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PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036-8299
Telephone: (212) 969-3000
Facsimile: (212) 969-2900
Martin J. Bienenstock
Michael P. Kessler
Irena M. Goldstein

Attorneys for the Statutory Creditors' Committee of MF Global Holdings Ltd., et al.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11
MF GLOBAL HOLDINGS LTD., *et al.*,	)	Case No. 11-15059 (MG)
	)	(Jointly Administered)
Debtors.[1]	)	

STATEMENT OF STATUTORY CREDITORS' COMMITTEE OF MF GLOBAL HOLDINGS LTD., *ET AL.* IN SUPPORT OF, AND IN RESPONSE TO OBJECTIONS TO, CONFIRMATION OF JOINT PLAN OF LIQUIDATION

The statutory creditors' committee appointed in the chapter 11 cases of MF Global Holdings Ltd., *et al.* (Case no. 11-15059 (MG)) (the "Committee"), submits this statement in support of, and in response to objections to, confirmation of the *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*

[1] The debtors in these 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").

Market Services LLC, and MF Global Holdings USA Inc. [Docket No. 1031] (as amended and supplemented, the "Plan") and respectfully represents as follows:

STATEMENT

1. The Plan should be confirmed: It increases distributions to creditors by limiting the administrative costs of these cases and democratically ensures that the creditors with the most significant claims willing to serve on the Director Selection Committee,[2] will have the ability to appoint third-party disinterested directors to oversee the liquidation; while creditors holding smaller claims, will have transparency into the liquidation process.

2. Moreover, creditors, with only four exceptions, voted in favor of accepting the Plan. *See Amended Declaration of Jeffrey S. Stein of the Garden City Group, Inc. Certifying the Methodology for the Tabulation of Votes on and Results of Voting with Respect to the Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code for MF Global Holdings Ltd, MFGlobal Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC, MF Global Market Services LLC, and MF Global Holdings USA Inc.* [Docket No. 1266]. Finally, contrary to the contentions of the parties objecting to the Plan, the Plan meets all the requirements of section 1129 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").[3]

3. Not surprisingly, MFGI creditors Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund L.P. (collectively, "Sapere") [Docket No. 1235] object to the Plan on the basis that the Plan impermissibly fails to accord Sapere's claim against Holdings Ltd. the priority status it would have if Holdings Ltd. were a commodity broker

[2] Capitalized terms not otherwise defined herein, shall have the meanings ascribed thereto in the Plan.

[3] The Committee does not address herein all the elements of section 1129 and other Bankruptcy Code sections relating to confirmation of the Plan; instead, it addresses only those specific sections raised by the objecting parties.

(which, as this Court previously ruled, it is not)[4] and that it is entitled to broad discovery at this late date to prove its argument. Sapere is not entitled to discovery and should be strongly discouraged from filing yet another meritless objection in these proceedings.

4. Occidental Energy Marketing, Inc. ("Occidental") [Docket No. 1239], also a MFGI creditor, objects to the Plan to the extent that there is not a sufficient reserve for its disputed claim against the Debtors. Even assuming that Occidental is a creditor of the Debtors and MFGI customers are not paid in full, contrary to what the Plan Proponents anticipate, *Disclosure Statement for the Amended Joint Plan*, at p. 42, filed on February 20, 2013 [Docket No. 1111-1] (the "Disclosure Statement"),[5] the Plan already provides that a holder of a disputed claim, like Occidental, can request the Bankruptcy Court to increase the size of the reserve. *See* Plan, Art. IV (E). There is plenty of time for Occidental to file such a motion and for the motion to be heard before distributions are made to general unsecured creditors. The bulk of distributions to the Debtors' creditors are reliant upon Holdings Ltd. and Finance USA receiving distributions on account of their claims against and interests in MFG UK, MFGI, among other sources, and it is not anticipated that payments on such claims and interests will occur for some time. *See* Disclosure Statement, pp 51-64. As a result, the cash needed for the Plan to go effective will come from the Exit Facility.

5. The United States Trustee (the "U.S. Trustee") also filed an objection [Docket No. 1236] to confirmation arguing that the Plan impermissibly provides for (a) the payment of the professionals fees of the Creditor Co-Proponents and Wilmington Trust Company, as Indenture Trustee (the "Indenture Trustee") without requiring such parties to

[4] *See In re MF Global Holdings Ltd.*, 465 B.R. 736 (Bankr. S.D.N.Y. 2012).

[5] Pursuant to the MFGI-Debtors Letter Agreement, annexed to the Disclosure Statement as Exhibit VII, the Chapter 11 Trustee has agreed in principle to support a motion by the SIPA Trustee for the allocation and/or loan of funds from MFGI's unallocated property to cover any shortfall of customer property. Disclosure Statement, at p. 7.

demonstrate that they have made a substantial contribution to these estates under section 503(b) of the Bankruptcy Code and (b) non-Debtor releases. The United States of America (the "Government") filed a joinder to the U.S. Trustee's objection to the non-Debtor releases. [Docket No. 1248]

6. Section 503(b) is not the only means by which the Creditor Co-Proponents and the Indenture Trustee can receive payment of their professionals' fees and expenses; Bankruptcy Code section 1129(a)(4) allows this Court to approve the payment of the parties' reasonable fees and expenses under the Plan. Finally, both the U.S. Trustee's and the Government's objection to the Plan's very limited third-party releases should be overruled. The releases are narrowly constructed to ensure that the parties involved in these cases are not burdened with claims that should have been (or were) asserted against the Debtors and that the Plan can go effective without reprisals.

7. For the reasons set forth above and below, this Court should overrule the objections and confirm the Plan.

Argument

8. As set forth below and in the papers filed with this Court by the Plan Proponents, the Plan meets all of the requirements of section 1129 of the Bankruptcy Code and should be confirmed. In contrast, not one of the objecting parties sets forth a coherent basis to deny confirmation: Sapere contends that the Plan is not confirmable because it does not accord its claim with the priority status it would have if Holdings Ltd. was a commodity broker, even though this Court previously ruled that Holdings Ltd. was *not* a commodity broker; Occidental seeks this Court to preserve rights that are already preserved under the Plan; the U.S. Trustee objects to payment of the Indenture Trustee's and the Creditor Co-Proponents' professional fees

and expenses despite the fact that the Bankruptcy Code clearly allows for such payment and the parties have, through their actions, demonstrated the significant value they provided to the estates; and finally, the U.S. Trustee and the Government object to the Plan's non-Debtor release provisions even though the releases are limited in nature and are part of the package that the Plan Proponents bargained for and the Debtors' creditors voted to accept. Each of these objections should be overruled.

1. Sapere's Objection

9. Sapere's objection largely repeats its prior motion where it sought priority status for claims against Holdings Ltd. arising from Sapere's damages as a customer of MFGI on the grounds that Holdings Ltd. was a commodity broker.[6] Sapere acknowledges that this Court previously denied it essentially the same relief, but asserts that new facts have come to light which justify Sapere's raising these arguments yet again. Sapere objection at 2, 6-7. Sapere is wrong on all counts.

10. Sapere's "new evidence," mainly found in the Report of the Trustee's Investigation and Recommendations issued by the SIPA Trustee SIPA [Docket No. 1865], concerns the downfall of MFGI as a commodity broker. This evidence is neither "new"[7] nor pertinent to the question of whether or not Holdings Ltd. was a commodity broker according to the very decisions relied upon by Sapere in its objection.

11. In order for Holdings Ltd. to be considered a commodities broker, it would have had to have been acting in such capacity for customers. *See Inskeep v. Grosso (In re*

[6] *See Motion to Direct the Debtors' Estates to be Administered Pursuant to 11 U.S.C. § 761-767 and 17 C.F.R. § 190* [Docket No. 278].

[7] The "new" evidence cited by Sapere includes: (a) there were inter-locking boards of directors of Holdings Ltd. and MFGI (objection at 12), (b) Jon Corzine sought to transform the MF Global enterprise (objection at 14); (c) Jon Corzine traded in sovereign European debt (*Id.*); and (d) Holdings Ltd. executives were involved in MFGI's operations (objection at 15).

Financial Partners, Ltd., 116 B.R. 629 at 634 (Bankr. N.D. Ill) (debtor was a commodity broker because it accepted funds for the purpose of purchasing "commodity securities" for a third party); and *State Bank of Spring Hill v. Bucyrus Grain Co., Inc. (In re Bucyrus Grain Co., Inc.)*, 127 B.R. 45, 49 (D. Kan. 1988) (a futures commission merchant must "(1) accept orders for the purchase or sale of any commodity for future delivery . . . (2) deal in futures commodities subject to the rules of a contract market . . .and (3) in connection with the orders, accept money to margin the contracts.") Sapere does not, nor could it, allege that it was a customer of Holdings Ltd. More importantly, the SIPA Report, relied so extensively by Sapere, does not allege that Holdings Ltd. was acting as a commodities broker. Finally, Sapere's asserted claim based upon Holdings Ltd. alleged control over MFGI, even if allowed, is only entitled to general unsecured status. It is not a priority claim.

12. Sapere further argues that confirmation should be delayed so that it can take discovery to further pursue its meritless argument. Putting aside the fact that Sapere has access to discovery as a member of the class action litigation currently pending before Judge Marrero (most of the discovery request seeks documents in the possession of the SIPA Trustee), there is no cause to halt these proceedings to allow Sapere to take discovery and further waste everyone's time and money. Sapere will have the opportunity to raise these issues again in response to the objection filed by the Plan Proponents to its claim. [Docket No. 1081] Accordingly, Sapere's objection should be overruled.

2. Occidental Objection

13. Occidental, also a customer of MFGI, objects to the Plan because it is concerned that the Plan Proponents are not reserving amounts necessary to pay its claim in the event the Plan Proponents' objection to its claim is overruled. This is not a basis to object to confirmation because the Plan specifically states that Occidental is not precluded "from seeking, on notice to the Plan Administrator, an order of the Bankruptcy Court to increase the amount reserved for such Holder's Disputed Claim." Plan, Art. IV (E). Occidental, thus, will have the opportunity to be heard on the size of the Disputed Claims Reserve and, therefore, suffers no prejudice if the Plan is confirmed as is. Accordingly, Occidental's objection should be overruled.

3. U.S. Trustee Objection and the Government's Joinder

14. The U.S. Trustee argues that the Plan cannot be confirmed because it impermissibly provides for (a) the payment of the professional fees and expenses of the Creditor Co-Proponents and Indenture Trustee without requiring that the parties move for relief under section 503(b) of the Bankruptcy Code, and (b) non-debtor third party releases. The Government joins in the U.S. Trustee's objection to the releases. As set forth below, both the U.S. Trustee's objection and the Government's joinder lack merit.

A. The Reasonable Fees and Expenses of the Creditor Co-Proponents and Indenture Trustee Can and Should be Paid Pursuant to Bankruptcy Code Section 1129(a)(4)

15. Chapter 11 plans commonly provide for the payment of the fees and expenses of indenture trustees in cash on the effective date. This Plan is no different. The Plan Proponents, comprised of bank debt holders, bondholders and the Chapter 11 Trustee, provided for such payment in the Plan, and hundreds of claimants holdings billions of dollars in claims

voted in favor of the Plan, while only 4 votes representing less than $350,000 rejected the Plan. None of the rejecting parties objected to the payment of the Indenture Trustee's fees and expenses.

16. There are a number of reasons why it is commonplace for chapter 11 plans to provide for the payment of indenture trustee fees and expenses, including, without limitation, indenture trustees are not true economic stakeholders, yet given their position in between bondholders and debtors, they often play a pivotal role in the successful negotiation and implementation of chapter 11 plans. Also because of their unique circumstances, indenture trustees are often the only committee members that can be relied upon to remain on the committee for the duration, as was the case here. Payment of the indenture trustee's fees and expenses under a plan renders assertion of the trustee's charging lien unnecessary, simplifying and locking in distributions to bondholders. In this regard, plan payment of trustee fees and expenses is often viewed as part of the overall treatment and settlement of the bondholder claims under the plan.

17. As previous noted and discussed further below, section 1129(a)(4) provides a specific statutory basis upon which to pay such fees and expense under the Plan. While this should end the inquiry on the payment of the Indenture Trustee's fees and expenses, the Committee notes that the Indenture Trustee, which serves as the chair of the Committee and is the last remaining original Committee member, played a particularly active role in a difficult case. The Indenture Trustee's experience, leadership and guidance allowed the Committee to weather membership changes and disputes with the Chapter 11 Trustee and Creditor Co-Proponents. Such efforts included substantial advocacy and negotiating behind closed doors, enabling a fully consensual resolution to be presented to the Court.

18. The Creditor Co-Proponents also deserve significant praise. They filed a plan for these Debtors months before the date originally planned by the Chapter 11 Trustee, and thus saved the estates significant amounts in administrative costs and expenses.

19. Notwithstanding the foregoing, the U.S. Trustee argues that the Indenture Trustee and the Creditor Co-Proponents, in order to have their professionals' fees paid, have to incur *further* fees and expenses to establish the substantial contribution they have made to these cases under Bankruptcy Code section 503(b). While the Indenture Trustee and the Creditor Co-Proponents clearly can establish the substantial contribution they have made to these cases, they should not be required to given that creditors overwhelmingly voted in favor of paying their professionals' reasonable fees and expenses as part of the Plan.

20. As admitted by the U.S. Trustee, two judges in this circuit have found that fees and expenses of unsecured creditors and committee members may be awarded as part of a confirmed plan (as opposed to the granting of a substantial contribution motion) pursuant to Bankruptcy Code section 1129(a)(4): *In re Adelphia Commc'ns Corp.*, 441 B.R 6 (Bankr. S.D.N.Y. 2010) (REG), *In re Lehman Brothers Holdings Inc.*, 2013 WL 587343 (Bankr. S.D.N.Y. Feb 15, 2013). Judge Gerber authorized payment of the fees and expenses of the professionals to certain *ad hoc* committees and individual creditors because "reasonable fees may be paid where, as here, the provision for fees is an element of a chapter 11 reorganization plan." *Adelphia*, 441 B.R. at 9. The only limits placed by the Court in *Adelphia* on what is "reasonable" in the context of fees awarded pursuant to Bankruptcy Code section 1129(a)(4) is that section 1129(a)(4) "does not permit payment for fees to advance interests unrelated to recovering on claims (such as short positions or competitive advantage), or for activities that go beyond normal advocacy or negotiation, that represent scorched earth tactics, or that are abusive,

irresponsible, or destructive to the estate." *Id.* at 9-10. Clearly the Indenture Trustee and the Creditor Co-Proponents have greatly benefited the estates and have done nothing "abusive, irresponsible or destructive."

21. Judge Peck, in response to the same argument made by the U.S. Trustee here, followed the *Adelphia* decision and found that the U.S. Trustee's conclusion that section 503(b) eliminates the possibility that professional fees may be reimbursed under any other circumstance "fails to take into account the ability . . . to identify other means to provide for reimbursement of such professional fees." *In re Lehman Brothers Holdings Inc.*, 2013 WL 587343 *7. Judge Peck further stated, relying upon the *Adelphia* decision that "'[S]ection 503(b) does not provide that it is the *only* way by which individual creditors' fees may be absorbed by an estate." *Id.* at *9, *quoting Adelphia*, 441 B.R. at 14-15.

22. As noted in both the *Adelphia* and *Lehman* decisions, claims for reimbursement of professional fees pursuant to section 503(b) of the Bankruptcy Code and payment made pursuant to a plan of reorganization are "clearly distinct," *In re Lehman Brothers Holdings Inc.*, 2013 WL 587343 *10, mainly because the latter is made on a consensual basis.

23. Here, the Plan Proponents, the Indenture Trustee, the Committee and other stakeholders in these cases have negotiated essential terms of the Plan to secure a consensual confirmation process. The remarkable Plan process led by the Creditor Co-Proponents has eliminated at least another few months of administrative expenses to the already over-burdened Debtors' estates. Therefore, the Committee submits that the Plan provisions allowing for payment of the reasonable fees and expense of Creditor Co-Proponents and the Indenture Trustee are in the best interest of the Debtors' estates and all parties in interest. Moreover, the Plan

grants the U.S. Trustee the opportunity to object to the fees to the extent that the U.S. Trustee believes that the fee requests are not reasonable. Plan, Art. II (A) (3 and 4).

24. The U.S. Trustee also contends that the Indenture Trustee, SilverPoint Capital Fund, LP ("SilverPoint") and Knighthead Capital Management LLC ("Knighthead") are not entitled to have their professionals' fees paid because Bankruptcy Code section 503(b)(4)(F) only allows for reimbursement of committee members' out-of-pocket expenses and not professionals fees. First, SilverPoint and Knighthead are seeking payment of their professionals' fees as Creditor Co-Proponents, not as Committee members. Second, none of these Committee members are seeking payment of their professionals' fees under Bankruptcy Code section 503(b)(4)(F). As stated above, the Plan Proponents have agreed to pay such fees pursuant to Bankruptcy Code section 1129(a)(4). The limitations set forth in Bankruptcy Code section 503(b)(4)(F) have no bearing on Bankruptcy Code section 1129(a)(4), and for this reason, Judge Peck overruled the exact same argument made by the U.S. Trustee in *Lehman*:

> [T]he UST Fee Objection is not well-founded and is overruled. It is based on the proposition that Section 503(b) standards for allowing administrative expenses necessarily must govern the right of individual members of an official committee to receive reimbursements for their professionals' expenses. That mixes up the test for being able to assert an administrative expense claim with the right to receive a payment that the Debtors voluntarily have proposed to make under the Plan and that may be authorized in accordance with Section 119(a)(4).

Lehman, at *10. Here like in *Lehman*, "[t]he acceptances of the Plan are a strong, one-sided referendum in support of paying the fees requested by the Applicants." *Id.* Accordingly, the U.S. Trustee's objection to the payment of the Indenture Trustee's and the Creditor Co-Proponents' professional fees and expenses under the Plan should be overruled.

B. The Limited Non-Debtor Releases in the Plan Are Proper

25. The U.S. Trustee and the Government object to Article XI (D) of the Plan, which releases and enjoins claims against the Protected Parties "solely with respect to any Claims or Interests that are treated pursuant to this Plan." The Government also objects to Plan Art. IV (E) which exculpates "employees or independent contractors of the Plan Administrator, members of the Direction Selection Committee, and/or directors of any Debtor following the Effective Date . . . for any act taken or omitted to be taken following the Confirmation Date through the Effective Date in connection with any matters necessary to implement this Plan, or in contemplation of his or her duties to be assumed upon the Effective Date." Government objection at 2. Finally, the Government objects to the Plan Trust Agreement provisions that provide protection from liability to the Plan Trustees and their professionals and agents. *Id.*

26. Contrary to the U.S. Trustee's and the Governments' assertions, the third-party releases are proper and should not prevent confirmation of the Plan. The U.S. Trustee and Government rely principally on the decision in *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d Cir. 2005) where the Second Circuit cited its previous decisions holding that "'in bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan.'" (citations omitted) The Second Circuit cautioned that such releases are proper "only in rare cases" and refused to approve the broad release sought in *Metromedia*, which covered "*any matter* related to the Debtor or one or more subsidiaries . . . whether for tort, fraud, contract, violations of federal or state securities laws, or otherwise were inappropriate because the only factual finding supporting the releases was that the released party made a "'material contribution to the case.'" *Metromedia*, 416 F.3d at 141-43 (emphasis added).

In particular, the Court held that this type of release, which "afford[ed] blanket immunity" was the type of release which "lends itself to abuse." *Id.* at 142.

27. The *Metromedia* court identified a non-exclusive number of factors which the Second Circuit and other courts held justify a release including creditor consent, the released parties having provided a substantial contribution to the case and "the enjoined claims would indirectly impact the debtor's reorganization 'by way of indemnity or contribution." *Id.* (citations omitted) Neither the U.S. Trustee nor the Government dispute that the Protected Parties provided a substantial contribution to the case. Instead, the U.S. Trustee and the Government implicitly state that there are no unusual circumstances warranting such releases. That could not be further from the truth. These cases have been the subject of substantial media and Congressional attention, have provided a forum for numerous parties with only a tangential relationship to the chapter 11 Debtors to be heard and have required negotiations on a global basis to achieve the relative peace currently being enjoyed.

28. In addition, both the U.S. Trustee and the Government contend that this Court does not have jurisdiction to grant the releases sought in the Plan under *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.)*, 517 F.3d 52 (2d Cir. 2008) ("Manville I"), *rev'd and remanded on other grounds sub nom., Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009), *aff'g in part and rev'g in part*, 600 F.3d 135 (2d Cir. 2010) ("Manville II"). In *Manville* II, the Second Circuit stated that it did not have jurisdiction to release the claims in question because they were predicated on an independent duty owed by a settling insurer to a third party, and the claims had no impact on the bankruptcy estate.

29. Unlike in *Manville II* and *Metromedia*, the release under Plan Art. XI (D) is limited to "any Claims or Interests that are treated pursuant to this Plan," and does not offer

the Protected Parties unlimited immunity from liability. Indeed, the releases only relate to acts or omissions of the non-debtors solely in their capacity as officers, directors, managers, members, accountants, financial advisors, investment bankers, agents, restructuring advisors, attorney, and representatives, *subsequent* to the commencement of these cases, and with respect to the Securities Plaintiffs, solely with respect to acts and omissions of such parties subsequent to November 21, 2011. *See* Plan, Art. 1 (A)(129) (Definition of Protected Parties). Because the Plan releases only post-petition matters, this Court, as part of its determination that the Plan was filed in good faith pursuant to Bankruptcy Code section 1129(a)(3), certainly has jurisdiction to find in the order approving confirmation that the Protected Parties acted properly. To the extent releases granted under the Plan relate to post-Confirmation acts or omissions, this Court can make the findings necessary to grant such releases after the Effective Date, upon request.

30. Similarly, Plan Art. IV (E), which the Government also objects to, exculpates "employees or independent contractors of the Plan Administrator, members of the Direction Selection Committee, and/or directors of any Debtor following the Effective Date . . . for any act taken or omitted to be taken following the Confirmation Date through the Effective Date in connection with any matters necessary to implement this Plan, or in contemplation of his or her duties to be assumed upon the Effective Date." Government objection at 2. Because there is a gap between the Confirmation Date and the Effective Date, the Plan Proponents are ensuring, through this provision, that the parties who will serve on the Director Selection Committee along with the future directors, officers, and independent contractors who will participate in the post-Effective Date management, will do what is necessary in advance of the Effective Date. These parties, who creditors want to immediately start working to ensure a smooth transition to the post-Effective Date liquidation rather than waiting for the Plan to go

effective, need to know they are protected and will have indemnity and contribution rights in the event a litigious party (*e.g.* Sapere) determines to upset their hard work.

31. Courts in this Circuit have previously held comparable third-party releases to be acceptable. *See In re Adelphia Communc'ns Corp.*, 368 B.R. 140, 267 (Bankr. S.D.N.Y. 2007) (there is less potential for abuse if only postpetition events are covered); *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (third-party releases were sufficiently narrow as they only covered conduct taken in connection with the chapter 11 cases); *Upstream Energy Servs. v. Enron Corp. (In re Enron Corp.)*, 326 B.R. 497, 504 (S.D.N.Y. 2005) (finding that the exculpation provision was sufficiently limited to only conduct occurring after the filing of the debtors' bankruptcy petitions). Moreover, third-party releases may be approved if they are essential to a debtor's plan of reorganization, *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992), *Metromedia*, 416 B.R. at 142 and are in consideration for parties' material contributions to the Plan. *In re Finlay Enters. Inc.*, 2010 LEXIS 5584 (Bankr. S.D.N.Y. June 29, 2010). The post-petition officers, employees, and professionals in these chapter 11 cases were instrumental in resolving a number of complex issues, and their collective efforts allowed for a Plan to be presented sooner than expected, thereby maximizing the value for all the constituencies in these cases. The Plan releases and exculpations contained in Plan Art. IV (E) and XI (D) are appropriately limited in scope to comply with this Circuit's standards, and thus, should be approved.

32. Finally, the Government objects to section 4.2 of the Plan Trust Agreement which provides immunity to the Plan Trustees and their professionals and agents except in cases of "gross negligence, willful misconduct or criminal conduct." Government objection at 2. This provision of the Plan Trust Agreement is substantially identical to provisions

in corporate charters and LLC agreements exculpating directors from liability. For example, section 402(b) of the New York Business Corporation Law allows the certificate of incorporation to "set forth a provision eliminating or limiting the personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity" with limitations similar to the limitations to the Trustee's exculpation under section 4.2 of the Trust Agreement.

33. There is no basis for the Government to object to this provision of the Plan Trust Agreement. As a result, the Government's and the U.S. Trustee's objections to the release and exculpation provisions of the Plan should be overruled.

WHEREFORE, the Committee supports confirmation of the Plan and requests this Court to overrule any unresolved objections relating thereto.

Dated: April 2, 2013
New York, New York

Respectfully submitted,

/s/ Martin J. Bienenstock

PROSKAUER ROSE LLP
Martin J. Bienenstock
Michael P. Kessler
Irena M. Goldstein
Eleven Times Square
New York, NY 10036-8299
Telephone: (212) 969-3000
Facsimile: (212) 969-2900
Attorneys for the Statutory Creditors' Committee of MF Global Holdings Ltd., et al.

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