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July 22, 2014

VIA HAND DELIVERY

Steven L. Yerger, Jr., Chief
Company Licensing Division
Bureau of Company Licensing and Financial Analysis
Office of Corporate and Financial Regulation
Pennsylvania Department of Insurance
1345 Strawberry Square
Harrisburg, PA 17120

RECEIVED
Corporate & Financial Regulation

JUL 22 2014

**Pennsylvania
Insurance Department**

RE: Form "A" - Statement Regarding the Acquisition of Control of OneBeacon Insurance Company, Potomac Insurance Company, OneBeacon America Insurance Company and The Employers' Fire Insurance Company by Armour Reinsurance Group Limited

Dear Mr. Yerger:

The Travelers Indemnity Company ("Travelers"), through its attorneys and in accordance with the Pennsylvania Bulletin (Vol. 44, No. 25, June 21, 2014), respectfully submits this letter of comment regarding the acquisition of OneBeacon Insurance Company, Potomac Insurance Company, OneBeacon America Insurance Company, and The Employers' Fire Insurance Company (collectively, "OneBeacon") by Trebuchet US Holdings, Inc., a wholly owned subsidiary of Trebuchet Investments Limited, a Bermuda company, which in turn is a wholly owned subsidiary of Armour Group Holdings Limited (collectively "Armour"). For the reasons set forth herein, Travelers believes that the proposed acquisition of OneBeacon is unfair, unreasonable in its impact on policyholders and ceding companies, and not in the public interest. *See generally* 40 P.S. §991.1402(f)(1).

Travelers is one of the country's largest property and casualty insurance companies and writes personal, business, financial and international insurance in the United States, Canada and the United Kingdom. As a cedent and creditor of OneBeacon, Travelers has a substantial financial interest in Armour's proposed acquisition and is concerned that if approved by the Pennsylvania Department of Insurance (the "Department"), the acquisition will severely impair the future recovery of reinsurance assets under its reinsurance agreements with OneBeacon. Travelers maintains a ceded recoverable of \$8.6 million from OneBeacon. Given the long-tail nature of the relevant reinsured business (environmental, asbestos and other cumulative injury

claims), the ultimate exposure under the various reinsurance agreements written by OneBeacon will likely be several multiples of the current ceded recoverable.

Six years ago, over the objections of Travelers and other similarly-situated companies, the Department approved the acquisition of PMA Capital Insurance Company (“PMA Re”) by Armour (Order No. ID-RC-09-42). At the time, Travelers urged the Department not to approve the acquisition due to serious concerns relative to the financial underpinnings of the deal and whether Armour would act in the best interests of PMA Re’s ceding companies post-acquisition.¹ Among other issues articulated, Travelers expressed its fear that Armour would stop paying legitimate claims in order to maximize its own profits.

Travelers’ concerns were prescient. Once the acquisition was approved, Excalibur (formerly PMA Re) – under the direction of Armour – adopted a “slow pay” and then a “no pay” practice with respect to Travelers’ reinsurance claims arising under the reinsurance contracts written by PMA Re, extending even to claims that were historically paid by PMA Re prior to acquisition. Between December 2009 and June 2014, Excalibur’s failure to pay valid claims compelled Travelers to file 10 lawsuits and to issue numerous demands for arbitration, requiring Travelers to devote substantial resources and to incur significant legal fees to recover its reinsurance assets.

Excalibur’s failure, under Armour’s ownership and management, to meet its claim obligations is well-documented. Under Armour’s wing, Excalibur’s pattern of gross misconduct in avoiding its contractual obligations to Travelers was sufficient, in the eyes of the Connecticut federal judiciary, to state a cognizable claim for unfair business practices under the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.* (“CUTPA”), *akin* to the Pennsylvania Unfair Insurance Practices Act, 40 P.S. § 1171.1, *et seq.* In February 2013, the Honorable Charles Haight granted, over Excalibur’s objection, Travelers’ motion to amend an existing complaint to state a claim for violation of CUTPA based upon Excalibur’s unfair business practices. Judge Haight evaluated Excalibur’s behavior, determined that the amendment should be allowed, and ruled that the allegations of unfair trade practices would withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court noted:

Travelers contends that Excalibur intends by these practices to take advantage of “the float,” which is to say, *hold on to monies as long as possible, even in derogation of the letter and spirit of contractual obligations owing to others.* This interpretation is entirely plausible. It is equally plausible to think that *finders of fact at trial would conclude that such practices, if proven, were cynical, self-serving, and constitute substantial aggravating circumstances of*

¹ Unlike OneBeacon, PMA Re had no direct policyholders, only reinsurance relationships.

magnitude sufficient to constitute a violation of [the Connecticut Unfair Trade Practices Act].

The Travelers Indemnity Company v. Excalibur Reinsurance Corporation, No. 3:11CV1209 (CSH), 2013 WL 424535, at *7 (D.Conn. Feb. 1, 2013) (emphasis added) (copy attached and marked Exhibit "A").

Not only did Armour's run-off of Excalibur result in repeated and unnecessary litigation to recover reinsurance assets which Excalibur owed under the contracts which Travelers purchased from PMA Re, but the unfair pattern and practice of denying or delaying payment of claims without reasonable basis was palpable. In March 2014, a federal judge in Connecticut found that Excalibur acted in bad faith with respect to the settlement of a lawsuit brought against it by Travelers. The Honorable Alvin Thompson detailed Excalibur's reinsurance claims handling practices and explained the financial implications of the delay tactics:

Travelers has established that Excalibur generally was not even beginning its review of Travelers' reinsurance billings until they are at least 180 days old, regardless of whether the terms of the applicable contracts require payment on a short schedule. For example, of the 192 billings that Travelers submitted through Guy Carpenter & Company during the period from July 9, 2009 to February 8, 2013 that Excalibur paid, the average time for payment was 200 days and Excalibur made payment within 30 days in only one instance. ***The consequence of this pattern of slow payments by Excalibur to Travelers was that Excalibur instead of Travelers got the use of the money.***

The court finds that Excalibur's actions were taken in bad faith because they were without color and taken for an improper purpose. Travelers has established that Excalibur had during the relevant period over \$100 million in assets and \$7 million immediately-available cash on hand....Based on the record, ***the court concludes that Excalibur decided not to pay by June 7, 2013 so that it could continue to have the use of the money for additional time at the expense of Travelers.***

The Travelers Indemnity Company v. Excalibur Reinsurance Corporation, No. 3:13CV293 (AWT), 2014 WL 1094451, at *1 (D. Conn. Mar. 19, 2014) (emphasis added) (copy attached and marked Exhibit "B").

Pursuant to 40 P.S. §991.1402(f)(1), the Department may refuse to approve an acquisition if, among other reasons:

(iv) The plans or proposals which the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair or unreasonable and fail to confer benefit on policyholders of the insurer and are not in the public interest.

(v) The competence, experience and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger, consolidation or other acquisition of control.

Armour's management, through Excalibur, of the legacy PMA Re assumed reinsurance obligations provides strong evidence that the Department should have grave concerns about both of these factors. While Travelers is not a "policyholder" of OneBeacon in the truest sense of the word, contracts of reinsurance nonetheless establish an insurance relationship pursuant to which one party agrees to underwrite risk and to provide insurance coverage for the other, in exchange for premium. Reinsurance contracts are contracts of indemnity; *i.e.*, they obligate the reinsurer to indemnify the cedent for losses to which it is exposed under an insurance policy issued to the original insured. *See Ario v. Reliance Ins. Co.*, 981 A.2d 950 (Pa. Commw. 2009) (noting that reinsurance contracts are contracts of indemnity).

Insurers like Travelers purchase reinsurance for a variety of reasons, including risk transfer and smoothing of results. Purchasing reinsurance also expands the insurer's surplus and allows it to write more policies with higher limits – all to the ultimate benefit of its policyholders. Due to the nature of the cedent-reinsurer relationship, it is universally recognized that reinsurers owe to their cedents – like Travelers – a duty of utmost good faith. Thus, like a policyholder, an insurer purchasing reinsurance coverage for valuable consideration is entitled to expect that a regulated reinsurance company will honor its obligations and its duties of good faith and fair dealing.

Travelers is not a direct insured of OneBeacon and therefore leaves the discussion of whether Armour's acquisition of OneBeacon would be contrary to the interests of policyholders to those entities. In fact, Travelers understands that a group of OneBeacon policyholders have voiced concerns to the Department that Armour's proposed acquisition of the Acquired Companies may "create incentives to slow-pay, or refuse to pay, valid [long-tail] claims that are due and owing." As observed by Colgate-Palmolive in its Petition to Intervene,

. . . Armour is not an insurance company and has no need to maintain a positive image or reputation to attract future policyholders. Armour's goal is to maximize profits for its shareholders. The few claims it pays, the higher the profits. Accordingly, Armour is incentivized to pay as few claims as possible, even if

doing so means quickly moving its newly acquired companies towards liquidation.

The concerns expressed by Colgate-Palmolive (Public Document No. 57) mirror those of Travelers and echo the findings made in the above-cited cases relative to Excalibur's business practices under the aegis of Armour. As a ceding company and a reinsured of OneBeacon, Travelers notes that the integrity of Excalibur's reinsurance claims handling and business practices subsequent to Armour's acquisition of PMA Re in 2009 has been criticized by more than one federal judge. Given these findings and the manner in which Armour has run-off PMA Re's legacy obligations through Excalibur thus far, the Department should give serious consideration to the question of whether Armour's proposed acquisition of OneBeacon satisfies the fairness test under the statutory standard of 40 P.S. §991.1402(f)(1)(iv). Tellingly, the original Form A, the First Amended Form A, dated June 19, 2014 (Public Document No. 79) and the Second Amended Form A (Public Document No. 84) submitted on June 24, 2014 to the Department all show that the same individuals who have been responsible for Excalibur's claims handling continue to be officers, directors and executive officers of Armour and will be directly involved in the run-off of OneBeacon, leaving Travelers with every reason to expect the exact same course of dealing if the proposed acquisition is approved.²

If past conduct is any predictor of future behavior, Armour's proposed run-off of OneBeacon's book of assumed reinsurance may well follow the business model that it

² Prior to the Insurance Commissioner issuing his December 23, 2009 Approval Order in PMA Re's acquisition (Order No. ID-RC-09-42), the Insurance Department received numerous comments from "interested persons", including ceding insurance companies like Travelers who had long-term, on-going reinsurance arrangements with Excalibur, addressing among others the following items:

- a. Concerns regarding the financial condition of Armour Re;
- b. Concerns that PMACIC was failing to make prompt and full payments on its outstanding reinsurance obligations;
- c. Concerns that the collection of reinsurance from PMACIC would become more difficult if Armour Re acquired control of PMACIC; and
- d. Concerns regarding the competency, experience and integrity of persons who would control the operation of PMACIC post-acquisition, when it was anticipated that a number of PMACIC's current staff who were responsible for claims handling would continue with the company post-acquisition.

See, page 4, paragraph 26 of Approval Order.

In his Approval Order, the Insurance Commissioner particularly noted among other things that in response to concerns raised by "interested parties" Armour Re (for the Respondent) stated that it "... has no intention of having PMACIC implement tactics for the purpose of delaying the payment of obligations that have been determined to be due and payable" (*See*, page 5, paragraph 30. b. of Approval Order).

implemented through Excalibur. If so, the implementation of that model with respect to the run-off of OneBeacon's liabilities would have significantly negative and far-reaching consequences which impact not only Travelers but also, for the reasons stated above, Travelers' policyholders. Put differently, Travelers fears that history will repeat itself and that Armour will run off OneBeacon in similar fashion to Excalibur (formerly PMA Re) – to the detriment of not only ceding companies but, ultimately, to the policyholders of those cedents as well.

As the Department knows, there are both fair and unfair ways to conduct the run-off of an insurance or reinsurance company. In a fairly conducted run-off, the management of the company in run-off recognizes the obligations of the insurer or reinsurer to meet valid claims as they come due for payment and applies its expertise to the settlement of claims and the collection of ceded reinsurance. On the other hand, if conducted unfairly, the goal of a reinsurer in run-off is to extract capital and then use the reduced capitalization as leverage to compel ceding companies to accept less than full value for their reinsurance coverage. There can be little doubt that with respect to Travelers, at least, Armour's run-off of Excalibur falls into the latter category because Excalibur has repeatedly engaged in unfair business practices in the reinsurance run-off context.³ These business practices were apparently designed to benefit Armour to the detriment of Travelers and other cedent companies.

³ The Unfair Insurance Practices Act declares the following acts to constitute unfair claim settlement or compromise practices if performed with such frequency as to indicate a business practice:

- (ii) Failing to acknowledge and act promptly upon written or oral communications with respect to claims arising under insurance policies.
- (iii) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- (iv) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

- (vi) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear.
- (vii) Compelling persons to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due and ultimately recovered in actions brought by such persons.

- (xiv) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

40 P.S. § 1171.5 (a)(10).

One may infer, as noted by the federal district court in Connecticut, that the procedures implemented by Armour after it acquired PMA Re and re-named it Excalibur were designed to systematically deny or delay claim payments to the financial benefit of Armour and the detriment of PMA Re's reinsured cedents. As a result, Armour frustrated the essential purpose of the reinsurance contracts that Travelers purchased from PMA Re – risk transfer – and deprived Travelers of the financial benefit of its reinsurance contracts by withholding payment and ignoring Excalibur's indemnity obligations.

In stark contrast, Excalibur's financial statements from 2010 through 2012 reveal that Excalibur paid Armour over \$21 million in management fees – while reported surplus capital dipped into the low six-figure range – meaning that Armour realized financial benefit at the same time that Excalibur was ignoring or refusing to process claims, attempting to pressure Travelers (and presumably other cedents) to accept significant discounts regarding claim cessations, commutations and payment of reinsurance recoveries and practically compelling aggrieved parties to commence costly legal proceedings to recover reinsurance assets that any traditional reinsurer would have paid in satisfaction of its duty of utmost good faith.

Based upon Excalibur's public financial reports, and in light of the several lawsuits that Travelers and other ceding companies have filed against Excalibur, one might reasonably conclude that post-acquisition, Armour has been more focused upon extracting capital (in the form of "management" fees) from Excalibur than meeting Excalibur's claim obligations. Such conduct directly implicates 40 P.S. §991.1402(f)(1)(v) ("integrity of those persons who would control the operation of the insurer").

In light of the foregoing, Travelers is not optimistic that Armour will properly oversee and handle OneBeacon's reinsurance obligations to Travelers post-acquisition. Regrettably, despite the rulings mentioned above, Armour has not changed its business practices with respect to Excalibur's treatment of Travelers. Nor, more importantly, has Armour offered any assurances that its conduct and business practices will be any different with respect to its proposed run-off of OneBeacon. Travelers therefore urges the Department to give serious consideration to whether to allow the proposed acquisition between Armour and OneBeacon to proceed, and respectfully suggests that it is highly questionable whether the transaction can meet the standard in 40 P.S. §991.1402(f)(1)(iv).

Even sophisticated companies like Travelers rely on a system of regulatory checks and balances to verify the accuracy of their reinsurers' reserves, capital and surplus. Should the Department allow the acquisition to proceed, Travelers urges the Department to determine not only the adequacy of the OneBeacon-related reserves, but also to ensure that post-acquisition there will be adequate capital and surplus to meet OneBeacon's legacy obligations under Armour's management. Moreover, in accordance with the above cited statutes, and in light of the Department's familiarity with Armour's run-off of Excalibur post acquisition, the

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Pennsylvania Insurance Commissioner must act under authority of Pennsylvania law and should prevent a repeat of what has occurred and continues to ensue in Armour's run-off of Excalibur. Travelers respectfully submits that the Department must, in light of the serious concerns expressed in this letter and by others, ensure that the proposed acquisition will, under applicable Pennsylvania statutory standards, be fair and reasonable to OneBeacon's policyholders and ceding companies, as well as in the public interest; otherwise, it must be disapproved.

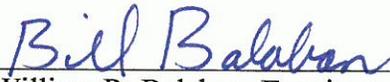
Travelers will be represented at the public informational hearing scheduled for tomorrow, July 23, 2014 at 9:00 AM EDT in Suite 200, Capitol Associates Building, 901 North 7th Street, Harrisburg, PA 17102 by Matthew D. Coble, Esquire and myself.

Thank you for your time and consideration and please do not hesitate to contact me if Travelers can be of further assistance to your review of this proposed transaction.

Respectfully yours,

WILLIAM BALABAN & ASSOCIATES, LLC

By:


William R. Balaban, Esquire

Attachments:

cc: The Travelers Indemnity Company (with attachments)
James R. Potts, Esquire, Cozen O'Connor (with attachments)
Steven B. Davis, Esquire, Stradley Ronon Stevens & Young (with attachments)

Exhibit “A”

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

THE TRAVELERS INDEMNITY COMPANY
as successor in interest to GULF INSURANCE
COMPANY,

Plaintiff,

v.

EXCALIBUR REINSURANCE
CORPORATION f/k/a PMA CAPITAL
INSURANCE COMPANY,

Defendant.

3:11 - CV- 1209 (CSH)

RULING ON PLAINTIFF'S MOTION TO AMEND ITS COMPLAINT

HAIGHT, Senior District Judge:

This diversity action presents a not infrequently encountered situation in the insurance industry. A reinsurer refuses to pay to an insurer amounts claimed to be owing under a contract or treaty of reinsurance. The insurer sues the reinsurer to recover them. In the case at bar, the insurer is Plaintiff The Travelers Indemnity Company, as successor in interest to Gulf Insurance Company ("Travelers"). The reinsurer is Excalibur Reinsurance Corporation, formerly known as PMA Capital Insurance Company ("Excalibur").

Travelers filed its original complaint [Doc. 1] against Excalibur on August 1, 2011. Excalibur answered the complaint and asserted affirmative defenses [Doc. 15] on September 9, 2011. Discovery has begun but not yet completed; motions concerning discovery issues are pending before the Court and are not addressed in this Ruling. The case is not on the Court's trial calendar.

Travelers now moves [Notice of Motion, Doc. 56] to amend its complaint in the form attached to its motion as the Proposed Amended Complaint (“PAC”) [Doc. 56-1]. Excalibur opposes the motion. This Ruling resolves it.

I. BACKGROUND

Travelers’ original complaint against Excalibur alleges that at the pertinent times its predecessor in interest, Gulf, an insurance company, issued Errors and Omissions insurance policies to a variety of businesses. Gulf purchased a reinsurance policy entitled “Errors and Omissions Liability Cessions Treaty” (the “E & O Treaty”). Excalibur, then known as PMA Capital, was one of the reinsurers who subscribed to the E & O Treaty for the periods April 1, 1998 to April 1, 1999 and April 1, 1999 to April 1, 2000.

Gulf and its affiliates issued primary and excess Errors and Omissions policies to a certain insurance and reinsurance Broker, not named in this record. Two insurance companies made claims against the Broker for losses allegedly sustained from insurance transactions involving the Broker. Travelers, as successor to Gulf, entered into settlement agreements whereby Travelers paid the Broker negotiated amounts from the Errors and Omissions policies issued to the Broker for the years July 1 - June 3, 1999 and July 1, 1999 - June 30, 2000. Travelers then claimed from Excalibur its portion of the reinsurance covering the underlying claims. The original complaint alleges that Excalibur has wrongfully refused to pay the net amount of \$1,573,189.58 due to Travelers under the E & O Treaty, and asserts one count: for breach of contract, namely, the E & O Treaty.

Travelers’ original complaint against Excalibur is an uncomplicated pleading. It simply alleges the existence of the reinsurance treaty, amounts owing under its terms, demand and failure to pay, and breach. By its present motion, Travelers seeks leave to file the PAC, which is a

somewhat more complex pleading. It reiterates the count for breach of contract, and adds two new counts: the second, for account stated; and the third, for violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a *et seq.*

In its brief supporting its motion to amend the complaint, Travelers says that these additional counts are based on two relatively recent factual sources. The first is a deposition taken on May 29, 2012 of Carol Barnhardt, an Excalibur employee, during which “she revealed material facts not previously known to Travelers.” [Doc. 56-2] at 2. The second is “a recent telephone call” between a Travelers employee (later identified as a Ms. Robles) and “Excalibur's claims manager, Diane Ferro.” *Id.* at 3. Travelers filed this motion to amend on July 9, 2012.

Excalibur opposes Travelers’ motion to amend the complaint, principally upon the grounds that the motion is untimely, and that on the facts as Excalibur perceives them, the two causes of action Travelers seeks to assert are not viable as a matter of law, so that the amendment would be futile.

II. DISCUSSION

While this is Travelers’ first amendment of its complaint, the timing is such that it may not do so as a matter of course. Instead, the question is governed by Rule 15(a)(2), Fed. R. Civ. P., which provides that in the circumstances of the case at bar “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Excalibur, the opposing party, does not consent to the amendment, so the Rule requires Travelers to obtain leave of court to do so. Whether leave should be granted is entrusted to the district court’s discretion, which cannot be regarded as entirely unfettered, since the last sentence of Rule 15(a)(2) contains a pointed instruction, reflective of the procedural rules’ ultimate

objective that justice be done.

Notwithstanding the favor with which the Rule regards motions for leave to amend pleadings, leave is not granted uncritically or whenever sought. “[D]espite the considerable latitude which Rule 15(a) grants in terms of allowing amendments, leave to amend should not be granted automatically or reflexively.” *Oneida Indian Nation of N.Y. State v. County of Oneida, N.Y.*, 199 F.R.D. 61, 72 (N.D.N.Y. 2000). The Second Circuit has cautioned recently that “motions to amend should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party.” *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008) (citations omitted). In *Burch* the Second Circuit cited and quoted the Supreme Court’s seminal decision in *Foman v. Davis*, 371 U.S. 178 (1962), which identified those particular reasons for denying leave to amend, but immediately followed them with this cautionary note: “Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.” 371 U.S. at 182.

I consider in turn Excalibur's two principal bases for denying Travelers leave to amend: untimeliness, and insufficiency in law.

A. Timeliness of Travelers’ Motion to Amend the Complaint

There is no substance to Excalibur’s objection that Travelers’ motion to amend its complaint is untimely. Excalibur neither asserts specifically nor suggests generally that it has been prejudiced by Travelers not moving to amend earlier. Nor could Excalibur plausibly do so: the case, while

energetically litigated by experienced insurance-law counsel, is in its early stages; discovery is in progress; trial is neither scheduled nor imminent. Excalibur has time, presently unlimited, and the full resources of discovery to combat the two additional causes of action Travelers seeks to assert in the PAC.

Travelers says that the May 29, 2012 deposition of Excalibur's Carol Barnhardt revealed facts new to Travelers which led to its motion to amend the complaint, filed on July 9. That is prompt action on Travelers' part, at least as the practice of law measures time. Excalibur contends that the facts underlying the two new causes of action were known to Travelers, or could have been, much earlier. That is a doubtful proposition, but it need not be further pursued in the absence of any prejudice to Excalibur caused by any delay of Travelers. "Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (citation and internal quotation marks omitted). Undue prejudice arises "where an amendment [comes] on the eve of trial and would result in new problems of proof." *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981) (reversing denial of leave to amend promptly sought after learning new facts, where "no trial date had been set by the court and no motion for summary judgment had yet been filed by the defendants" and where "the amendment will not involve a great deal of additional discovery.").

As an additional support for its untimeliness objection, Excalibur relies upon a Scheduling Order [Doc. 19] the Court entered on October 14, 2011, following the parties' Rule 26(f) conference. That order began with the provision: "Plaintiff may file motions to add additional parties *and to amend the complaint* by October 20, 2011" (emphasis added). Plaintiff filed the present motion to

amend the complaint on the later date of July 9, 2012. There is less to Excalibur's argument than meets the eye. This scheduling order was entered at the beginning of the case; its subsequent provisions did not require completion of discovery until September 14, 2012. Travelers says it did not learn of the facts underlying its new causes of action until discovery resulted in the Barnhardt deposition in May 2012, and the submitted pages of that deposition support the assertion. The parties necessarily recognized that discovery might give rise to motions to add additional parties or amend the complaint to allege additional claims. That is what occurred in this case.

In the circumstances of the case at bar, I conclude that it would be an abuse of this Court's discretion to deny Travelers leave to amend the complaint on the ground that its motion to do so was not timely made. I reject that objection by Excalibur.

B. Legal Sufficiency of the Two Additional Causes of Action as Pleaded in the Proposed Amended Complaint

1. Standard of Review

A recognized reason for denying leave to amend a pleading is "futility." A proposed pleading is futile if it is legally insufficient. Thus it is frequently held that an "amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6)." *Dougherty v. Town of North Hempstead Bd. Of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

Use of a Rule 12(b)(6) dismissal as a practical yardstick for futility of amendment under Rule 15(a)(2) renders applicable to Rule 15(a)(2) analysis recent Supreme Court decisions interpreting Rule 12(b)(6), the most recent being *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, the Court held at 556 U.S. at 679:

[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Following *Iqbal*, the Second Circuit has embraced the concept of a complaint being *legally sufficient* if it is *plausible*. See, e.g., *Absolute Activist Value Master Fund, Ltd. v. Ficeto*, 677 F.3d 60, 65 (2d Cir. 2012): “To survive a motion to dismiss [pursuant to Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” (citing and quoting *Iqbal*). *Ficeto* is instructive in the case at bar because the plaintiff in that case asked the Second Circuit to grant it leave to amend its complaint if the court affirmed the district court’s dismissal of the original complaint, alleging violations of federal securities laws. The court of appeals did affirm that dismissal, concluding that the complaint failed to state claims under the securities laws “because it does not adequately allege the existence of domestic securities transactions.” 677 F.3d at 70. The Second Circuit then granted plaintiff “leave to amend their complaint in order to plead additional factual allegations to support their claim that the transactions took place in the United States.” *Id.* at 71. The Second Circuit clearly applies the *Iqbal* touchstone of plausibility to claims asserted in both original complaints and amended complaints filed by leave of court; nor is there a discernible basis for applying different standards.

2. Travelers’ Claim for an Account Stated

Turning to the two additional claims Travelers pleads in the proposed amended complaint, the Second Count is for “account stated.” In that count, the PAC alleges at ¶¶ 65-67 that “[t]he reinsurance claims, billings and credits” pleaded in earlier paragraphs “constituted statements of the

amount Excalibur owed Travelers under the E & O Treaty for reinsurance claims arising out of Travelers' insurance of the Broker"; "Excalibur failed to question or object to Travelers' statements within a reasonable time"; and "[t]he reinsurance claims, billings and credits" pleaded earlier "constitute an account stated in the amount of \$1,573,189.58, exclusive of interest and costs."

In earlier paragraphs, the PAC describes the several unpaid billings it includes in that total amount stated. The first is "the April 2010 Claim." Travelers alleges in the PAC that on April 19, 2010, it "submitted a reinsurance claim to Excalibur under the E & O Treaty"; Travelers requested Excalibur to pay the claim by May 3, 2010; Excalibur did not pay the April 2010 Claim by May 3, 2010, and has not paid it to date; and Excalibur did not object to or question the April 2010 Claim at any time between April 19, 2010 and May 3, 2010. PAC, ¶¶ 30-37. Comparable allegations are made with respect to subsequent claims for payment under the E & O Treaty.

Excalibur's brief in opposition to granting leave to file the proposed amended complaint asserts that additional facts exist which negate any recovery based upon an account stated. However, factual disputes do not factor into a plausibility analysis under *Iqbal* and its progeny. In deciding whether to dismiss a complaint under Rule 12(b)(6), or to grant leave to file an amended complaint under Rule 15(a)(2), the Court accepts the truth of well-pleaded factual allegations, and considers whether they state a claim that is plausible on its face. Putting aside conclusions, the facts alleged in Travelers' PAC state a plausible claim for an account stated.

A claim's plausibility also depends upon its viability as a matter of law. In the case at bar, Excalibur contends that Travelers cannot state a claim for an account stated because Travelers "does not even attempt to allege that Excalibur made an explicit promise to pay a 'sum certain' owed by Excalibur," with the result that "Travelers has not and cannot allege facts in good faith to show that

the claim is an agreed sum certain which Excalibur promised to pay,” and “[a]ccordingly, Travelers’s claim for account stated would not withstand a motion to dismiss and thus is futile.” Brief [Doc. 57] at 8, 11. This argument takes too narrow a view of the legal concept of an account stated. In *In re Rockefeller Center Properties and RCP Associates*, No. 00 CIV. 647 (LAP), 2002 WL 22051 (S.D.N.Y. Jan. 8, 2002), Judge Preska said:

Under federal and New York law, an account stated refers to a promise by a debtor to pay a stated sum of money which the parties had agreed upon as the amount due. The promise may be either express or implied but it must be founded on previous transactions creating the relationship of debtor and creditor.

An account stated may be implied if the party receiving the statement keeps it for a reasonable time without objecting to or questioning the correctness of the account. Additionally, an implied account stated may arise if the debtor makes a partial payment towards reducing the balance of the account.

Whether a statement has been kept long enough to create an implied account stated is ordinarily a question of fact; such an inquiry, however, becomes a question of law when only one inference is rationally possible.

2002 WL 22051, at *4 (citations, internal quotation marks, and ellipses omitted). “Because an account stated is not conclusive as a settlement if mistake is shown to impeach it, an account stated can always be opened upon proof of mistake or fraud.” *American Home Assur. Co. v. Instituto Nacional de Reaseguros*, No. 88 Civ. 0917 (CSH), 1991 WL 4461, at *3 (S.D.N.Y. Jan. 10, 1991), (citations and internal quotation marks omitted).¹

In the case at bar, Travelers’ proposed amended complaint adequately pleads a plausible claim for an *implied* – not an express – amount stated. Such claims are enforceable if proven. The

¹ New York cases are cited in text because Travelers says without contradiction that “the relevant reinsurance contracts are governed by New York law.” Reply Brief [Doc. 63] at 3 n.1.

contracts and treaty of reinsurance created the relationship of Excalibur as debtor and Travelers as creditor. Travelers submitted to Excalibur claims for specific amounts it calculated Excalibur was obligated to pay under these contracts and treaty. Excalibur received these claims, held them, and did not pay them. I am mindful of Excalibur's contention that the early reservations it expressed and questions it posed about the manner in which Travelers allocated the underlying claims against the Broker among the several reinsurance contracts preclude any finding of an account stated.² Excalibur is of course entitled to establish such propositions in discovery and advance them in a summary judgment motion or at trial. But such propositions go to the merits, and cannot be determinative of Travelers' right to assert in an amended complaint a claim that is on its face factually plausible and legally viable. Travelers argues correctly that it is not required to prove a claim before it can plead it.

The PAC combines a claim at law for breach of contract (First Count) with a claim for account stated, sounding in quasi-contract with equitable overtones akin to unjust enrichment. There is no obstacle, in these modern and enlightened procedural days, to pleading in the alternative in such a manner.

3. Travelers' Claim for Violations of CUTPA

The same sort of considerations apply to the second claim Travelers seeks to assert in the PAC, Third Count: violations by Excalibur of principles of fairness and public policy enacted into the Connecticut Unfair Trade Practices Act, Conn. Gen Stat. §§ 42-110a *et seq.* Travelers says that it bases this claim upon information recently obtained during discovery and informal discussions

² Excalibur's brief in opposition to the amendment [Doc. 57] is confined to a discussion of express statements of account, but its contentions would seem to be equally applicable to implied statements, that being the basis of the claim Travelers seeks to assert in the PAC.

between employees of the parties.

Specifically, the PAC [Doc. 1] alleges in ¶¶ 69-71 that Excalibur “has a general business practice of refraining from even beginning its review of reinsurance claims until they are at least 180 days old,” even though the reinsurance policies in question expressly required payment within a shorter time; “identifying every reinsurance cash call claim in its computer system as ‘disputed,’ irrespective of whether Excalibur has a meritorious basis for disputing the claim;” and, even when Excalibur “deems a reinsurance claim to be payable,” withholding payment until after a quarter-of-year period has ended, notwithstanding provisions in reinsurance contracts “requiring payment within a shorter period of time.” These general business practices, the PAC alleges at ¶ 77, Excalibur employed “with respect to reinsurance claims submitted by Travelers” pursuant to the reinsurance contracts in suit.

Travelers contends that Excalibur intends by these practices to take advantage of “the float,” which is to say, hold on to monies as long as possible, even in derogation of the letter and spirit of contractual obligations owing to others. This interpretation is entirely plausible. It is equally plausible to think that finders of fact at a trial would conclude that such practices, if proven, were cynical, self-serving, and constitute substantial aggravating circumstances of a magnitude sufficient to constitute a violation of CUTPA.

CUTPA provides that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Conn. Gen. Stat. § 42-110b(a). Construing CUTPA, the Second Circuit said in *Boulevard Associates v. Sovereign Hotels, Inc.*, 72 F.3d 1029 (2d Cir. 1995): “A simple breach of contract, even if intentional, does not amount to a violation of the Act; a [claimant] must show substantial aggravating circumstances attending

the breach to recover under the Act.” 72 F.3d at 1038-39 (internal quotations and citation omitted). Applying that construction to the facts in the case, the Second Circuit went on to say: “Because a breach of contract standing alone does not offend public policy, to invoke CUTPA, Boulevard was required to show that the defendants engaged in some conduct that was more offensive than simply not paying the rent.” *Id.* In the case at bar, Travelers’ PAC plausibly alleges that Excalibur’s business practices of arbitrary and contract-violative delays in the evaluation of reinsurance claims, and in the payment of them even when approved, is “more offensive than simply not paying” a reinsurance claim when first presented.

In short, Travelers’ proposed amended complaint states a plausible claim against Excalibur for violations of CUTPA. The pleading satisfies the requirements of *Iqbal* and its progeny, and leave will be granted to file it. Whether Travelers can prove the facts upon which this claim is based, including what Excalibur’s Pierro is alleged to have said on the telephone to Travelers’ Robles, is for another day. Excalibur’s objection, that there is an insufficient nexus pleaded between the business practices alleged in the Third Count and the damages caused by the particular breaches of contract alleged in the First Count, is entirely unpersuasive. So precise a nexus is not required by the Act or any case construing it; and such connection as is required between the two counts is satisfied by the allegation that Excalibur applied and followed the business practices described in the Third Count to its conduct in paying reinsurance claims, in breach of contract as alleged in the First Count. The damage such breaches of contract inflicted upon Travelers is the wrongful deprivation of Travelers’ use of monies contractually owing to it, the inevitable and inescapable consequence of Excalibur’s business practices alleged as violative of CUTPA, which had the perverse and offensive effect of letting Excalibur use those same monies that Travelers should have

been using.

C. Additional Issue

Lastly, Excalibur complains that “Travelers seeks leave to amend its complaint solely to compel Excalibur to file a pleading to trigger the Pre-Answer Security Statute.” Brief [Doc. 57] at 18. Travelers has professed qualms about Excalibur’s financial solvency, and filed a motion for a statutory Prejudgment Remedy (“PJR”), which Excalibur opposes.

That motion for a PJR is pending. In its brief on the present motion to amend, Excalibur stresses that Travelers’ main brief in support of this motion to amend [Doc. 56-2] says at 6: “A hearing on this [PJR] application has not been scheduled. If Travelers is permitted to file its proposed Amended Complaint, however, there will be no need for a prejudgment remedy hearing, as there is a simpler, more efficient mechanism that Travelers intends to use to secure the judgment Travelers expects.” Travelers has in mind a Connecticut statute requiring a defendant non-licensed insurer (such as Excalibur has recently become) to post security sufficient to satisfy a final judgment for a plaintiff before the defendant can file a pleading in response to a complaint, a requirement that Travelers believes would be triggered in the case at bar by the filing of an amended complaint.

With the benefit of hindsight, counsel for Travelers may regret its candor in having revealed that stratagem in its brief, since it flung open the door to the indignation counsel for Excalibur now profess. However, on the core question of whether the Court should grant Travelers leave to amend its complaint, this issue comes to nothing. Excalibur’s brief does not flesh out its argument. Presumably, its contentions are that Travelers’ real motive in seeking leave to amend the complaint, now revealed for all to see, is an exercise in bad faith, resulting in undue and unfair prejudice to

Excalibur: both are recognized grounds for denying leave to amend a pleading. There is no substance to such contentions. Travelers is entitled to add to its complaint claims for which plausible bases in fact were recently discovered and are viable in law. To do so is not bad faith; it is a proper and professional exercise, in legitimate furtherance of a civil plaintiff's always-present ultimate purpose: to transfer money from a defendant's pocket into its own. Excalibur may not welcome the consequences of the filing of an amended complaint; one may even agree that those consequences are prejudicial to Excalibur, just as being sued in the first place is at some level prejudicial. But this is not unfair or undue prejudice, as those phrases are used in Rule 15(a)(2) analysis. The Rule ends with the salutary direction that the court "should freely give leave" to amend; and the circumstances cited by Excalibur furnish no basis for denying Travelers leave to amend its complaint in this case.

III. CONCLUSION

For the foregoing reasons, the Motion of Plaintiff The Travelers Indemnity Company to file and serve an amended complaint [Doc. 56] in the form attached to the Motion is GRANTED.

Plaintiff is directed to file its Amended Complaint on or before February 15, 2013. Defendant is directed to file its responsive pleading in accordance with the Federal Rules of Civil Procedure.

It is SO ORDERED.

Dated: New Haven, Connecticut
February 1, 2013

/s/Charles S. Haight, Jr.
Charles S. Haight, Jr.
Senior United States District Judge

Exhibit “B”

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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THE TRAVELERS INDEMNITY      :
COMPANY as successor in     :
interest to GULF INSURANCE  :
COMPANY,                    :
                             :
        Plaintiff,          :
                             :
        v.                  :   Case No. 3:13-CV-293 (AWT)
                             :
EXCALIBUR REINSURANCE       :
CORPORATION f/k/a PMA CAPITAL :
INSURANCE COMPANY,         :
                             :
        Defendant.         :
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RULING ON MOTION TO ENFORCE SETTLEMENT AGREEMENT

For the reasons set forth below, the plaintiff's Motion to Enforce Settlement Agreement is being granted.

I. FACTUAL BACKGROUND

The Travelers Indemnity Company as successor in interest to Gulf Insurance Company ("Travelers") purchased a number of reinsurance contracts from Excalibur Reinsurance Corporation f/k/a PMA Capital Insurance Company ("Excalibur") over the years. At issue in this case are the "Errors and Omissions Liability Variable Quota Share Reinsurance Agreements" (the "E & O Treaties"). (Mem. Supp. Mot. to Enforce (Doc. No. 31-1) at 1).

Under the E & O Treaties, Travelers pays claims over the course of a given month. At the end of the month, Travelers sends Excalibur a statement of all of the claims it paid during that month under reinsured policies. The E & O Treaties then require Excalibur to reimburse Travelers for a portion of those payments in thirty days or less. Travelers has established that Excalibur generally was not even beginning its review of Travelers' reinsurance billings until they are at least 180 days old, regardless of whether the terms of the applicable contracts require payment on a shorter schedule. For example, of the 192 billings that Travelers submitted to Excalibur through Guy Carpenter & Company during the period from July 9, 2009 to February 8, 2013 that Excalibur paid, the average time for payment was 200 days and Excalibur made payment within 30 days in only one instance. The consequence of this pattern of slow payments by Excalibur to Travelers was that Excalibur instead of Travelers got the use of the money.

In mid-2011, Excalibur stopped paying Travelers altogether, and when the backlog of unpaid statements reached almost eighteen months, Travelers filed this action. On May 9, 2013, the parties reached a settlement agreement which required Excalibur to pay the full amount of the unpaid reinsurance billings, \$216,799.67, by the end of May 2013. On May 30, 2013, the day before Excalibur's payment was due, Excalibur requested

a one-week extension to June 7, 2013 to make the payment. Travelers stated that it would grant the extension and amend the settlement agreement to reflect the new date of payment if Excalibur agreed to pay an additional \$1,000. Excalibur agreed to pay the additional \$1,000, resulting in a total of \$217,799.67 being due on or before June 7, 2013.

On June 6, 2013, Excalibur requested a second one-week extension in exchange for a payment of \$1,000. In response, Travelers asked Excalibur to explain why it was unable to make the payment by the agreed upon deadline, to stipulate to a judgment and to make a payment of \$2,000. Excalibur refused and its response reflected that it would breach the amended settlement agreement if Travelers did not extend the payment date. As of June 10, 2013, the date Travelers filed the motion to enforce the settlement agreement, Excalibur had not paid the agreed upon amount of \$217,799.67. In its motion to enforce, Travelers also asked the court to sanction Excalibur in the amount of Travelers' attorneys' fees for engaging in bad faith conduct and order Excalibur to pay interest on the settlement amount.

On July 1, 2013, Excalibur filed a memorandum in opposition to the motion to enforce the settlement agreement, and it stated that the motion should be denied as moot because it had "wired

to Travelers the agreed settlement amount of \$217,799.67.”

(Mem. Opp. Mot. to Enforce (Doc. No. 35) at 1).

II. DISCUSSION

A. Enforcement of Settlement Agreement

Under Connecticut law, the enforceability of a settlement agreement is determined using general principles of contract law. Omega Engineering, Inc. v. Omega, S.A., 432 F.3d 437, 443 (2d Cir. 2005). A contract is binding if the parties have mutually assented to the terms, id., and where the terms of the agreement are “clear and unambiguous.” Audubon Parking Assoc. Ltd. P’ship v. Barclay & Stubbs, Inc., 225 Conn. 804, 811 (1993).

In the present case, it is undisputed that the parties entered into a settlement agreement under which Excalibur was required to pay Travelers \$216,799.67 by May 31, 2013. That agreement was then amended to require Excalibur to pay Travelers \$217,799.67 by June 7, 2013. The terms of the agreement are clear and unambiguous. Therefore, the motion to enforce the settlement agreement is being granted. The court has considered the fact that after the plaintiff filed the motion to enforce the settlement agreement, the defendant paid the amounts due under the settlement agreement. The defendant argues that the motion should therefore be denied as moot. However, while the issue of whether the court should issue an order directing the

defendant to pay the \$217,799.97 to the plaintiff has been rendered moot, the other issues presented by the motion have not been.

B. Attorneys' Fees and Interest; Sanctions

In addition to seeking to enforce the settlement agreement, "[b]ecause Excalibur's failure to pay is unquestionabl[y] an act of bad faith, Travelers also seeks an order from this Court granting it attorneys['] fees and interest." (Mot. to Enforce Settlement Agreement (Doc. No. 31) at 2). Excalibur contends that because Travelers brought a motion to enforce the settlement agreement instead of a new action to enforce the settlement agreement, Travelers cannot seek attorneys' fees and interest. The court concludes they can be awarded as a sanction.

The court's authority in enforcing a settlement agreement is "limited to enforcing the undisputed terms of the settlement agreement that are clearly and unambiguously before it, and the court has no discretion to impose terms that conflict with the agreement." Colapietro v. Dep't of Motor Vehicles Conn., No. 3:08-cv-238 (WWE), 2011 WL 3349842, *3 (D. Conn. Aug. 3, 2011) (quoting Nanni v. Dino Corp., 117 Conn. App. 61, 65 (2009)). Therefore, because the settlement agreement does not provide that attorneys' fees or interest are payable in the event of a

breach of the agreement, the court cannot award attorneys' fees or interest pursuant to the settlement agreement.¹

However, "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (internal quotation marks and citation omitted). The court's inherent power includes the authority to sanction where "a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. at 45-46 (internal quotation marks omitted). "[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986). In order for conduct to constitute "bad faith" in the Second Circuit, there must be "clear evidence that the challenged actions are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes." Id. (internal quotation marks omitted).

¹ Consequently the court does not need to address Excalibur's argument that "[f]or Travelers to succeed on its claims for interest and attorneys' fees based on breach of contract, it would have to prove . . . the settlement agreement was a 'time of the essence' contract." (Mem. Opp. Mot. to Enforce at 4).

In the present case, the defendant's actions in the conduct of the litigation interfered with the orderly and expeditious disposition of the case. The plaintiff and the defendant entered into a written settlement agreement under which, as amended, the defendant agreed to pay the plaintiff \$217,799.67 by June 7, 2013. Had the defendant made payment on or before that date, all issues in this case would have been resolved. However, the defendant did not pay the amount due by June 7, 2013 and it gave the plaintiff no explanation for the non-payment other than it was "unable to make the payment." Given the history of Excalibur's failure to pay, the defendant's actions necessitated the filing of the motion to enforce the settlement agreement and the related memorandum, a memorandum in opposition to the motion, and a reply memorandum; this was a reasonable alternative to a separate action to enforce the settlement agreement. There is nothing in the record to suggest that the plaintiff would have been paid the overdue amounts in the absence of the instant motion; if parties regularly refused to pay amounts due under a settlement agreement until faced with a motion to enforce it (or if in response, parties who were owed payment concluded they could not enter into a settlement agreement unless all amounts due to them were simultaneously paid), such a practice would have an adverse impact on the court's docket.

The court finds that Excalibur's actions were taken in bad faith because they were without color and taken for an improper purpose. Travelers has established that Excalibur had during the relevant time period over \$100 million in assets and \$7 million immediately-available cash on hand. On both occasions when Excalibur asked Travelers for an extension of time to pay the amount owed under the settlement agreement, Excalibur did not state why it needed the extension. When specifically asked by Travelers why the second extension was necessary, Excalibur still did not provide an explanation. Additionally, Excalibur does not explain to the court in its opposition memorandum why it was unable to make the payments at the agreed upon times and instead states only that "Travelers has not sufficiently established Excalibur's bad faith" (Mem. Opp. Mot. to Enforce at 6).

Based on the record, the court concludes that Excalibur decided not to pay by June 7, 2013 so that it could continue to have the use of the money for additional time at the expense of Travelers. Travelers was deprived of the opportunity to use and earn interest on the money it was owed when Excalibur breached the settlement agreement. Travelers also incurred the additional attorneys' fees associated with briefing the motion to enforce the settlement agreement. Thus, Excalibur breached the settlement agreement without color and for an improper

purpose, i.e. to retain for its own benefit money it had already agreed was overdue to Travelers. Therefore, the court concludes that it is appropriate to impose on Excalibur a sanction in the amount of Travelers' attorneys' fees associated with filing and briefing the motion to enforce the settlement agreement.

Travelers also seeks an order requiring Excalibur to pay interest on the settlement amount at the rate of 10% per annum pursuant to Connecticut General Statutes § 37-3a. As an initial matter, the court notes that ordering prejudgment interest pursuant to Connecticut General Statutes § 37-3a does not appear to be warranted because the settlement agreement did not provide for the payment of interest, and this is not a separate action to enforce payment of the settlement amount but rather a request for a sanction. It appears that the more appropriate interest rate would be the post-judgment interest rate pursuant to 28 U.S.C. § 1961. Excalibur paid \$1,000 for an extension to June 7, 2013. Thus the period of time during which it was acting in bad faith was June 8, 2013 to July 1, 2013. For the reasons set forth above in the court's analysis with respect to attorneys' fees, and in the absence of any evidence of the extent to which Excalibur was able to benefit from the use of the money, the court concludes that it is appropriate to impose a sanction equal in amount to interest on \$217,799.67 accrued at the

