UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH DEANGELIS, *et al.*, Plaintiffs, vs JON S. CORZINE, *et al.*,	Case No. 11-CIV-7866 (VM) **ECF CASE**
THIS DOCUMENT RELATES TO: *All Securities Actions* *The Commodities Customer Class Action* *Tavakoli, as Litigation Trustee of the MF Global Litigation Trust v. Corzine et al.*	
-and- **UNITED STATES BANKRUPTCY COURT** **SOUTHERN DISTRICT OF NEW YORK**	
In re MF GLOBAL HOLDINGS LTD., et al., Debtors.[1]	Chapter 11 Case No. 11-15059 (MG) (Jointly Administered)

MOTION (A) FOR ENTRY OF AN ORDER SCHEDULING A COMBINED HEARING TO APPROVE (I) THE GLOBAL SETTLEMENT AMONG THE PLAN ADMINISTRATOR, LITIGATION TRUSTEE, CUSTOMER REPRESENTATIVES AND CERTAIN INDIVIDUAL DEFENDANTS NAMED IN THE MDL WITH (II) THE FINAL APPROVAL HEARING OF THE SECURITIES SETTLEMENT, (B) FOR RECONSIDERATION OF THE DECISION AND ORDER GRANTING FINAL APPROVAL; AND (C) RELATED RELIEF

Movants (i) MF Global Holdings Ltd., on behalf of itself and its affiliates, including MF Global Assigned Assets, LLC ("MFGAA") (the "Plan Administrator"), as Plan Administrator under

[1] The debtors in the chapter 11 cases (the "Chapter 11 Cases") are MF Global Holdings Ltd.; MF Global Finance USA Inc.; MF Global Capital LLC; MF Global Market Services LLC; MF Global FX Clear LLC; and MF Global Holdings USA Inc. (collectively, the "Debtors").

the *Second Amended and Restated Joint Plan of Liquidation* (Ch. 11 Dkt. 1382), and Nader Tavakoli, as Trustee of the Litigation Trust (the "Litigation Trustee"; collectively with the Plan Administrator, "Estate Movants"); and (ii) co-lead counsel for the Customer Representatives (collectively with the Estate Movants, "Movants"),[2] by and through their undersigned counsel hereby jointly move the District Court and the Bankruptcy Court in the above-captioned matters for an order :

(a) scheduling a joint hearing for the final approval of (i) a global settlement that has been reached among Movants and certain defendants[3] (the "Global Settlement"), and (ii) the *Stipulation and Agreement of Settlement with Individual Defendants, In re MF Global Holdings Ltd. Sec. Litig.,* No. 1:11-cv-07866-VM (S.D.N.Y. July 7, 2015) [MDL Docket No. 969-1] (the "Securities Settlement") on a date and time convenient to both Courts;

(b) reconsidering and withdrawing its November 25 Decision;

(b) entering a scheduling order with respect to the Motion; and

(c) staying all proceedings in the MDL while the parties work to promptly bring the Global Settlement on for final hearing.

In support of the Motion, Movants respectfully state as follows:

I. PRELIMINARY STATEMENT

1. Until recently, the Movants and Defendants were adversaries in one or more of the following proceedings: the MDL proceedings with respect to the *Commodities Customer Class Action* and *Tavakoli, as Litigation Trustee of the MF Global Litigation Trust v. Corzine et al.* matters, and the

[2] Defendant Abelow's counsel joins in the relief sought herein.

[3] Currently, a term sheet has been agreed to by the Movants and defendants Jon S. Corzine and Bradley Abelow, named as individual defendants by the Movants in the above–referenced Estate-related MDL actions*, i.e.,* the *Commodities Customer Class Action* and *Tavakoli, as Litigation Trustee of the MF Global Litigation Trust v. Corzine et al.* (the "Estate-Related MDL proceedings"), whose counsel have being leading the settlement negotiations with Movants (the "Lead Defendants"). As discussed below, the term sheet provides for a global resolution of all claims against the remaining defendants named in the Estate-Related MDL proceedings. The non-Lead Defendants have been provided with the term sheet and given the opportunity to participate in the Global Settlement. As discussed briefly below, the parties understood that they had until Monday to report to Magistrate Judge Francis that all parties had agreed on the terms of the proposed Global Settlement, but submit this Motion now given the time urgency to request reconsideration of the Court's Decision and Order granting approval of the Securities Settlement ("November 25 Decision")(MDL Docket No. 1027) which reflects that the Court was not aware that the Movants and Lead Defendants had reached the Global Settlement.

Bankruptcy Court with respect to the Adversary Proceeding [4] concerning the use of certain D&O proceeds in the Securities Settlement. Despite this adversity, for the past several months, the parties have been actively negotiating a global resolution of all disputes remaining between them.

2. While negotiations were made difficult by a number of factors external to the disputes between the Movants and Lead Defendants, all parties were motivated to reach a global resolution and have been working in good faith and at arms' length to do so. The parties' motivation to reach a settlement was made more acute by (i) the continuing dissipation of the insurance proceeds to pay defense costs in the MDL litigations and (ii) funding and timing mechanisms drafted by the insurers and parties to the Securities Settlement which seek to utilize only proceeds of the Side ABC Policies[5] which will have the effect of wasting $25 million from the total D&O tower otherwise available for global settlements and which become final, absent Court relief or an appeal, thirty days after final approval of the Securities Settlement in the District Court.

3. **Negotiation of a Global Settlement.** At this time, the Movants are pleased to report that the Movants and Lead Defendants have reached a Global Settlement that resolves all of the MDL claims between them, and which provides for certain reserves and contingent risk-sharing to address the claims in the MDL not completely resolved by the Global Settlement. The parties have agreed in principle on all of the material terms of the Global Settlement and are working to finalize definitive documentation with all relevant parties.

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[4] So that this pleading can be as brief as possible, we have assumed that the Court is familiar with the Adversary Proceeding *MF Global Holdings,Ltd as Plan Administrator et al. v. Corzine et al*, Adv. Proc. No. 15-01362 (MG) and the related Objection to the Securities Settlement filed by the Estate Movants in the MDL. Capitalized terms not defined herein shall have the meanings ascribed to them in the Adversary Complaint [Adv. Dkt 7; MDL Dkt 1006-1].

[5] As has been noted elsewhere, Mr. Abelow (as well as certain other defendants in the Estate-related MDL actions; hereinafter collectively, the "Other Insureds") was not a party to the Securities Settlement and was therefore not privy to the Insurer Funding Agreement and releases contained therein until this document was produced in discovery on November 6, 2015. This document is cited by the Primary D&O Insurer as the basis for an argument that the "ship has sailed" with respect to the funding and releases entered as part of the Securities Settlement, even though (i) the Funding Insurers never obtained the consent or agreement of Mr. Abelow or the Other Insureds to this approach of funding the Securities Settlement; (ii) the Securities Settlement has not been approved by any Court; (iii) the entire Securities Settlement is contingent on final approval of the District Court after a Fairness Hearing; (iv) an Adversary Proceeding concerning the Securities Settlement is pending in the Bankruptcy Court; and (v) all Side ABC Policies' proceeds used to fund the Securities Settlement are still held an Escrow account within the custody and control of the District Court.

4. The parties have been negotiating in good faith around the clock to meet the deadline imposed by the Court last Friday, when this Court admonished the parties that the determination of whether to reserve ruling on the Securities Settlement would depend on whether sufficient progress had been made toward a global settlement:

> THE COURT: Thank you.
> I'm going to close the proceeding at this point. I'm aware that Judge Francis has scheduled a mediation session with the parties involved, which is now to take place on Monday. He and I have discussed the matter insofar as the schedule. I have also had discussions with Judge Glenn. My inclination at this point is to close the hearing on the settlement. I will reserve decision until next Wednesday. **If by Wednesday the indications are from Judge Francis** that the parties have not been able and likely will not be able to resolve the matter globally, I will then render a decision on the matter that is before the Court. If Judge Francis **reports that the parties are making substantial progress and the likelihood is more than not that a couple more days might help, I will be open to that request if it comes from Judge Francis.**
> Let us hope that the session on Monday is constructive and cooperative and that by Wednesday we will have news that will give you all reason to be thankful in celebrating on Thursday.

See Transcript of Fairness Hearing, November 20, 2015 at 33 (emphasis added).

5. The parties met with Magistrate Judge Francis on both Monday and Tuesday of this past week to address limited open issues, none of which need to be resolved in order for the parties to finalize the Global Settlement given the risk-sharing embodied in that agreement. The parties conferred with Magistrate Judge Francis at the close of the mediation on Tuesday to confirm what the next steps should be in light of this Court's directive at the Fairness Hearing. The parties understood (based on their shared interpretation of the Court's comments at the conference) that since "substantial progress" had been made, this would be reported to the Court and the parties would have until Monday to report back to Magistrate Judge Francis that the terms of the Global Settlement had been reached.

6. Especially in light of the Court's comment at the close of Friday's hearing that, "We have all of the filings that have been made. If we need any more filings, we will let you know" (*id.* at

34), Movants did not believe that a further report to the Court was needed before communicating with Magistrate Judge Francis on Monday.

7. Under these circumstances, Movants respectfully request that the Court accept this submission, and forgive its tardiness.

8. **Request to Schedule Concurrent Hearings on the Global Settlement and the Securities Settlement.** The Movants respectfully request that the Courts schedule approval hearings before the Bankruptcy Court and this Court on the Global Settlement at the earliest opportunity, consistent with applicable notice requirements including notice requirements for the Customer Class. The Movants also request that these hearings be scheduled for the same time and place as the conclusion of the final hearing on the Securities Settlement.

9. Scheduling the hearings in this manner will preserve the *status quo* with respect to the Securities Settlement and preserve the ability for the Estate Movants and Other Insureds to seek to utilize all of the D&O Policies that the Debtors purchased, including the Excess Director Policies, to fund the Global Settlement and the Securities Settlement. In so doing, the Courts will allow the full amount of the D&O Policies, intended to protect the Other Insureds and not just the parties to the Securities Settlement, to be employed to equitably protect *all* of the insureds under the D&O Policies.

10. **Request for Stay of Other Proceedings.** Movants also request that the District Court stay all proceedings not related to the approval of the settlements in the MDL to allow the parties to document and present the Global Settlement to the Courts without parties incurring additional costs proceeding with summary judgment motions and other litigation practice.

11. **Request for Reconsideration.** As noted, the parties believed that this Court wished to hear directly from Magistrate Judge Francis, and not from the parties, with respect to the progress toward global settlement.[6] Movants and the Lead Defendants regret not reaching out to the Court to

[6] The November 25 Decision refers to the Court's Docket Minute Entry for November 20, 2015, but while Movants saw that entry, it only noted the Court's intention to "reserve ruling" until November 25, 2015:

clarify this point, but believed that the transcript of the hearing (which had been obtained prior to meeting with Magistrate Judge Francis on Tuesday) was crystal-clear and did not wish to burden the Court or other parties with filings right before the Thanksgiving holiday. The Court's November 25, 2015 Decision notes that the Court had reserved ruling until November 25, 2015, and having "not been informed of any such progress toward resolution," (November 25 Decision at 6), the Court entered its decision. Given the mixed communications concerning whether the report to the Court was supposed to come from the parties or Magistrate Judge Francis, and given that the parties indeed have made "substantial progress" toward global resolution, Movants respectfully request that the Court reconsider its entry of the November 25 Decision and reserve ruling until a joint hearing on both the Global Settlement and the Securities Settlement for the reasons set forth herein.[7]

II. JURISDICTION

12. Both the District Court and Bankruptcy Court have jurisdiction over this Motion pursuant to 28 U.S.C. § 1334.

13. The request for relief with respect to scheduling approval of the Global Settlement in the Bankruptcy Court is a core proceeding pursuant to 28 U.S.C. § 157(b).

14. Venue is proper before these Courts pursuant to 28 U.S.C. §§ 1408 and 1409.

> 0 - **Minute Entry for proceedings held before Judge Victor Marrero: Settlement Conference held on 11/20/2015.** Co-lead counsel Salvatore Graziano present on behalf of Lead Plaintiffs and Settling Classes. Co-lead counsel Javier Bleichmar present on behalf of Lead Plaintiffs and Settling Classes. Attorney Edmund Polubinski III present for Independent Director Defendants. Attorney Robert Hotz present for Randy MacDonald. Attorney Danielle Levine present for Henri Steenkamp. Attorney Jonathan Streeter present for Jon S. Corzine. Attorney David Fine present for PricewaterhouseCoopers LLP. Attorneys Jane Rue Wittstein and Thomas Cullen, Jr. present for Plan Administrator and Litigation Trustee**. Court reserving decision until Wednesday, November 25**. (aw) (Entered: 11/20/2015).

See MDL Docket No. 0, entered at 11/20/2015 16:31 PM (located between entries 1022-1023) (emphasis added). This entry did not direct any report by the parties, and as such, Movants and the defendants were all under the misimpression from the transcript of the November 20 hearing that the progress report was only to come directly from Magistrate Judge Francis.

[7] At a minimum, Movants request that the Court not enter final judgment in accordance with the November 25, 2015 until after the hearing on the Global Settlement.

III. RELIEF REQUESTED

15. Movants seek to have both Courts schedule concurrent or combined hearings on the Global Settlement and the Securities Settlement so that if both settlements are approved, they will become final and be implemented at the same time.

16. Movants further seek to have the District Court enter a stay of all discovery and motion practice in the MDL to prevent the further wasting of D&O proceeds on defense costs while the parties quickly work to prepare papers to submit the Global Settlement to the Courts for approval.

17. Movants request that the Court *sua sponte,* or on this Motion, reconsider the November 25 Decision and reserve ruling to enable the parties to have the Securities Settlement and Global Settlement be tracked together for a final hearing and final judgment.

IV. ARGUMENT

18. Now that the Movants and Lead Defendants have reached a Global Settlement, Movants submit that the interests of efficiency and equity will be served by scheduling a hearing to approve the Global Settlement as a joint proceeding with the Bankruptcy Court and the District Court,[8] to be held concurrently with the final approval of the Securities Settlement. The objections to deferring the final hearing on the Securities Settlement, previously founded on skepticism surrounding the prospect of any settlement that would require exhaustion of the underlying policy limits needed to reach the Excess Director Policies, have now been mooted by the Global Settlement.

19. Under the *Order Preliminarily Approving Proposed Settlement with Individual Defendants and Providing for Notice* [MDL Docket No. 975 at 4-5 ¶ 5] (the "Preliminary Settlement Order"), the Securities Settlement hearing can be adjourned or continued, without requiring further notice to the Individual Defendant Settlement Class. *Id.* at 5, ¶ 6. As such, there is no legally cognizable harm to any party from combining the final Securities Settlement hearing with the Global

[8] Since this global settlement will resolve all of the Estates' MDL-related claims and the Customer Representatives' claims, the parties will be required to obtain the Bankruptcy Court approval of the Litigation Trustee's and Plan Administrator's settlement of claims under Rule 9019, and the parties will also require the District Court's approval of the settlement of the Customer Representatives' class claims in the District Court.

Settlement hearing to provide all parties with time to resolve the issues (now made significantly more complex and no longer hypothetical) which have been raised in the Adversary Proceeding and in the Estate's Objection to the Securities Settlement. Moving these matters to one combined hearing will ensure that all parties have a right to be heard and that there are no procedural irregularities in whatever relief is ultimately ordered (assuming the parties are not able to reach a consensual resolution prior to final hearing).[9]

20. Equitable considerations call out for the Securities Settlement and Global Settlement to be set for hearing at the same time, without any funding provisions locked in until final approval, to ensure that both the Securities Settlement and the Global Settlement can draw on the full D&O tower to fund these settlements.[10] While the Court entered its November 25 Decision not realizing that the parties had reached a Global Settlement, this mistake (especially given the Fairness Hearing transcript and confusion surrounding the understanding that the report was supposed to come directly from Magistrate Judge Francis) satisfies the requirements for timely seeking reconsideration, whether under Fed. R. Civ. P. 54(b), Fed. R. Civ. P. 59(e), Fed. R. Civ. P. 60(b) or Local Civil Rule 6.3.[11]

21. As the Estate Movants have previously stated, their goal is not to interfere with the amount of the Securities Settlement, but only to ensure that the Securities Settlement is funded in a

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[9] While the parties to the Securities Settlement have suggested that altering the funding provisions might "blow up" the settlement, they have never pointed to a single provision that would require such a result, and that is because there is none. No party would have the right to terminate the Settlement Agreement based on a continuance of the final hearing, or on a request to modify a term. Similarly, nothing contained in the Settlement Agreement prevents Lead Plaintiffs and the Individual Defendants from having all of the D&O policies contribute to the Global Settlement and Securities Settlement. It should also be noted that *only* the Individual Defendants and Lead Plaintiffs in the Securities Settlement would have to reach any agreement to alter the funding sources for the Securities Settlement, since the insurers are not parties to the Securities Settlement and merely provided the funding at the request of their Insureds.

[10] The very limited relief sought here is clearly within the Bankruptcy Court's powers under Bankruptcy Rule 1001, 9019, and Section 105 and within the District Court's general equitable powers. *See, Memorandum Of Law In Support Of The Plan Administrator's And Litigation Trustees Joint Motion To Temporarily Stay Or Enjoin Final Approval Of The Individual Defendants' Settlement Of The Securities Action* [Adv. Dkt 3]; Fed. R. Civ. P. 1 and Bankruptcy Rule 1001 (rules to be construed to secure the just, speedy, and efficient determination of every proceeding).

[11] Given that the Court entered the November 25 Decision but has not yet entered a judgment, it is unclear which rule applies, but this clear misunderstanding about the state of progress toward Global Settlement should satisfy any of the applicable rules. *See, e.g.* Fed. R. Civ. P. 54(b)("any order …may be revised at any time before the entry of [final] judgment,"); Fed. R. Civ. P. 59(e) ; and Fed. R. Civ. P. 60(a) or (b)(permitting relief from a judgment or order to correct mistakes from oversight or any mistake, inadvertence, or excusable neglect). *See also* Local Civil Rule 6.3.

manner that does not reduce the aggregate insurance coverage available to any defendant, including Mr. Abelow.[12]

22. In the event the parties are not able to reach a consensual resolution now that the Global Settlement has been achieved, it may be necessary to amend the Adversary Proceeding to bring in the Other Insureds as plaintiffs and the carriers who issued the Excess Director Policies as defendants.[13] At a minimum, there are serious questions concerning the determinations of the insurers to fund the Securities Settlement using only Side ABC Policies when demands for the full Side ABC and Side A Excess remaining limits have been made prior to any final approval of the Securities Settlement.[14]

23. Indeed, the Other Insureds (and Estate Movants who will be standing in their shoes under the assignment of claims under the Global Settlement) would be free to challenge the insurers' mantra that they acted properly in using the lower-tier Side ABC Policies to fund the Securities Settlement (invoking the so-called "first in time, first in right" principle, which is itself hardly black-letter law).[15] Given the facts here—when the Securities Settlement has not become final,[16] a Global

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[12] Mr. Abelow, who is one of the defendants named in the action brought by the Litigation Trustee but not named in the Securities Action, filed a joinder of the Estate's Objection to the Securities Settlement [MDL Docket No. 1021].

[13] Moreover, it may well be necessary to take discovery since it has been suggested that incentives may have been provided by certain insurers to structure the Securities Settlement in a manner that eliminated the Excess Director Policies and increased the depletion of the ABC Side Policies to the detriment of the Defendant Movents. If true, bad faith and other claims might exist as well as an independent basis to reject or enjoin the funding provisions of the Securities Settlement.

[14] A global settlement in which all parties worked together to secure the full D&O tower to apply to the Securities Settlement and the Global Settlement is also the only scenario in which the contribution claims of all Insureds and all Defendants could be addressed.

[15] As one New York court has stated, "[t]he first in time rule seems to merely be an expedient rather than a reasoned response to a situation where an injustice will inevitably result to either the carrier or claimant." *Matter of Belizaire v. Aetna Cas. & Sur. Co*., 171 Misc. 2d 473, 477, 654 N.Y.S.2d 982, 985 (Sup. Ct. 1997). The *Belizaire* decision further noted that, in the *Gerdes* decision (which the Directors cite), the court "did not determine the case before it on that basis." *Id*. Rather, the *Gerdes* court "rejected plaintiff's claim upon the grounds that she failed to give notice of her application to Travelers Insurance Company and that her papers were otherwise defective." *Id.* (discussing *Gerdes*). Other jurisdictions have observed that "the first in time rule has been harshly criticized, even in New York courts." *See In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 391 F. Supp. 2d 541, 587 (S.D. Tex. 2005) (citing *Belizaire*).

[16] It should be noted that the Securities Settlement does not go effective until after final judgment and a time to appeal has expired (or any appeal has been resolved, whichever is later); as such, the funds remain in Escrow until the settlement's Effective Date (except for the costs of notice, etc). While Movants believe that reserving ruling on final approval is one means to counter the insurers' intransience (which is why the joint hearing is so important), it should nonetheless be noted that any insurers who ignore demands from the Other Insureds do so at their own risk.

Settlement has been reached, and the completely interchangeable insurer funds are all still in Escrow in the District Court's custody—the Insurers' position that the Excess Director Policies cannot be tapped to help fund the Securities Settlement is untenable and should not be given any semblance of an *imprimatur* by either the District Court or the Bankruptcy Court.[17]

24. The position of the insurers seems particularly strained given that if the Court were, on reconsideration, to require the Securities Settlement and Global Settlement to be submitted for concurrent approval, the escrowed funds could be deemed to revert back to the D&O carriers so that underlying exhaustion would be clearly met. In any event, as Judge Glenn noted at the November 16, 2015 hearing on the Estate Objectors' request for a section 105 injunction, the Side ABC Policies' funds have not been spent but remain in the Court's custody in escrow. Thus, all unapplied insurance policy proceeds remain subject to the competing demands by the Other Insureds (who are not bound by *any* releases).

V. CONCLUSION

25. Now that the Movants and Lead Defendants have reached agreement on a Global Settlement, Movants submit that the narrow relief requested—time to schedule a hearing on sufficient notice for all affected parties— serves the interests of justice.

26. Here, scheduling the Securities Settlement and the Global Settlement for a joint hearing will encourage all of the parties to preserve the $25 million in total D&O insurance proceeds that is no longer only hypothetically needed, but actually needed, to fund the Global Settlement and Securities Settlement and prevent the insurers from obtaining a windfall due to the structure and timing of the Securities Settlement.

[17] The behavior of the insurers here seems problematic since two of the three Excess Direct Policies' issuers were directly involved in negotiating (U.S. Specialty as the primary insurer) or funding (New Hampshire) the Securities Settlement.

27. For all the foregoing reasons, Movants urge: (i) the District Court to reconsider its November 15 Decision and instead reserve ruling on the final approval of the Securities Settlement; (ii) the District Court and the Bankruptcy Court to schedule a joint hearing on the Securities Settlement and the Global Settlement at the earliest date that will provide sufficient notice to the Customer Class; (iii) the District Court to stay all further proceedings in the MDL until further order of the Court; and (iv) for such other and further relief as the Courts deem proper.

Dated: New York, New York
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/s/ *Bruce Bennett*
Bruce Bennett
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: 213-489-3939
Facsimile: 213-243-2539
Counsel for the Litigation Trustee of the MF Global Litigation Trust

/s/ Andrew J. Entwistle
Andrew J. Entwistle
ENTWISTLE & CAPPUCCI LLP
280 Park Avenue, 26th Floor West
New York, New York 10017
Telephone: 212-894-7200
Facsimile: 212- 894-7272

-and-

/s/ *Jane Rue Wittstein*
Bruce Bennett
Jane Rue Wittstein
JONES DAY
222 East 41st Street
New York, NY 10017
Tel: 212-326-3939
Fax: 212-755-7306
Counsel for MF Global Holdings Ltd., as Plan Administrator on behalf of MF Global Assigned Assets, LLC

/s/ Merrill G. Davidoff
Merrill G. Davidoff
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: 215- 875-3000
Facsimile: 215-875-4604

Interim Co-Lead Counsel for the Customer Representatives

NAI-1500663748