (Mot. Seq. No. 007) for an order increasing the amount of security required to be posted by AUCRA and requiring security to be posted by Applied Risk Services of New York, Inc. is denied; and it is further

ORDERED that the branch of Mot. Seq. No. 007 for an injunction is held in abeyance and shall be decided with Mot. Seq. No. 004.

Alternative Fuels Action

III. It is hereby ORDERED that the Bond Defendants' motion (Mot. Seq. No. 005) for an order setting aside plaintiffs' exception to the sufficiency of the surety on the bond and justifying Pennsylvania Insurance as surety for the bond is denied. Provided that: Pennsylvania Insurance shall appear at a justification hearing as set forth in the above order in the Breakaway Action determining Mot. Seq. No. 004; and it is further

ORDERED that the cross-motion of Alternative Fuels Transportation, Inc. (Alternative Fuels) for leave to amend and supplement its first amended complaint is granted to the following extent:

Alternative Fuels is granted leave to amend its first amended complaint to add Pennsylvania Insurance, Illinois Insurance, and Texas Insurance as defendants in this Action and to serve the proposed second amended complaint annexed to the motion, provided that the constructive trust cause of action and the allegations as to court decisions or regulatory holdings are deleted; and it is further

ORDERED that the aforesaid proposed second amended complaint shall be served on Pennsylvania Insurance, Illinois Insurance, and Texas Insurance within thirty (30) days after Notice of Entry of this Order; and it is further

ORDERED that the branch of Alternative Fuels' motion (Mot. Seq. No. 006) for an order increasing the amount of security required to be posted by AUCRA and requiring security to be posted by Applied Risk Services of New York, Inc. is denied; and it is further

ORDERED that the branch of Mot. Seq. No. 006 for an injunction is held in abeyance and shall be decided with Mot. Seq. No. 003.

This constitutes the decision and order of the court.

Dated: New York, New York
August 8, 2019


MARCY FRIEDMAN, J.S.C.