Confirmation Hearing Date & Time: April 5, 2013 @10:00 am
Objection Deadline: March 25, 2013 @ 4:00 pm

FORD MARRIN ESPOSITO
WITMEYER & GLESER, L.L.P.
John J. Witmeyer III
Jon R. Grabowski
Wall Street Plaza
New York, New York 10005
(212) 269-4900

Attorneys for Sapere

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MF GLOBAL HOLDINGS, LTD., *et al.*,	:	Case No.11-15059 (MG)
Debtor.	:	(Jointly Administered)

OBJECTION OF SAPERE WEALTH MANAGEMENT LLC, GRANITE ASSET MANAGEMENT AND SAPERE CTA FUND, L.P. TO CONFIRMATION OF THE JOINT PLAN OF MF GLOBAL HOLDINGS, LTD.

Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund, L.P. (collectively, "Sapere") hereby objects to confirmation of the Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code for MF Global Holdings, LTD., MF Global Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC, MF Global Market Services LLC, and MF Global Holdings USA Inc. (the "Joint Plan") (ECF Doc. No. 1111).[1] Sapere respectfully states as follows:

[1] Since the Plan Proponents submitted their initial Proposed Disclosure Statement and Proposed plan on January 10, 2013 (ECF Doc. Nos. 995 and 996), there have been a number of amendments and supplements. The most recently filed version of the Joint Plan is included as Exhibit I to the Amended Notice of Filing of the Solicitation Version of the Amended Disclosure Statement and the Amended Joint Plan of Reorganization (ECF Doc. No. 1111), is identified as the "Final Plan" on this case's administration website, and was supplemented by ECF Doc. No. 1193.

INTRODUCTION

Sapere objects to confirmation of the Joint Plan because the debtors have failed to meet their burden of proof to show that the Joint Plan satisfies Section 1129 of title 11 of the United States Code (the "Bankruptcy Code"). The Joint Plan violates 11 U.S.C. § 1122, thereby violating 11 U.S.C. § 1129(a)(1), by mischaracterizing and misclassifying Sapere's claim to priority over general creditors of MF Global Holdings, Ltd. ("Holdings") to the extent that Sapere has not been made whole for its out-of-pocket loss as a commodities customer whose funds were required to be segregated[2] and excluding it from consideration as a Priority Non-Tax Claim. Fundamentally, the Joint Plan provides a distribution scheme whereby commodities customers are denied priority over general creditors to which commodities customers are legally entitled. However, 11 U.S.C. § 761-767 and 17 C.F.R. § 190 should be applied to Holdings' estate and commodities customers given priority over Holdings' general creditors pursuant to 17 C.F.R. § 190.08(a)(1)(ii)(j).

Sapere objects to the proposed Joint Plan on the basis of facts that have been uncovered and disclosed in the SIPA Trustee's Report and elsewhere that were not available to Sapere when it made its earlier Motion to Direct the Debtors' Estates to be Administered Pursuant to 11 U.S.C. § 761-767 and 17 C.F.R. § 190 (the "Priority Motion") and subsequent replies. (ECF Doc. Nos. 278, 355, 364) Those facts establish that the corporate structure and operations of MF Global included and facilitated Holdings' excessive control over MF Global, Inc. ("MFGI") and caused the unlawful use of commodities customers' funds to meet the liquidity needs of Holdings resulting from the decision of the Holdings' Board of Directors to "bet the farm" (as it were) on distressed foreign sovereign debt. Those facts further establish that the Holdings' Board

[2] The term "segregated" as used in this Objection includes both 4d and 30.7 commodities customers'

set the risk management controls of the MF Global enterprise that were to protect commodities customers' segregated funds. In sum, Holdings' Board of Directors and executives put risky strategies in place that caused the illegal use of commodities customer funds and turned a blind eye to MF Global's inadequate controls. Further, Holdings' executives directly engaged in the day-to-day business concerning MFGI's risky trades and use of customer funds for liquidity purposes. Holdings exploited MFGI's commodities customer money for its own gain and should not be allowed to evade provisions of the Bankruptcy Code that apply to commodities brokers, also known as FCMs.[3]

FACTS

On October 31, 2011, Holdings and various subsidiaries filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York (Case No. 11-15059 (MG) (Jointly Administered)). In that filing, Holdings judicially admitted that it was a commodities broker. (ECF Doc. No. 1, Ex. A) Also on October 31, 2011, the United States District Court for the Southern District of New York ordered MFGI liquidated and appointed a SIPA liquidation trustee. Pursuant to SIPA, the liquidation case was removed to the United States Bankruptcy Court for the Southern District of New York (Case No. 11-2790 (SIPA)(MG)), where both it and the Holdings case are currently pending. On June 4, 2012, the SIPA Trustee issued a Report of the Trustee's Investigation and Recommendations (the "SIPA Trustee's Report") (SIPA ECF

[3] Holdings' estate should be administered under 17 C.F.R. § 190 and 11 U.S.C. §§ 761-767 for at least several reasons in addition to Holdings' judicial admission that it is a commodities broker. One is the US Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51, 62 (1998), concerning a parent entity's obligation to fulfill its subsidiary's regulatory obligations, in particular here, the obligations owed to commodities' customers in respect of segregated account funds. Second, Holdings is, for the purposes of the Commodity Exchange Act and the CFTC's regulations thereunder, the "person" charged with compliance with the Act's requirements, per Commodity Exchange Act § 2(a)(1)(b), 7 U.S.C. § 2(a)(1)(b). A third is that Holdings was a *de facto* commodities broker.

Doc. No. 1865) in which he refers to Holdings, together with MFGI and other MF Global subsidiaries and affiliates, collectively as "MF Global." This objection uses the term "MF Global" as it is used in the SIPA Trustee's Report.

MF Global's scandalous downfall involved the "vanishing" of $1.6 billion in commodities customers segregated account funds held in accounts purportedly administered by MFGI, but over which Holdings exerted control. Sapere had segregated accounts as a commodities customer, which included cash in excess of $95 million and $125 million in United States Treasury Bills in specifically identifiable accounts held in Sapere's name. These funds were among those included in what has been identified as a $1.6 billion shortfall in commodities customers' funds as of October 31, 2011. The shortfall resulted from the misuse of commodities customers' funds in responding to the known and ignored liquidity demands that Holdings confronted from MF Global's speculative gambles on billions of dollars of distressed foreign sovereign debt. Despite recent settlements announced by the SIPA Trustee with the Joint Administrators of MFGUK, Sapere and other commodities customers have not been repaid their out-of-pocket loss, and the SIPA Trustee has not provided assurance that they will receive 100%.

On December 15, 2011, Sapere filed its Priority Motion,[4] which is described in more depth below. On February 1, 2012, a mere three months after Holdings filed its voluntary petition, this Court denied Sapere's Priority Motion in its Memorandum Opinion Denying Motion to Direct the Debtors' Estates to be Administered Pursuant to 11 U.S.C. § 761-767 and 17 C.F.R. § 190 (the "Memorandum Opinion"). In denying Sapere's Priority Motion, this Court wrote, "Although 'an entity may be determined to be a commodity broker for purposes of the

[4] Sapere hereby incorporates by reference its arguments made in the Priority Motion and subsequent replies. (ECF Doc. Nos. 278, 355, and 364)

commodity broker liquidation subchapter even though it is not registered with the CFTC as an FCM,' the [Priority] Motion fails to allege facts necessary for this determination." (Memorandum Opinion 9) In the thirteen months that have followed this Court's Memorandum Opinion, extensive information has been released that supports Sapere's contention that Holdings' estate should be administered pursuant to 11 U.S.C. § 761-767 and 17 C.F.R. § 190. Specifically, the Chapter 11 Trustee, the SIPA Trustee, and the House Investigations Subcommittee on Oversight & Investigations (the "House Subcommittee") have each released a report summarizing their respective investigation of MF Global's collapse. Sapere now respectfully asserts that the facts that have come to light since this Court's Memorandum Opinion warrant treating Sapere and other commodities customer creditors as priority claimants of Holdings' estate and refusing to confirm the Joint Plan.

A. Sapere's Priority Motion

In its Priority Motion, Sapere argued that commodity customers of MFGI are entitled to the rights and priority status of commodities customers in the administration of Holdings' estate with Holdings being treated as a commodities broker and the commodities customers being Holdings' brokerage customers. Sapere argued that the estate should be administered pursuant to 11 U.S.C. § 761-767 and 17 C.F.R. § 190 because: (1) Holdings judicially admitted that it was a commodities broker; (2) Holdings was required to comply with CFTC regulations and failed to do so, resulting in the shortfall of customer funds; and (3) Holdings was a *de facto* commodities broker because of its improper control over customer funds held by MFGI. To grant Sapere's Priority Motion would give commodities customers such as Sapere a *priority* claim to Holdings' g*eneral estate* pursuant to 11 U.S.C. § 766(h) and 17 C.F.R. § 190.08(a)(1)(ii)(J).

In its February 1, 2012 Memorandum Opinion (ECF Doc. No. 400), this Court denied Sapere's Priority Motion on the grounds that Holdings is not a commodities broker and that 11 U.S.C. § 761-767 and 17 C.F.R. § 190 are inapplicable in a Chapter 11 reorganization. Sapere appealed this Court's denial of Sapere's Priority Motion to the United States District Court for the Southern District of New York, which dismissed Sapere's appeal for lack of jurisdiction on the grounds that the Memorandum Opinion was not a final order, judgment, or decree. Sapere appealed the issue of finality to the United States Court of Appeals for the Second Circuit where it is currently pending.

B. Sapere's Proof of Claim in Holdings' Chapter 11 Proceeding

On August 22, 2012, Sapere filed its proof of claim against Holdings (claim number 1481). In it, Sapere asserts, among other things, a priority right to $93,216,187.00, which was Sapere's out of pocket loss of commodities customer funds at that time.

On February 13, 2013, the Plan Proponents and the Chapter 11 Trustee filed their Objection to Proof of Claim 1481 Filed by Sapere CTA Fund, L.P. (the "Claim Objection"). (ECF Doc. No. 1081) They argued that Sapere's claim should be disallowed because it was improperly asserted against Holdings, it is duplicative of Sapere's claim against MFGI, Sapere would be made whole in MFGI's SIPA liquidation, and there was no basis for awarding exemplary damages. Sapere disagrees with this assessment of its claim and intends to respond by the April 11, 2013 Response Deadline. Pursuant to 11 U.S.C. § 1128(b), Sapere has standing to make the present objection to the Joint Plan.

C. Facts Elicited Following the Memorandum Opinion

In the thirteen months following this Court's Memorandum Opinion, there have been several investigations into MF Global's collapse. In one of the most revealing conclusions, the

House Subcommittee wrote, "Jon Corzine caused MF Global's bankruptcy and put customer funds at risk." (House Subcommittee Report p. 80) In addition to the House Subcommittee's report, both the Chapter 11 Trustee and the SIPA Trustee released reports outlining the course of events that led to the $1.6 billion shortfall in commodities customer segregated account funds. Most significant for the present objection, and excerpts of which are included below, is the SIPA Trustee's report, released on June 4, 2012. (SIPA ECF Doc. No. 1865) The SIPA Trustee's report establishes that Jon Corzine took control of MF Global following five straight unprofitable quarters. In an effort to return MF Global to profitability, and with Holdings' Board of Directors' approval, Corzine began using MFGI to trade in distressed European sovereign debt. (SIPA Report 15) When the increased liquidity demands became too severe, Holdings and MFGI illegally used customer funds to meet their obligations stemming from the sovereign debt transactions. In an effort to increase Holdings' profitability and avoid a credit rating downgrade, Holdings, its executives, and its Board of Directors controlled MFGI such that Holdings should be subjected to rules applicable to FCMs. The SIPA Trustee's findings supporting that assertion are discussed more fully below.

D. The Plan Proponents' Joint Plan and Disclosure Statement

On January 10, 2013, a group of Bank and Bond Creditors of Holdings (the "Plan Proponents") submitted a Disclosure Statement for the Plan of Liquidation for MF Global Holdings, Ltd., MF Global Finance USA Inc., and Their Debtor Affiliates (ECF Doc. No. 995) and a Chapter 11 Plan of Liquidation for MF Global Holdings Ltd., MF Global Finance USA Inc., and Their Debtor Affiliates (ECF Doc. No. 996). On February 2, 2013, the Chapter 11 Trustee joined the Plan Proponents and submitted an amended joint disclosure statement (ECF Doc. No. 1029) and an amended joint Chapter 11 plan of liquidation (ECF Doc. No. 1031).

Following additional negotiations with creditor JP Morgan, the Plan Proponents made further amendments to the disclosure statement and plan and, on February 20, 2013, submitted the Solicitation Version of the Amended Disclosure Statement and the Amended Joint Plan of Reorganization (the "Joint Disclosure Statement" and the "Joint Plan"). (ECF Doc. No. 1111)

Sapere objected to the adequacy of information included in the Joint Disclosure Statement on the grounds that it did not provide adequate justification for ascribing a value of $0 to approximately $4 billion in claims asserted against Holdings' estate, it provided an inaccurate description of Sapere's claim, and that the Joint Plan did not provide the necessary priority to commodities customers. The Plan Proponents incorporated Sapere's objections into an amended disclosure statement that this Court approved on February 19, 2013 (ECF Doc. No. 1101). Sapere now objects to confirmation of the Joint Plan on the grounds that it violates 11 U.S.C. § 1129(a)(1).

ARGUMENT

THE JOINT PLAN CANNOT BE CONFIRMED BECAUSE IT VIOLATES 11 U.S.C. § 1129(a)(1)

A plan for reorganization under Chapter 11 of the Bankruptcy Code may not be confirmed unless it complies with sixteen enumerated requirements. 11 U.S.C. § 1129. The debtor bears the burden of proving that a proposed plan complies with 11 U.S.C. § 1129. *In re Texaco, Inc.*, 84 B.R. 889, 891 (Bankr. S.D.N.Y. 1988); *see also In re Perez*, 30 F.3d 1209, 1214 (9th Cir. 1994) ("The burden of proposing a plan that satisfies the requirements of the [Bankruptcy] Code always falls on the party proposing it . . ."). A proposed plan that does not comply "with the applicable provisions of [the Bankruptcy Code]" may not be confirmed. 11 U.S.C. § 1129(a)(1). The Second Circuit has held that the relevant consideration in determining whether a plan complies with 11 U.S.C. § 1129(a)(1) is whether the plan complies with

provisions addressing the form and content of reorganization plans, not mere technical requirements. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648 (2d Cir. 1988). The Joint Plan is unconfirmable because it does not adhere to two applicable provisions of the Bankruptcy Code: (1) the Joint Plan does not distribute customer property as required by 11 U.S.C. § 766—which should be applied in the present proceedings; and consequently (2) the Joint Plan mischaracterizes and erroneously classifies creditor claims in violation of 11 U.S.C. § 1122(a).[5]

A. The Joint Plan Violates 11 U.S.C. § 766 by Failing to Treat Commodity Customer Creditors as Priority Claimants.

When a commodities broker is liquidated, "the trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other claims." 11 U.S.C. § 766(h). Section 766(h) of the Bankruptcy Code requires a trustee to distribute customer property ratably to customers without according a lesser status to some customers. *In re Chicago Discount Commodity Brokers, Inc.*, 58 B.R. 619, 625 (Bankr. N.D. Ill. 1985). A company whose actions are consistent with those of a commodities broker will be treated as such, regardless of its registration status as an FCM. *In re Bucyrus Grain Co., Inc.*, 127 B.R. 45 (Bankr. D. Kan. 1988). Here, because Holdings exerted excessive control over MFGI such that Holdings was acting as a commodities broker, Holdings' estate should be administered in a manner by which commodities customers are given the priority treatment to which they are entitled pursuant to 11 U.S.C. § 766(h). Because the Joint Plan does not provide for commodity customer priority, it cannot be confirmed.

[5] Sapere reserves its right to be heard in connection with confirmation of the Joint Plan on any other matter that may affect Sapere's claims, rights, or interests, and to adopt or join in any objections raised by other parties.

i. The Facts Presently Available Warrant the Relief Requested

Commodities customers with accounts at MFGI are entitled to priority treatment in the administration of Holdings' estate because: (1) Holdings misused the corporate form to gain unlawful control over commodities customers segregated funds; (2) Holdings is subjected to the CFTC regulations, including 17 C.F.R. § 190, which gives commodities customers priority; (3) Holdings was a *de facto* FCM by virtue of the fact that it misused and controlled customer segregated account funds for its own benefit; and (4) Holdings judicially admitted it was a commodities broker.[6] The detailed facts that have been elicited since this Court's Memorandum Opinion demonstrate that Holdings' efforts to increase profits for Holdings caused it impermissibly to use funds deposited with MFGI. To deny commodities customers the priority treatment to which they are entitled would be unjust. Indeed, the SIPA Trustee's report confirms that the decisions that led to the collapse of MF Global came from the Holdings Board and its executives.

The corporate structure of MF Global combined with the overlapping executives of Holdings and MFGI allowed Holdings to exercise excessive control over MFGI and the commodities customer funds. Further, Holdings executives, such as Jon Corzine, Laurie Ferber, Bradley Abelow, Henri Steenkamp, Vinay Mahajan, Michael Stockman, and J. Randy MacDonald dictated the internal affairs of MFGI and how the company operated on a day-to-day basis and directly participated in the illegal use of commodities customer money.

[6] Holdings' Chapter 11 Petition, Ex. A states, "MF Global, a Delaware corporation, is one of the world's leading brokers in markets for commodities and listed derivatives." In paragraph 1 of Exhibit A, Holdings states that any reference to "MF Global" refers to MF Global Holdings, Ltd. As a judicial admission, this admission by Holdings is "conclusive of the case" such that the Trustee is bound by it. *See generally Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2983 (2010); *Henderson v. Morgan*, 426 U.S. 637, 648 (1979); *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 105-05 (2d Cir. 2011).

The corporate structure of MF Global consisted of Holdings, a Delaware corporation, as the holding company and parent of nearly fifty separate direct or indirect subsidiaries, including MFGI, with MFGI representing by far the predominant part of the MF Global enterprise. (SIPA Report 24)

Holdings was a public company that traded on the New York Stock Exchange under the ticker symbol "MF." MF Global Holdings USA Inc., a New York corporation, was a direct subsidiary of Holdings that in turn had nine direct subsidiaries, including MFGI, which operated both as an FCM and a BD and held custodial assets for itself, customers, and other affiliates. (SIPA Report 24) Less than nine months before its collapse, MF Global became one of twenty primary dealers authorized to trade U.S. Government Securities with the Federal Reserve Bank of New York (the "New York Fed"). The Firm traded through more than seventy exchanges globally, including through affiliates in the United Kingdom, Australia, Singapore, India, Canada, Hong Kong, and Japan. (SIPA Report 24) A number of affiliates of MFGI in turn traded through accounts with MFGI as their FCM or BD, including MF Global Special Investor LLC. At least two affiliates executed agreements subordinating certain of their assets to customers and other creditors of MFGI, excluding such assets from the customer reserve formula for regulatory purposes. (SIPA Report 24) In the course of its daily operations, MFGI had extensive affiliate trading interactions with MFGUK, through which MFGI traded in European sovereign debt. MFGUK also served as a broker and depository for MFGI and customer monies and assets trading on foreign exchanges. (SIPA Report 25)

In addition, from time to time, MFGI and other affiliates were funded by liquidity drawn from the committed lending facility on which Holdings was primary borrower. (SIPA Report 52)

Those funds moved through the account of another Holdings' subsidiary, MF Global Finance USA Inc. ("FINCO"). (SIPA Report 25)

As a separately incorporated subsidiary of Holdings, MFGI had its own Board of Directors. (SIPA Report 25) For the three years immediately prior to the Filing Date, MFGI's Board consisted of three directors who were executives of Holdings and who consistently acted by unanimous written consent in lieu of meetings, as allowed under Delaware law and MFGI's by-laws. (SIPA Report 25)

As set forth below, each of the MFGI Board members in this time period also held positions at Holdings and its affiliates:

MFGI Board Member	**Term**	**Other Positions Held**
Jon Corzine	3/25/2010 – 10/8/2010	CEO of MFGI from 9/1/2010 to Filing Date; CEO and Chairman of Holdings from March of 2010 to Filing Date
Laurie Ferber	12/11/2009 – Filing Date	General Counsel of Holdings and of MFGI from 11/19/10 to Filing Date
J. Randy MacDonald	10/9/2010 – Filing Date	Chief Financial Officer of Holdings prior to April of 2011; Global Head of Retail thereafter; President of FINCO
Bradley Abelow	10/9/2010 – Filing Date	President and Chief Operating Officer of Holdings; Chief Operating Officer of FINCO

(SIPA Report 25)

The substantive resolutions by the MFGI Board related to appointment of officers and authorization of their authority or signatory status, bank loan and credit arrangements, and approving contractual agreements such as leases or joining exchanges. (SIPA Report 25) The key decisions regarding sovereign debt investments, *the expansion of MFGI's proprietary business into new products, and the risk and liquidity policies were all made by the Holdings board, not the MFGI board.* (emphasis added) (SIPA Report 25)

The key executive officers of Holdings included: Jon Corzine (Chairman and Chief Executive Officer); Bradley Abelow (Chief Operating Officer as of September 2010 and also President as of March 2011); Laurie Ferber (General Counsel); J. Randy MacDonald (Chief Financial Officer prior to April 2011 and Head of Retail thereafter); Henri Steenkamp (Chief Financial Officer effective April 2011 and before that Chief Accounting Officer); Michael Stockman (Chief Risk Officer starting in January 2011); and Vinay Mahajan (Global Treasurer as of August 2011.) (SIPA Report 26)

As of the Filing Date, the following directors were on the Board of Holdings:

Director	**Term**	**Holdings Position(s)**
Jon S. Corzine	2010 – Filing Date	Chief Executive Officer, Chair of the Board of Directors and Chair of the Executive Committee
David P. Bolger[7]	2010 – Filing Date	Director, Member of the Audit and Risk Committee and Member of Nominating and Corporate Governance Committee
Eileen S. Fusco[8]	2007 – Filing Date	Director, Chair of the Audit and Risk Committee, Member of Nominating and Corporate Governance Committee and Member of the Executive Committee
David Gelber[9]	2010 – Filing Date	Director, Chair of Compensation Committee, Member of Audit and Risk Committee and Member of Executive Committee
Martin J. Glynn[10]	2008 – Filing Date	Director, Member of Audit and Risk Committee and Member of Compensation Committee
Edward L. Goldberg[11]	2007 – Filing Date	Director, Chair of Nominating and Corporate

[7] Mr. Bolger was a former executive of Aon Corporation and of Bank One Corporation. (MF Global Schedule 14A Proxy Statement filed July 7, 2011 for the period Aug. 11, 2011 ("July 2011 Proxy"), at 18.)

[8] Ms. Fusco formerly was a senior partner at Deloitte & Touche, regional tax counsel of UBS AG, CFO of Twenty-First Securities Corporation, managing director and director of tax of Kidder, Peabody & Co., Inc., and a tax partner at Ernst & Young LLP and Spicer & Oppenheim. (*Id*.)

[9] Mr. Gelber formerly was a director and Chief Operating Officer of ICAP plc, Chief Operating Officer of HSBC Global Markets, and held a variety of senior trading positions in the foreign exchange and derivatives businesses at Citibank NA, Chemical Bank and HSBC. (*Id.*at 19.)

[10] Mr. Glynn was formerly an executive of HSBC Bank ISA, HSBC Bank Canada, and held other positions at HSBC affiliates. (*Id.*)

		Governance Committee, Member of Compensation Committee and Member of Executive Committee
David I. Schamis[12]	2008 – Filing Date	Director, Member of Audit and Risk Committee and Member of Compensation Committee
Robert S. Sloan[13]	2007 – Filing Date	Director

(SIPA Report 26)

In the SIPA Trustee's Report of the Trustee's Investigation and Recommendations, which was released on June 4, 2012, the SIPA Trustee discloses a number of detailed facts that demonstrate that Holdings exercised excessive control over MFGI to improperly gain access to commodities customer funds.

Sapere incorporates by reference the facts included in the SIPA Trustee's report, but notes the following as being particularly relevant to the present objection:

- Upon his arrival at MF Global in 2010, Corzine quickly moved to transform what had been a longstanding FCM combined with a BD conducting a relatively modest customer and proprietary securities business into a full service global investment bank. (SIPA Report 13-14)

- Moody's indicated that for MF Global to maintain its Baa2 rating, it would need to generate $200 million to $300 million in annual before-tax profits and reduce leverage. (SIPA Report 66)

- Corzine built a portfolio of European sovereign debt securities in an attempt to improve profitability. These trades provided paper profits booked at the time of the trades, but presented substantial liquidity risks including significant margin demands that put further stress on MF Global's daily cash needs. (SIPA Report 15)

- On July 1, 2010, MFGI and MFGUK entered into an investment management agreement ("IMA") in relation to the European sovereign trades. Under the IMA, MFGUK, which

[11] Mr. Goldberg is a founder of Dix Hills Partners, LLC and its affiliate management company, Dix Hills Associates, LLC and serves as a managing member of both companies. Mr. Goldberg was previously an executive at Merrill Lynch. (*Id.*)

[12] Mr. Schamis is a managing director and member of the operating committee of J.C. Flowers & Co. LLC. (*Id.*)

[13] Mr. Sloan is the Managing Partner of S3 Partner, LLC and was formerly a managing director at Credit Suisse First Boston. (*Id.* at 20.)

had relationships with the LCGH and other European clearing entities, agreed to execute the European sovereign RTM trades, which would then be kept on the books of MFGI. (SIPA Report 72)

- Margin calls on the [RTM] portfolio from LCH went to MFGUK, which relayed the calls to MFGI. MFGUK could demand advance margin funding from MFGI. MFGI would transfer collateral, usually U.S. Treasury bills, to MFGUK to meet the margin calls; MFGUK, however, did not provide to MFGI any cash or collateral in exchange for the T-Bills, so MFGI was "out of pocket" for several days until MFGUK returned the T-bills. (SIPA Report 75)

- Corzine was very hands-on with respect to the sovereign debt trades. (SIPA Report 76) In addition to his management duties, Corzine also acted as head of trading, executing trades for the firm on his own, while also instructing others to do so. (SIPA Report 26) Corzine also maintained his own portfolio for the company in a division within MFGI called the Principal Strategies Group. His portfolio consisted of proprietary trades that he himself executed or instructed others to execute on his behalf. (SIPA Report 68)

- Holdings' executives were regularly involved with MFGI's day-to-day activities and operations in a significant and meaningful way. Such involvement included:

    - Christine Serwinski testified that customer funds were managed by Mahajan, who was only affiliated with Holdings, and O'Brien, who was only affiliated with MFGI. (SIPA Report 30)

    - Steenkamp explained to Corzine the effect of a ratings downgrade on liquidity by writing: "There would be no impact on RTM's from a ratings downgrade, as the legal analysis of sale is independent of credit rating until maturity. However, there could be an impact on the reverse RTM netting trades as these are to different maturities than the original RTM's. The potential issue is whether some counterparties will choose not to roll over transactions or the trading counterpart can't trade with us due to our rating. If this were to happen, then MFG Inc. could lose its netting benefit on these reverses and thus be subject to higher margins, thereby increasing liquidity needs for the BD." (SIPA Report 78)

    - Edith O'Brien wrote that "Henri [Steenkamp] says to me today . . . 'we have plenty of cash.' I was rendered speechless – and wanted to say 'Really, then why is it I need to spend hours every day shuffling cash and loans from entity to entity?'", a process that she described as a "shell game." (SIPA Report 83)

- In July 2011, Steenkamp asked Serwinski to review trends in the FCM Customer Accounts to consider whether $250 million in funds could be "loaned" overnight on a regular basis from the FCM to Operations in New York. (SIPA Report 83)

- On October 6, 2011, Steenkamp wrote to Corzine, Abelow, and Mahajan: "Jon . . . we need to address the sustained [liquidity] stress. In summary, we have three pools of liquidity for Inc. – (1) finco cash which is real and permanent, (2) FCM excess cash which is temporary and volatile, [and] depends on how customers post margin, and (3) the situation of our broker-dealer that is currently unable to fund itself, and more worrying continues to need more cash than we have [from] finco, thereby having us dip into FCM excess every day. This should be temporary but is becoming permanent and the FCM cash is not reliable. Why is the BD unable to fund itself? Part of it is the permanent pool of liquidity needed for RTM's, but we also see continued haircut increases in fixed income, increased funding needed PSG and box size being permanently large." (SIPA Report 89)

- On October 14, 2011, Matthew Besgen informed Steenkamp and Abelow that liquidity was so strained that the broker-dealer would be relying upon a "$53mm FCM balance" plus $16mm of "FCM buffer," noting that this was the "[f]irst time that the B/D has relied upon the FCM buffer." (SIPA Report 90)

- Vinay Mahajan advised Mr. Steenkamp and Mr. Stockman that "the B/D is leaning on FINCO and FCM's cash pool. We now require $16mm of the FCM's buffer as well. This leaves us with $24mm of liquidity – and no buffer – for the U.S. going into the weekend." (SIPA Report 90)

- On a daily basis, Corzine, Abelow, Steenkamp and Mahajan received a Liquidity Dashboard showing the available liquidity for the BD and the available FCM cash. (SIPA Report 107)

- On a daily basis, Corzine, Abelow, Steenkamp and Mahajan received reports on the balances in the Customer Segregated and Foreign Secured accounts and the amount of the Firm Invested in Excess. (SIPA Report 87)

- The Holdings Board of Directors repeatedly approved increases to the limits of the sovereign debt portfolio. MF Global's investment in sovereign debt peaked at nearly $7 billion (net) in October 2011, and still stood at nearly $6 billion as of the Filing Date. (SIPA Report 16)

- An October 2011 memo to the Holdings Board of Directors indicated that MFGI's RTM portfolio was staggeringly large. The Holdings board and management were aware that MF Global's appetite for sovereign debt had taken the Firm to a very precarious position. (SIPA Report 97)

- Various internal audit reports informed the Holdings Board of Directors that the liquidity and risk monitoring controls were insufficient. Such reports included:

    - An April 2010 report and presentation to the Board showed that shortcomings in MF Global's technology made the data needed for forecasting liquidity risks inadequate and unreliable. An October 2010 follow up to this report showed that necessary changes had not been made. (SIPA Report 68)

    - A May 2010 Corporate Governance internal audit identified MF Global's risk policies as incongruent with the changes that Corzine had implemented in MFGI's BD business. (SIPA Report (SIPA Report 68)

    - A May 2011 internal audit report concluded that MFGI's process lacked controls and was susceptible to human error due to a number of "Control Gaps" and "Control Design" defects. (SIPA Report 69)

    - A June 20, 2011 internal audit report warned of inadequacies of MFGI's internal controls. (SIPA Report 82)

- From time to time, MFGI and other affiliates were funded by liquidity drawn from the committed lending facility on which Holdings was the primary borrower. Those funds moved through the account of another Holdings' subsidiary, MF Global Finance USA, Inc. ("FINCO"). (SIPA Report 24-25)

- Holdings and a number of MFGI affiliates, including MF Global Special Investor, LLC, MFGUK and MF Global Canada Co. traded through accounts with MFGI as their commodities FCM or securities BD, in addition to maintaining their own depository accounts. (SIPA Report 57)

- Regardless of whether Mr. Corzine's bets on European sovereign debt would ultimately have been profitable, in the short term, MF Global became increasingly vulnerable to the developments that ensued in the fall of 2011. (SIPA Report 18)

- As MF Global's liquidity needs intensified, senior management looked increasingly to the FCM as a source of liquidity for the non-FCM business. In fact, on eight days during the month of October, some customer funds were used for liquidity purposes. (SIPA Report 92)

- An April 2009 Enterprise Risk Policy included an explicit recognition that segregated client funds were not available for MF Global to use for liquidity purposes. It stated: "In the major jurisdictions in which it operates, MF Global is forbidden to use segregated funds for any purpose other than as directed by the client. Therefore, as a matter of policy MF Global considers that segregated funds are not available to it for liquidity purposes." (SIPA Report 33)

- On August 24, FINRA informed MFGI that MFGI was required to take a full haircut of approximately $257 million on all sovereign RTMs. The net impact on MFGI was an increased capital requirement of $255 million. FINRA notified MFGI that rather than applying the new capital charges only prospectively, the Firm was required to retrospectively reflect the modified capital treatment of the RTM transactions. This retrospective application resulted in a regulatory net capital deficiency of $150.6 million as of July 31, 2011. (SIPA Report 94)

- In an amended Form 10-Q filed on September 1, 2011, Holdings disclosed that the net capital infusion had been made. The 10-Q was submitted by Holdings and amended Holdings' 10-K from earlier that year. (SIPA Report 94)

- It was not until an October 17 article in *The Wall Street Journal* that the market reacted significantly to the news of the net capital charge and what it indicated about MF Global's financial health. (SIPA Report 98)

- Credit events impacting MF Global throughout the week of October 24 to October 28 escalated its liquidity drain to crisis proportions. (SIPA Report 98) These events included:

    - On October 24, Moody's Investors Service downgraded MF Global's credit rating to near-junk status. The next day, S&P put MF Global on "Credit Watch Negative," and on October 27, Moody's cut MF Global to junk status. (SIPA Report 21)

    - On October 25, MF Global's stock price, which was already low, fell by 48%. (SIPA Report 99)

    - On Thursday October 27, Moody's downgraded MF Global again by two notches into non-investment grade territory. Fitch also announced a two-notch downgrade. (SIPA Report 100)

- Holdings' announcement of poor financial results coupled with the two Moody's ratings downgrades began a "run on the bank" scenario at MFGI. Customers sought to liquidate their positions and withdraw their funds from MFGI. The primary source of extra liquidity was the $1.2 billion unsecured RCF that Holdings used to finance the operations of MF Global, including MFGI. (SIPA Report 101)

- After the ratings downgrade, MFGI and Holdings began liquidating investments and assets. Although these efforts resulted in billions of dollars of sales on a very short settlement cycle, the impact was insufficient to relieve MF Global's dire liquidity situation. (SIPA Report 153)

    - Both MFGI and Holdings' proprietary investments were typically fully financed through repurchase agreements facilitated by MFGI's repo desk. As a result, sale of these investments reduced leverage (and potentially in the long term could have reduced the drain on liquidity) but did not generate significant liquidity in the short term as the cash received from the sale of the proprietary position was used to repay (or unwind) the repurchase agreement used to finance the purchase. (SIPA Report 154)

    - Holdings also liquidated $4.5 billion in agency debentures on Friday October 28. These debentures had also been financed through a repurchase agreement with MFGI, which had in turn entered into repurchase agreements with external counterparties. (SIPA Report 155)

    - DTCC decreased the net debit cap from $300 million to $100 million after MF Global's credit downgrade. This required MFGI to fund the DTCC transactions in cash (by means of an intraday transfer from the Customer Segregated account) to continue clearing operations. (SIPA Report 160)

- Corzine reportedly resisted until after the downgrade the idea of selling off any of the European sovereign debt portfolio. As of October 24, MFGI had a net sovereign debt RTM portfolio of $6.4 billion. MFGI sold a portion of the portfolio during the week of October 24, resulting in cumulative losses of nearly $7.3 million in the final two months of the firm's existence. (SIPA Report 154)

- Had customer funds been properly protected, the customer property in Customer Accounts should have been largely if not completely unaffected by the liquidity crisis at MF Global. Instead, these funds were used to fund MF Global's liquidity needs in at least the latter part of the week of October 24. (SIPA Report 104)

The above facts establish that Holdings put risky strategies in place that caused the misappropriation of commodities customer funds and that Holdings executives had excessive control over MFGI and the commodities customer funds. The relevant consideration as to the applicability of 11 U.S.C. § 761-767 and 17 C.F.R. § 190 is how Holdings conducted its

business, not how it filed its bankruptcy petition. A company subject to 11 U.S.C. § 761-767 and 17 C.F.R. § 190 does not escape its obligations to commodities customers by trying to liquidate itself under Chapter 11. Rather, its obligations flow from the facts of how it conducted its business. The proposition that substance controls over form is well established in the law, including in bankruptcy. *See, e.g.*, *In re Racing Servs.*, 540 F.3d 892, 903 n.2 (8th Cir. 2008); *In re Miller*, 55 F.3d 1487, 1490 (10th Cir. 1995); *In re Spong*, 661 F.2d 6, 9 (2d Cir. 1981); *In re The Drexel Burnham Lambert Group, Inc.*, 160 B.R. 508, 512 (S.D.N.Y. 1993).

Courts consider the actual business of the putative debtor to determine whether the putative debtor is a commodities broker. *See, e.g.*, *In re Financial Partners, Ltd.*, 116 B.R. 629, 641 (Bankr. N.D. Ill. 1990) (holding company was commodities broker despite not being registered as such); *In re Bucyrus Grain Co., Inc.*, 127 B.R. 45 (Bankr. D. Kan. 1988) (holding company was commodities broker despite not being registered as such). The facts that have come to light since this Court issued its Memorandum Opinion support a finding that Holdings was a commodities broker whose liquidation should be administered pursuant to 11 U.S.C. § 761-767 and 17 C.F.R. § 190. Because the Joint Plan does not provide the priority status mandated by 11 U.S.C. § 766, the Joint Plan cannot be confirmed.

Although a parent and its subsidiary can be treated as legally distinct entities in appropriate cases, a parent will be responsible for the obligations of a subsidiary under various circumstances. One such circumstance is when the parent dominates and controls the actions of the subsidiary. *Carte Blanche Pte., Ltd., v. Diners Club Int., Inc.*, 2 F.3d 24 (2d Cir. 1993); *see also D. Klein & Son, Inc. v. Good Decision, Inc.*, 147 F. App'x 195 (2d Cir. 2005). Here, Holdings and its executives' domination and control over MFGI caused the misuse and loss of customer funds. The facts described above demonstrate that MFGI was merely an

instrumentality used to generate profits for, and preserve the credit rating of, Holdings. Through MFGI, Holdings executives engaged in risky trades. Holdings used MFGI, at the approval of the Holdings Board of Directors, to enter the European sovereign debt RTMs in an effort to generate profits for Holdings (SIPA Report 16); Holdings provided cash from its RCF with JP Morgan when MFGI faced liquidity strains (SIPA Report 24-25); and when MFGI's liquidity problems reached crisis proportions, both MFGI and Holdings liquidated investments in an effort to meet MFGI's liquidity needs. (SIPA Report 155) Further, the Holdings Board of Directors and its executives knew that there were no adequate controls to protect customer funds and turned a blind eye to such inadequacies.

The control that Holdings exerted over MFGI, and the extent to which lines distinguishing Holdings and MFGI were blurred, requires that Holdings is treated as a commodities broker with its estate being administered by the applicable rules. *United States v. Bestfoods*, 524 U.S. 51, 62 (1998). The actions and control that Holdings exerted over MFGI also renders Holdings a "principal" responsible to the commodities customers under the Commodity Exchange Act just as MFGI. 7 U.S.C. § 13c(a).[14]

ii. Alternatively, Sapere Renews its Request for Rule 2004 Examinations to Occur Prior to the Court's Ruling on Plan Confirmation

In anticipation of the possibility that the sufficiency of evidence is questioned, Sapere again requests that this Court order that Sapere may conduct Fed. R. Bankr. P. 2004 examinations of any party in interest relating to the relevant facts and that this is completed

[14] "Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible for such violation as a principal." 7 U.S.C. § 13c(a).

before confirmation of a proposed Joint Plan. Rule 2004 allows for the examination of any entity on the motion of any party in interest. Fed. R. Bankr. P. 2004(a). Rule 2004 allows for a broad and far-reaching inquiry. *In re Frigitemp Corp.*, 15 B.R. 263, 264 (Bankr. S.D.N.Y. 1981). The purpose of a Rule 2004 examination is to allow the court to gain a clear picture of the condition and whereabouts of the estate. *In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984). A creditor's discovery rights under a Rule 2004 examination are unfettered and broad. *In re GHR Cos.*, 41 B.R. 655, 661 (Bankr. D. Mass. 1984).

The Rule 2004 examinations would cover: the existence, amount and/or disposition of commodities customers' segregated account funds at MFGI (including without limitation access, dominion and/or control over the same by or for the benefit of any of the Debtors and/or any other non-debtor subsidiary or affiliate of the Debtors); and/or the circumstances under which any such funds became missing and/or have not been 100% transferred post-petition to commodities customers owning those segregated accounts; and/or the existence, description, nature, condition and location of any documents or other tangible things and the identity and location of persons who know of any matter relevant to the subject matter of Sapere's Priority Motion.

The 2004 examinations will include matters from the date one year prior to the filing of the Debtor's petition and SIPC's SIPA liquidation action against MFGI. The 2004 examinations will include examinations of: the Debtors; MFGI; the Debtors' and their non-debtor subsidiaries' and affiliates' present and former employees and representatives identified as being involved in such circumstances; witnesses potentially knowledgeable about any such circumstances; the banks and correspondents of the Debtors and their non-debtor subsidiaries and affiliates who received funds that may have originated from commodities customers'

segregated accounts; the trustees and their representatives involved in investigating the missing segregated account funds; and other persons. The 2004 examinations will include the production of documentary evidence.

B. The Joint Plan Violates 11 U.S.C. § 1122(a) by Mischaracterizing and Erroneously Categorizing Sapere's Claim Against Holdings' Estate.

Section 1122 of the Bankruptcy Code states that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). A plan that erroneously mischaracterizes a creditor's claim violates 11 U.S.C. § 1122. *See e.g., In re Valley Park Group, Inc.,* 96 B.R. 15 (Bankr. N.D.N.Y. 1989) (holding that Chapter 11 plan was unconfirmable when it erroneously treated holders of mechanics liens as general unsecured creditors because the two types of claimants were markedly different); *In re Butler,* 42 B.R. 777 (Bankr. E.D. Ark. 1984) (holding that proposed plan violated Section 1129(a)(1) where there was general misclassification of secured creditors); *see also In re Tribune Co.*, 476 B.R. 843 (Bankr. D. Del. 2012) (holding that the relevant question is whether claims in the same class have the same legal status in relation to the debtor's assets).

The Joint Plan for Holdings includes nine categories of classified claimants: Priority Non-Tax Claims, Secured Claims, JP Morgan Secured Setoff Claim, Convenience Claims, Liquidity Facility Unsecured Claims, General Unsecured Claims, Subordinated Claims, Preferred Interests, and Common Interests. Of particular relevance to the Joint Plan's violation of Section 1122, and the only two categories under which Sapere's claim could be classified, are Priority Non-Tax Claims and General Unsecured Claims. The Joint Plan defines those classes of claimants as follows:

> 67. **"General Unsecured Claim"** means any Claim that is unpaid as of the Effective Date that is not an Administrative Claim, Professional Fee Claim, Creditor Co-Proponents Fee/Expense Claim, Indenture Trustee Fee/Expense Claim, Cure Amount Claim, Priority Tax Claim, Priority Non-Tax Claim, Secured Claim, JPMorgan Secured Setoff Claim, Liquidity Facility Unsecured Claim, or Subordinated Claim. For the avoidance of doubt, the term General Unsecured Claim includes Intercompany Claims and the Notes Claim.
>
> 121. **"Priority Non-Tax Claim"** means any Claim that is entitled to priority in payment pursuant to § 507(a) of the Bankruptcy Code that is not an Administrative Claim or a Priority Tax Claim.

Sapere's claim includes two components: (1) Sapere's out-of-pocket losses caused by Holdings and its agents, for which Sapere is entitled to a Priority Non-Tax Claim; and (2) treble and exemplary damages, for which Sapere acknowledges it has a General Unsecured Claim. By including the entirety of Sapere's claim as a General Unsecured Claim, the Joint Plan violates 11 U.S.C. § 1122 and 11 U.S.C. § 1129(a)(1). *See, e.g., In re Victorian Park Assocs.*, 189 B.R. 147 (Bankr. N.D. Ill. 1995) (holding a plan could not be confirmed because it violated 11 U.S.C. § 1122(a) and 11 U.S.C. § 1129(a)(1) where it improperly included an unsecured deficiency claim in a class of general unsecured claims). The Joint Plan erroneously categorizes Sapere's claim against Holdings' estate, violates 11 U.S.C. § 1122 and 11 U.S.C. § 1129(a)(1), and cannot be confirmed.

CONCLUSION

For the foregoing reasons, this Court should not confirm the Plan Proponent's Joint Plan. This Court should also grant such other and further relief as is just and proper.

Dated: March 25, 2013
New York, New York

Respectfully submitted,

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.

By: */s/ John J. Witmeyer III*
John J. Witmeyer III (JW 7442)
Jon R. Grabowski (JG 9845)
Ford Marrin Esposito Witmeyer & Gleser, L.L.P.
Wall Street Plaza
New York, New York 10005
Tel: (212) 269-4900
Fax: (212) 344-4294
Email: jjwitmeyer@fmew.com
jrgrabowski@fmew.com

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HOWARD, STALLINGS, FROM & HUTSON, P.A.
Joseph H. Stallings (JS 5065)
5410 Trinity Road, Suite 210 (27607)
P.O. Box 12347
Raleigh, North Carolina 27605
Tel: 919-821-7700
Fax: 919-821-7703
Email: jstallings@hsfh.com

Attorneys for Sapere