UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WHITE ROCK INSURANCE (SAC) LTD., Petitioner, v. VESTTOO LTD. and its subsidiaries, Respondents.	Civil Action No. 1:23-cv-07065-PAE

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S VERIFIED PETITION FOR INJUNCTIVE RELIEF IN AID OF FOREIGN ARBITRATION

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Respondents Vesttoo Ltd. and its subsidiaries[1] (collectively, "Respondents" or "Vesttoo") respectfully submit this memorandum of law in opposition to Petitioner White Rock Insurance (SAC) Ltd.'s ("Petitioner" or "White Rock") Verified Petition for Injunctive Relief in Aid of Foreign Arbitration (the "Petition").

PRELIMINARY STATEMENT

In the Petition, White Rock seeks, based on mere conjecture and speculation, extraordinary preliminary injunctive relief to freeze essentially all of Vesttoo's assets to protect a theoretical arbitral award. Such relief, if compelled, hamstrings Vesttoo and destroys its business by ending its ability to operate. As discussed in more detail herein and as demonstrated in the supporting declaration of new interim Chief Executive Officer for Vesttoo, Ami Barlev, White Rock has not met its high burden of showing that it will suffer irreparable harm absent the injunction, the balance of equities weighs overwhelmingly in Vesttoo's favor, and White Rock has not made its *prima facie* showing that there is a likelihood of success on the merits of any claims underpinning its Petition. For these reasons and others set forth herein, Vesttoo respectfully submits that this Court should deny the Petition.

First, White Rock has failed to satisfy the most important element of a preliminary injunction: irreparable harm. In order to satisfy the irreparable harm element when seeking an injunction to freeze a company's assets, the movant must provide evidence that the non-movant is dissipating assets, or is likely to dissipate assets given its past and current conduct. White Rock has failed to provide any evidence of such activities. Instead, White Rock asks the Court to assume or speculate about Vesttoo based on news articles that provide no detail about Vesttoo's financial situation. White Rock also incorrectly argues that the Court can assume that,

[1] Petitioner identified Vesttoo's subsidiaries in Exhibit 1. *See* ECF No. 1-1.

because alleged fraudulent letters of credit were issued in the past, the new, current Vesttoo management will conceal or dissipate assets. However, the alleged past wrongdoing was not concealing or dissipating funds, and there is no support for the allegation that current management will conceal or dissipate funds. White Rock's irreparable harm argument further fails because White Rock has not shown that, even if the assets were transferred to another Vesttoo entity, White Rock would not be able to collect any arbitral judgment from that entity. To the contrary, Vesttoo is currently exploring available options to preserve the business and address claims by creditors, and Vesttoo's new interim CEO states in the attached declaration that there will be no immediate unusual transfers of assets or payments besides normal operations made in the ordinary course.

Second, to the extent that White Rock seeks to encumber all of Vesttoo's assets worldwide, the balance of equities weighs in favor of Vesttoo. White Rock's requested relief—freezing all assets of Vesttoo except $1,000,000—ensures that Vesttoo cannot continue its business operations and will, in fact, destroy Vesttoo's business. Courts have recognized going out of business is a real hardship that weighs the equities in favor of the potentially shuttered business. Here, because the injunctive relief would force Vesttoo out of business, the equities favor Vesttoo over White Rock's need to collect a potential arbitral award.

Third, White Rock has not provided facts or law to support that it will be successful on its breach of contract or rescission claims. To make the required *prima facie* showing for likelihood of success on the merits, the movant must make more than conclusory statements about liability. White Rock only makes conclusory allegations about its rescission claim, burying that point in a footnote. It provides no facts to support the "who, what, where, and when" of the misrepresentations or even if Bermuda law allows for rescission. For its breach of contract

claim—just as it did for its claim of irreparable harm—White Rock makes only conclusory allegations of breach and provides no facts to support that any breach occurred. White Rock also fails to provide any evidence to support that all the Vesttoo entities that it sued, including the Vestoo entities with the bank accounts at Truist, were parties to a PSA and liable for the breach of contract claim.

As set forth below and in the accompanying declaration in support of Vesttoo's Opposition, Vesttoo respectfully requests that the Petition be denied in its entirety.

FACTUAL BACKGROUND

Vesttoo relies on, and incorporates herein as if set forth in full, the declaration of Ami Barlev (respectively, the "Barlev Decl.") submitted in opposition to the Petition.[2]

Vesttoo is an Israeli fintech company. Vesttoo was created to connect global insurance markets with the global capital markets in order to provide efficiency and opportunities to all participants. It employs an artificial intelligence-driven process with an experienced team of data science, insurance, and finance professionals.

When the issue of possible fraudulent letters of credit ("LOCs") arose, Vesttoo took the matter very seriously. It began to conduct and is still conducting a rigorous internal and external analysis of the events leading up to the first report of a fraudulent LOC. To assist in that process, Vesttoo engaged an experienced investigation team led by DLA Piper, a well-regarded international law firm. *See* ECF No. 1-5. As part of that investigation, Vesttoo is evaluating all available opportunities with respect to its creditors. (Barlev Decl. ¶ 13).

[2] Vesttoo limits its Factual Background to only those facts pertinent to its defenses to the Petition.

Vesttoo also put in place new leadership, including a new interim CEO, Ami Barlev, who was installed as interim CEO after the allegations about fraudulent LOCs first surfaced and had no prior involvement with the management or operations of the Company. (Barlev Decl. ¶¶ 3-7). Vesttoo also took measures to ensure that no material assets will be transferred without the approval of new leadership. (Barlev Decl. ¶¶ 7, 11). The company has no intention of making any payments or transferring any assets outside of the ordinary course of business. (Barlev Decl. ¶¶ 10, 12).

White Rock provides no authority that supports this Court's ability to freeze assets outside of the United States. Moreover, freezing or encumbering Vesttoo assets worldwide would be catastrophic for the business and would force Vesttoo to cease operations. (Barlev Decl. ¶ 8). Because Vesttoo's expenses are approximately $360,000 a week, the million dollar limit proposed by White Rock is not sufficient for Vesttoo to continue its operations. (Barlev Decl. ¶ 8).

ARGUMENT

I. LEGAL STANDARD

It is well established that "issuance of a preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right," *We the Patriots USA, Inc. v. Hochul*, 17 F. 4th 266, 279 (2d Cir. 2021) (citations and internal quotations omitted), and "should not be granted as a routine matter." *JSG Trading Corp. v. Tray-Wrap, Inc*., 917 F.2d 75, 80 (2d Cir. 1990). Injunctive relief is not appropriate "unless the rights of the parties are indisputably clear." *Do The Hustle LLC v. Rogovich*, 2003 U.S. Dist. LEXIS 10445, at *23 (S.D.N.Y. June 17, 2003) (citation and internal quotations omitted). White Rock carries a heavy burden as the proponent of the Petition. Interim injunctive relief "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Moore*

v. Consol. Edison Co. of N.Y., Inc., 409 F.3d 506, 510 (2d Cir. 2005) (citation and internal quotations omitted).

To warrant preliminary injunctive relief, the moving party must demonstrate (a) that he or she will suffer irreparable harm in the absence of an injunction, "and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits [of the case] to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 405–06 (2d Cir. 2011) (citation and internal quotations omitted). Additionally, the moving party must show that a preliminary injunction is in the public interest. *Woodstock Ventures, LC v. Woodstock Roots LLC,* 837 F. App'x 837, 838 (2d Cir. 2021) (citation omitted).

II. WHITE ROCK IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. White Rock Has Not Met Its Burden Of Demonstrating Likely And Imminent Irreparable Harm.

In support of its irreparable harm argument, White Rock relies on suppositions and conjectures that Vesttoo is dissipating or concealing assets and that such actions will harm White Rock's ability to collect any potential arbitral judgment. White Rock's failure to present any actual evidence supporting either conclusion defeats its Petition for preliminary injunction.

"A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation and internal quotations omitted). "To satisfy the irreparable harm requirement, [White Rock] must demonstrate that absent a preliminary injunction, [it] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six*

Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (citations and internal quotations omitted). The mere possibility of harm does not suffice. *JSG Trading Corp.*, 917 F.2d at 79.

As a general matter, monetary injury "does not constitute irreparable harm." *Oliver v. N.Y. State Police*, 812 F. App'x 61, 62 (2d Cir. 2020) (citation omitted); *see also Moore*, 409 F.3d at 510 ("Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." (citation omitted)). Where a plaintiff cannot prove irreparable harm, a preliminary injunction must be denied. *See Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1998) ("In the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied." (citations omitted)). Showing irreparable harm is a necessary requirement to award injunctive relief and must be grounded in something more than conjecture, surmise, or speculation. *See Worldwide Diamond Trademarks, Ltd. v. Blue Nile, Inc.*, 2014 U.S. Dist. LEXIS 182590, at *10–12 (S.D.N.Y. Nov. 6, 2014) (denying preliminary injunction where irreparable harm was based on speculation that its business relationships were at risk and would lose additional customers).

Where, like here, the movant alleges that assets will dissipate or that the non-movant intends to frustrate any judgment on the merits by making it uncollectible, the movant must allege facts, not merely conclusions, and provide evidence of these assertions. *See Kebapci v. Tune Core, Inc*., 2016 U.S. Dist. LEXIS 159054, at *7 (E.D.N.Y. Nov. 11, 2016) ("a plaintiff must still allege facts (not conclusions) and provide evidence that the targeted defendants intend to frustrate judgment in the case at bar"). In *Kebapci*, the court held that the plaintiff's blanket contention that the defendants were "transferring their assets" and "trying to avoid satisfying any judgment" was insufficient, because, when a plaintiff seeks a provisional remedy, this requires a "substantial evidentiary showing". *Id.* at *7 & n.3; *see BMaddox Enters., LLC v. Oskouie,* 2017

U.S. Dist. LEXIS 175934, at *6 (S.D.N.Y. Oct. 23, 2017) (finding plaintiff's recitation of the balance of the defendant's account insufficient to support irreparable harm, explaining "the Court cannot speculate about solvency and asset-hiding at this early stage absent more evidence").

Here, White Rock has not met its heavy burden of showing that it will suffer irreparable harm absent the injunctive relief. In fact, White Rock has presented no evidence from which this Court may infer that Vesttoo will divert its assets prior to the conclusion of any arbitration or otherwise use its assets other than in the ordinary course of business. *See Kebapci*, 2016 U.S. Dist. LEXIS 159054, at *7. Instead, White Rock relies solely upon conjecture about Vesttoo's financial conditions based on news reports and supposition that Vesttoo's assets "are at risk of falling in the hands of the same bad actors who orchestrated the LOC fraud." ECF No. 3 at 15. None of these conjectures constitute real evidence or show Vesttoo hiding assets. Indeed, none of the news articles cited state anything about Vesttoo hiding or moving assets. Moreover, White Rock's assertion that the money will fall into the hands of the same bad actor is also conjecture, and indeed, contrary to the known facts, as Vesttoo has replaced its leadership with authority over the funds. (Barlev Decl. ¶¶ 7, 11). Because White Rock has not presented any evidence that Vesttoo has secreted assets or is about to do so in an effort to frustrate a future judgment, White Rock's argument fails. *See BMaddox Enters. LLC v. Oskouie,* 2017 U.S. Dist. LEXIS 146766, at *15 (S.D.N.Y. Sept. 8, 2017), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 175934.

White Rock's cited authority further supports that White Rock has not presented sufficient evidence to support irreparable harm. In each of the cases that White Rock cites, the movant presented actual evidence, not mere conjecture, that assets were being dissipated or that

the non-movant was acting in a way to frustrate judgment. *See Pashaian v. Eccelston Props., Ltd*., 88 F.3d 77, 87 (2d Cir. 1996) (defendants undertook transfers that left property without assets); *In re Feit & Drexler, Inc*., 760 F.2d 406, 408–409, 416 (2d Cir. 1985) (movant showed evidence of bond purchases and Swiss bank accounts to counter non-movants testimony that she had no assets, she disregarded court orders, and non-movant had already attempted to hide assets); *Quantum Corp. Funding, Ltd. v. Assist You Home Health Care Servs. of Va., L.L.C.*, 144 F. Supp. 2d 241, 248 (S.D.N.Y. 2001) (movant showed evidence that non-movant had a poor history of operating companies and a habit of making himself judgment proof); *New York Land Co. v. Republic of Philippines*, 634 F. Supp. 279, 287–88 (S.D.N.Y. 1986) (evidence showed that non-movants had various tiers of offshore holding companies shrouded in secrecy, arranged to sell the property at issue, and, during the discovery process, non-movants obstructed efforts to obtain discovery).

White Rock next argues that because Vesttoo allegedly already engaged in fraud, "it is susceptible to yet more fraud." ECF No. 3 at 17. As a logical matter, that fails, in particular because Vesttoo has itself initiated a vigorous investigation internally and externally. Moreover, contrary to White Rock's assertions, even a past wrongful use of funds does not infer evidence of intent to frustrate a future judgment. *Sterling Ornaments Pvt. Ltd. v. Hazel Jewelry Corp.,* 2015 U.S. Dist. LEXIS 77331, at *3 (S.D.N.Y. June 9, 2015) (denying preliminary injunction to freeze assets because, even though defendant has wrongly used money, the actions did not reflect an effort to frustrate a judgment); *Haggiag v. Brown*, 728 F. Supp. 286, 291 (S.D.N.Y. 1990) (denying asset freeze where plaintiffs failed to present "any significant evidence of any massive dissipation of assets of the sort which would be required in order for the drastic remedy sought by plaintiffs to be appropriate"). A court may not rest its finding of the likelihood of future harm

solely on past conduct, unless the past conduct is consistent with a current intent to frustrate judgment. *See BMaddox Enters., LLC*, 2017 U.S. Dist. LEXIS 146766, at *12–13 (because there was no evidence that defendants' efforts to conceal were done in an effort to frustrate judgment rather than hide their alleged infringement, there was not sufficient evidence to support an irreparable harm finding). Here, there is no past conduct to support that Vesttoo is hiding or dissipating assets. Moreover, Vesttoo's current conduct demonstrates that the assets will not be moved unless they are used as part of the ordinary course of business. (Barlev Decl. ¶¶ 10, 12).

White Rock's cited authority provides additional support for the proposition that past conduct must support a current intent to impede the enforcement of judgment. In *Mishkin v. Kenney & Branisel, Inc.*, 609 F. Supp. 1254, 1256 (S.D.N.Y. 1985), the court determined that there was evidence that "defendants are currently engaged in efforts to dispose of their assets" and that their past conduct of making fraudulent conveyances and transfers of property was intended to "defeat and defraud the rights of" the movants. That is not the situation here. White Rock has presented no evidence that Vesttoo has transferred assets or property to defeat White Rock's rights. Notably, unlike here, in *Mishkin*, the movant submitted affidavits, pretrial depositions, and documents to support the claim of fraudulent conduct and transfers. *Id.*

Furthermore, White Rock has not shown that even if the assets were moved within Vesttoo to other subsidiaries, White Rock would not be able to collect any arbitral judgment. As one of its own cited cases explains, courts have declined to allow a preliminary injunction to freeze assets, "where efforts to render a defendant judgment-proof may be remedied by enforcing the judgment against other companies and officers through corporate veil-piercing and other mechanisms." *See Sea Carriers Corp. v. Empire Programs, Inc.*, 2006 U.S. Dist. LEXIS 83843, at *14 (S.D.N.Y. Nov. 20, 2006) (finding petitioner did not meet its burden of showing

irreparable harm because the injury could be addressed with a monetary award and petition did not show that judgment would otherwise be uncollectible or that respondents were insolvent or about to become so).

Accordingly, because White Rock has only put forth conclusory statements and conjecture about the possibility of Vesttoo dissipating assets or frustrating judgment, the Court should deny the Petition. White Rock has failed to establish the most important factor for granting a preliminary injunction: irreparable harm.

B. The Balance Of Equities Strongly Favors Vesttoo.

To the extent that White Rock's request for relief seeks to freeze all of Vesttoo's assets worldwide, the balance of equities favors Vesttoo. Encumbering all of Vesttoo's assets will cause Vesttoo to go out of business, which courts have held constitutes a real hardship and weighs the equities in favor of the party potentially going out of business.

When considering the issuance of a preliminary injunction, the Court must consider and weigh the relative hardship to the parties and the potential harm to the public interest. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc*., 883 F.3d 32, 37 (2d Cir. 2018). In general, "[a] preliminary injunction may not issue unless the movant clearly shows that the balance of equities favors the movant." *Litwin v. OceanFreight, Inc*., 865 F. Supp. 2d 385, 401 (S.D.N.Y. 2011). The inquiry depends upon the circumstances of each case, and the Court should refuse relief where it "may do more harm by enjoining [the challenged conduct] than good." *Iavarone v. Raymond Keys Assocs*., 733 F. Supp. 727, 732 (S.D.N.Y. 1990). The policy against such injunctions becomes more significant "when there is a reason to believe the [injunction] will be burdensome." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24–27 (2008) (citing 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.2, at 167–68 (2d ed. 1995)).

In balancing the equities, the Court can consider the financial hardship to the entities. *See 5464 Route 212, LLC v. N.Y. State DOT*, 2020 U.S. Dist. LEXIS 66905, at *22 (S.D.N.Y. Apr. 16, 2020) (finding that the balance of equities weighed in favor of non-movants because of the financial hardships that would result from an injunction preventing the sale of property). The Second Circuit has characterized being "driven out of business" as a "real hardship." *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc*., 601 F.2d 48, 58–60 (2d Cir. 1979) (vacating preliminary injunction because plaintiff had not shown a significant possibility that it would be driven out of business); *Int'l Bus. Mach. v. Johnson*, 629 F. Supp. 2d 321, 333–34 (S.D.N.Y. 2009) (threat to the continued existence of a business is also a real hardship). This tips the equities in favor of the entity being driven out of business. *See Hodnett v. Medalist Partners Opportunity Master Fund II-A, L.P.*, 2021 U.S. Dist. LEXIS 27205, at *24–25 (S.D.N.Y. Feb. 12, 2021) (denying preliminary injunction, in part, because the balance of equities weighed in favor of the non-movant and the injunction would cause the non-movant to go out of business); *Cf. Holzer Watch, Inc. v. Montres Universal, S.A*., 1993 U.S. Dist. LEXIS 16311, at *4–6 (S.D.N.Y. Nov. 17, 1993) (finding that the balance of equities tipped in movant's favor because the failure to grant the preliminary injunction would cause movant to go out of business compared to the hardship that non-movant would suffer of not getting paid its bills).

Here, it is not clear the extent of the assets that White Rock asks the Court to encumber. In the opening paragraph of its brief, White Rock states that it seeks an injunction to secure the assets of Vesttoo and its subsidiaries "held in bank accounts with Truist Bank." ECF No. 3 at 1. However, in its Prayer for Relief, White Rock's injunctive relief appears to be broader: "enjoining Vesttoo from transferring, withdrawing, assigning, alienating, selling, pledging, encumbering, concealing, or disposing of *any of its assets*, including funds in Vesttoo's bank

accounts, held in bank accounts with Truist Bank[.]" ECF No. 3 at 26 (emphasis added). It is unclear whether White Rock seeks to enjoin only assets held in bank accounts with Truist Bank or if White Rock seeks to enjoin all assets worldwide, including those at Truist Bank. The Court's Order uses the same language and is equally ambiguous. *See* ECF 27 at 2.

To the extent that White Rock seeks to freeze Vesttoo's assets worldwide, it has identified no authority to support the proposition that this Court has jurisdiction over Vesttoo assets outside of the United States (and Vesttoo reserve its rights to oppose any such argument). Further, the balance of equities with regard to such a freeze weighs decisively in Vesttoo's favor. A decree imposing the relief White Rock seeks here would force Vesttoo out of business. For example, White Rock requests an injunction that would enjoin Vesttoo from "transferring, withdrawing, assigning, alienating, selling, pledging, encumbering, concealing, hypothecating, or disposing of *any of its assets*, including funds in Vesttoo's bank accounts . . . except for funds in the amount of $1,000,000." ECF No. 1 at 15 (emphasis added). A prohibition that bars Vesttoo from moving any assets beyond the threshold $1,000,000 amount until any arbitration is resolved would effectively mean that Vesttoo could no longer engage in its business activities. (Barlev Decl. ¶¶ 8-9). Freezing Vesttoo assets worldwide would be catastrophic for the business. (Barlev Decl. ¶ 8). The loss of potential revenue would end its business and result in the loss of jobs for Vesttoo's remaining employees. (Barlev Decl. ¶¶ 8-9). The million dollar limit currently in place is not sufficient for Vesttoo to continue its operations. (Barlev Decl. ¶ 8).

Further, White Rock has not identified a public interest that would be served by forcing Vesttoo out of business. The authorities that White Rock cites for the proposition that the public interest is served by enforcing contracts are inapposite. In each of the cases, the movant sought a preliminary injunction to require the non-movant to fulfill actual contractual obligations; the

movant did not seek to freeze assets to ensure a potential arbitral award could be paid. *See Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 893 (2d Cir. 2015) (seeking an injunction to prevent non-movant from selling food items pursuant to agreement); *Jet Experts, LLC v. Asian Pac. Aviation Ltd.*, 602 F. Supp. 3d 636, 640 (S.D.N.Y. 2022) (seeking specific performance of sale of aircraft as agreed to by the parties); *Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 620 (S.D.N.Y. 2010) (seeking an injunction preventing termination of the agreement).

Because the injunction that White Rock seeks will cause a real hardship for Vesttoo, the balance of equities weighs in favor of denying the Petition.

C. White Rock Has Not Met Its Burden To Show It Is Likely To Prevail On The Merits.

Finally, White Rock has failed to make any factual showing that it is likely to prevail on the merits. Other than summarizing the provisions at issue in the Participating Shareholder Agreements ("PSA") and making conclusory allegations, White Rock does not provide any analysis of how Vesttoo's actions constituted a breach of any PSA under Bermuda law, which governs. White Rock also fails to provide support that Vesttoo Ltd. or each of the subsidiaries identified in Exhibit 1 (except Vesttoo Bay XXIV, L.P. and Vesttoo Bay XVII, L.P.) that have been sued are liable for the breaches. Nor does White Rock provide any facts or analysis to support its equitable claims of rescission, and instead relegates this claim to a footnote. White Rock thus has failed to meet is burden of showing that it is likely to prevail on the merits of these claims.

This Court has described the factual showing required to demonstrate likelihood of success on the merits as "substantial." *Tula Business, Inc. v. Med. Indus. of Am., Inc.*, 1997 U.S. Dist. LEXIS 1631, at *3 (S.D.N.Y. Feb. 14, 1997). To demonstrate a likelihood of success on

the merits, the movant must demonstrate a *prima facie* case with respect to their individual claim. *See New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.,* 502 F. Supp. 120, 133 (S.D.N.Y. 1980). A *prima facie* case requires "non-conclusory fact-specific allegations or evidence." *Chirag v. MT Marida Marguerite Schiffahrts*, 604 F. App'x 16, 19 (2d Cir. 2015); *Coll. Essay Optimizer, LLC v. Edswell, Inc.*, 2015 U.S. Dist. LEXIS 133488, at *7 (S.D.N.Y. Sept. 30, 2015) ("The *prima facie* showing cannot be based on conclusory statements or allegations and must be 'factually supported.'" (citation omitted)).

Here, White Rock brings two claims: (1) equitable relief for rescission and (2) breach of contract. First, White Rock offers no facts to support that it is entitled to equitable relief for rescission. Instead, in a footnote, White Rock makes conclusory allegations that Vesttoo made material misrepresentations about the validity of the LOCs with the intent to deceive White Rock and fraudulently induce White Rock into entering the PSAs. ECF No. 3 at 16 n. 23. White Rock does not identify who made the representations, when those representations were made, what the representations were, or where the representations were made—elements that usually have to be pled to support fraud. Notably, White Rock does not even discuss whether Bermuda law allows rescission or what elements are required to prove rescission. Without this, White Rock has not met its burden of making the *prima facie* showing necessary for a likelihood of success on the merits.

Similarly, White Rock offers almost no evidence to support its breach of contract claim. Again, White Rock fails to identify the standard that applies to a breach of contract claim in Bermuda. White Rock instead states in a conclusory fashion that Vesttoo breached the PSAs because Vesttoo presented White Rock and its clients with fraudulent LOCs. ECF No. 3 at 3.

The only evidence that White Rock provides is a sample PSA and a letter from Vesttoo's counsel stating that they are investigating the issue of fraudulent LOCs. *See* ECF No. 1-2; 1-5.

White Rock also fails to establish that each of the Vesttoo entities that it sued are liable for White Rock's breach of contract claims. White Rock merely claims that it entered into a PSA with "a Vesttoo entity." ECF No. 3 at 6. It does not identify which Vesttoo entities were parties to the PSA or even allege that it entered into PSAs with all the Vesttoo entities that it sued. The only entities that White Rock arguably provides evidence that it entered into agreements with are Vesttoo Bay XXIV, L.P. and Vesttoo Bay XVII, L.P. *See* ECF 1-2; 1-3. Notably, White Rock fails to provide any evidence to support that all the Vesttoo entities that White Rock claims retain bank accounts in New York (*e.g.*, the Vesttoo Limited Partners) have a PSA with White Rock subject to its breach of contract claim. White Rock asks the Court to enjoin the assets of all of the entities even though White Rock has not offered evidence to show that all the entities are liable. This is not sufficient to show likelihood of success.

D. If Injunctive Relief Is Granted, White Rock Must Post A Substantial Bond.

Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Courts have characterized the issuance of a preliminary injunction bond as the "traditional" approach. *Bionpharma Inc. v. CoreRx, Inc.*, 2022 U.S. Dist. LEXIS 33364, at *12 (S.D.N.Y. Feb. 24, 2022) (finding that a security bond was warranted "as is traditional" to account for non-movant's potential hardship arising out of the injunction).

White Rock has not established that it is entitled to a preliminary injunction. However, if a preliminary injunction is nonetheless issued, White Rock should be required to post an

undertaking. *See* Fed. R. Civ. P. 65(c). Such an undertaking should be substantial given the likelihood that the injunctive relief White Rock seeks would put Vesttoo out of business.

CONCLUSION

Based on the foregoing, Respondents Vesttoo Ltd. and its subsidiaries respectfully request that the Court deny the Petition for a preliminary injunction.

Dated: August 14, 2023

Respectfully submitted,

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