

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 CASE NO. 11-15059-mg

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5 In the Matter of:

7 MF GLOBAL HOLDINGS LTD.,

8

9 Debtors.

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13 U.S. Bankruptcy Court  
14 One Bowling Green  
15 New York, New York

16

17 April 5, 2013

18 10:06 AM

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21 B E F O R E :

22 HON MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

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25 ECRO - TB

1 HEARING Re: Confirmation of Plan

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P R O C E E D I N G S

THE COURT: Please be seated.

We're here in MF Global Holdings Limited, No. 11-15059. Mr. Miller.

MR. MILLER: Good morning, Your Honor. Brett Miller, Morrison and Forrester on behalf of the Chapter 11 Trustee. We're here for the confirmation hearing in this case, on a plan that's been overwhelmingly supported by creditors, and although a few objections remain, we hope to resolve them through this hearing.

In addition to the matter on the calendar regarding confirmation, the trustee would like to make a brief statement after the confirmation hearing, and with that, I turn the podium over to Mr. Bennett, counsel to the co-proponents.

THE COURT: All right. Thank you. Mr. Bennett?

MR. BENNETT: Thank you, Your Honor. As Mr. Miller already indicated, I think we -- a good place to start is to talk about the votes that were received. It -- as I think -- if Your Honor has read the papers, as you usually have, you know that it's been overwhelmingly accepted by all the major classes of creditors. We had a couple of empty classes, the plan, and the disclosure statement provides those are deemed to accept.

We've had no -- there are no classes that have

1 voted no with respect to the plan, except for classes that  
2 have been deemed to vote no for the plan, because they are  
3 in the preferred equity and equity classes, and subordinated  
4 debt classes at the parent company.

5 I think the way I'd like to handle the hearing  
6 today is basically in three parts, and of course, subject to  
7 whatever Your Honor wants to do. Part 1 is that we filed I  
8 think yesterday the plan supplement, which has revisions in  
9 it from the last plan supplement. There are none that I  
10 would even regard as material, but I will try to point out  
11 to Your Honor the three or four most significant changes  
12 that wound up in the plan supplement.

13 A couple of those changes wound up also affecting  
14 plan provisions, so I will bring Your Honor up to date with  
15 respect to the documents that are before you, show you how  
16 things have moved, and the bottom line is not much, but I  
17 will make sure that Your Honor is informed about how things  
18 have moved.

19 Secondly, I'll put into evidence the declarations.  
20 I don't think anyone wants to cross-examine anyone, and then  
21 I don't -- I think unless Your Honor wants me to, I will  
22 skip the ritual of taking down all the requirements of 1129,  
23 because I think we've done that more than adequately in the  
24 papers, and I don't think anyone here is concerned with  
25 that. And then, finally, we'll get to the objections, and

1 we're down to -- well, I'll say two and a half at this  
2 point. So I don't think all of this will take a tremendous  
3 amount of time.

4 Okay. So let me begin with the -- with first of  
5 all, we filed also I think it's two days ago, an amended and  
6 restated plan. All that did was to bring the document up to  
7 date with all the changes that had occurred, as a result of  
8 the settlement with JPMorgan, the plan supplement and the  
9 related documentations. We wanted in one place a plan that  
10 had all of the provisions that it effectively had as a  
11 result of those few iterations.

12 And then in discussions with a whole bunch of  
13 people about a whole bunch of things, we wound up with a few  
14 additional changes, and those few additional changes to the  
15 plan itself are not in the amended and restated plan, but  
16 they're in the proposed form of order, that was filed  
17 yesterday, I think yesterday in the morning.

18 Now, that proposed form of order before it reached  
19 you was circulated among the committee, all of the  
20 objectors, and the U.S. Trustee's office, if they were any  
21 objectors, they would be included for that reason alone, and  
22 obviously the proponent group. And the -- so just to go  
23 over the few plan changes -- oh, and I should also say, the  
24 order that reached you had all the comments and suggestions  
25 that we received from the objectors and the committee,

1 except for one more change, which I'll get to in a second,  
2 which came from the committee for -- excuse me, from the  
3 U.S. Trustee last night.

4 But in any event, if you look at the form of order  
5 that Your Honor has, the changes relating to the plan, they  
6 start on paragraph 56 --

7 THE COURT: Do you have a version with you that  
8 includes -- that's complete --

9 MR. BENNETT: Yes.

10 THE COURT: -- with everything?

11 MR. BENNETT: Yes.

12 THE COURT: Could somebody hand that up to me,  
13 because the last thing I got handed was --

14 MR. BENNETT: That one page or two pager with that  
15 change?

16 THE COURT: -- page 37 and 38 changed.

17 MR. BENNETT: May I approach, Your Honor?

18 THE COURT: Yeah, please.

19 Thank you.

20 MR. BENNETT: So again just to keep track, the  
21 version of the order that I just handed you, Your Honor, is  
22 exactly the same as the one that was filed yesterday  
23 morning, plus the change you were handed this morning.  
24 That's it.

25 THE COURT: Okay.

1 MR. BENNETT: Okay. So just to cover the few,  
2 very few plan amendments, starting at paragraph 56. I'm  
3 pretty sure the numbering didn't change, but that's on --

4 THE COURT: Page 28.

5 MR. BENNETT: I'm sorry, paragraph 56.

6 THE COURT: On page 28.

7 MR. BENNETT: Okay.

8 THE COURT: Isn't it?

9 MR. BENNETT: Yeah, that's close enough. And  
10 there's --

11 THE COURT: Well, no, it's exactly because I mean  
12 that's what I'm looking at when I see paragraph 56.

13 MR. BENNETT: No, I have a marked version, and so  
14 the pages are a little bit messed up on mine, but it is the  
15 same paragraph. The paragraph relates to the modification  
16 Section V.D.2 of the plan?

17 THE COURT: Yes.

18 MR. BENNETT: Okay. That's where we need to be.

19 This is a minor modification of the plan relating  
20 to the Captive Insurance Company and is really at the  
21 request of the persons involved in liquidating that entity,  
22 and it basically just gives assurances that it will continue  
23 in effect for as long as it needs to.

24 The second change, which is in paragraph 57, the  
25 exit facility, the initial estimate of the exit facility

1 maximum amount was \$70 million, now the amount has increased  
2 to \$80 million. There are a handful of additional changes  
3 to the exit facility that we can talk about in the plan  
4 supplement.

5 And the last change of the -- to the plan that is  
6 implemented through the order confirming the plan, is a  
7 provision that -- well, I should by way of background, we  
8 have what is called a plan trust. The plan trust includes  
9 the only outstanding equity share in the debtors' post  
10 reorganization. The plan trustee -- the plan trustees,  
11 originally the plan said that the plan trustees were the  
12 directors selection committee. People thought about that  
13 and decided that maybe it would make more sense if that was  
14 just the same people, the same directors who are actually  
15 the directors for the debtor entities going forward were  
16 really Holdings the -- going forward.

17 So what we did in the plan, and it made conforming  
18 changes to the plan supplement documents is provided that  
19 the plan trust trustees can be either a debtor selection --  
20 a director selection committee member or the director that  
21 that director selection committee member designates. So  
22 people will figure out what they want to do, and hopefully  
23 in the next 14 days, but that is the -- that gives a little  
24 more flexibility than previously existed under the plan, and  
25 under the plan supplement documents. But it's effectively

1 the same, as you can see, the same effective governance path  
2 is maintained. And that is all of the changes that relate  
3 to the plan.

4 Now, I hesitate to spend much if any time, and  
5 I've got to find my unplanned supplement changes because  
6 again, they're not material, but to rapidly canvass through  
7 them without -- I don't think Your Honor should try or would  
8 want to track them.

9 With respect to the exit --

10 THE COURT: This morning I was handed a redline of  
11 the amended plan supplement.

12 MR. BENNETT: And just the change pages?

13 THE COURT: No, it's --

14 MR. BENNETT: Oh, okay. Okay.

15 THE COURT: It shows things with red and blue.

16 MR. BENNETT: All right. Let me tell you what  
17 they are, and first of all, let's talk about the exit  
18 facility, because I think that's the only one that has  
19 economic consequence in any way. The length of time -- we  
20 talked about changing the size from 70 to 80, the period  
21 during which draws may be made was originally limited to six  
22 months, it's been extended to nine months.

23 The -- a provision has been added to allow the  
24 commitment to be reduced at any time, which would enable the  
25 -- reconstitute the debtors to save money, if they decide they

1 don't need it anymore. And then there's one protective  
2 provision that was added for the benefit of the lone  
3 parties, which is that there are restrictions on the ability  
4 to make distributions to classes while the exit facility is  
5 still outstanding. And, of course, the exit facility is  
6 supposed to get paid back first after -- because it's paying  
7 claims that go first, administrative claims, and other  
8 things that have to be paid right away, and facilitating an  
9 early exit from the bankruptcy case. That's it. Those are  
10 the only substantive changes that were made to the exit  
11 facility.

12 As to the plan trust agreement, the plan trust  
13 agreement contains the same change we just discussed that's  
14 included in the plan to allow the plan trustees to be either  
15 members of the director selection committee or members of  
16 the board itself. We have done a little bit of work at the  
17 request of the directors to clean up the specification of  
18 duties, mainly to provide that there are no other duties  
19 that plan trustees -- that plan trust trustees have, other  
20 than the duties that are specifically delineated in that  
21 document. There really are no other changes.

22 The -- there were more changes to the consenting  
23 documents, the certificates, incorporations and bylaws, but  
24 again, I am comfortable saying that the only non-material  
25 significant changes is that there was previously a provision

1 where all entities other than the parent company would have  
2 only one director, Holdings USA and Finance USA will each  
3 have three directors. Those are, of course, the most  
4 significant of the subsidiaries.

5 A couple of the operating agreements didn't have  
6 the provisions relating to non-voting shares. We figured  
7 that out ourselves, we put them in, so that's what happened  
8 there.

9 And finally the exhibit relating to executory  
10 contracts and unexpired leases, there are some insurance  
11 contracts that have been added, so that out of an abundance  
12 of caution they will be assumed. There are lots of  
13 negotiations going on or some negotiations going on  
14 regarding cure amounts, that won't happen here today, but  
15 we'll deal with that outside the courtroom.

16 And finally we added an exhibit that -- and added  
17 a statement to the exhibit that basically said it's not  
18 exhaustive, and if we find other contracts that we need to  
19 assume between now and the effective date, we can do that as  
20 well.

21 Okay. Of course, with order of the Court. I  
22 think unless Your Honor has any questions, we've -- that  
23 settles what's before you. The plan we are seeking to  
24 confirm, the plan supplement documents that we're seeking  
25 approval of in the current form, and I think this is as good

1 a time as any to move introduction into evidence, the three  
2 declarations that support confirmation of the plan, Mr.  
3 Stein (ph), Mr. Freeh, and Mr. Gornus (ph) and -- they've  
4 all been filed. There are no changes to those, and we've  
5 certainly received no objections to any of them or any  
6 requests that anyone be made available for cross-  
7 examination.

8 THE COURT: You need to identify each of their ECF  
9 docket number.

10 MR. BENNETT: Let me see if I've got that. Okay.  
11 I have -- Mr. Stein's declaration is Docket No. 1260, and  
12 there's a -- I'm sorry, strike that. There's an amended  
13 declaration of Mr. Stein, it's at 1266, that's the one  
14 that's moved into evidence.

15 Mr. Freeh's declaration is 1271, and Mr. Gumm's  
16 (ph) declaration is 1272.

17 THE COURT: All right. Any objections to the  
18 Court admitting in evidence the Stein, Freeh, and Gumm  
19 declarations at ECF No. 1266, 1271 and 1272?

20 (No response)

21 THE COURT: All three declarations are admitted  
22 into evidence.

23 Does anybody wish to cross-examine any of the  
24 declarants?

25 (No response)

1 THE COURT: Hearing none, proceed.

2 MR. BENNETT: Okay. Unless Your Honor wants any  
3 discussion about the confirmation standards as to which no  
4 objector commented --

5 THE COURT: I don't.

6 MR. BENNETT: -- we -- I will turn the podium over  
7 to the objectors in whatever order Your Honor would like to  
8 proceed.

9 THE COURT: Let me hear from the U.S. Trustee  
10 first.

11 MS. GOLDEN: Good morning, Your Honor, Susan  
12 Golden for the U.S. Trustee. I'm here with my colleague  
13 Brian Masumoto, and I don't see the U.S. Trustee here, but I  
14 know she will be attending this hearing as well.

15 Your Honor, the U.S. Trustee's objection covers  
16 two issues, the first I hope to dispose of fairly quickly,  
17 and that is -- was on the releases. The U.S. Trustee's  
18 concerns were that certain parties which initially we had  
19 thought were under the protected party definition were going  
20 to be released for lack of a better word. I know that it  
21 was characterized as an injunction.

22 And with -- upon conversations with counsel and  
23 reading the response to the objection, the U.S. Trustee is  
24 satisfied that there parties, that the U.S. Trustee was  
25 concerned about, are not, in fact, being released.

1           The plan proponents also had a more fulsome  
2 explanation of why they satisfied the Metromedia standards,  
3 and so to that end, we now defer to the Court to make the  
4 determination that they've met their burden on the  
5 Metromedia standards.

6           THE COURT: Well, let me -- just so -- are you  
7 withdrawing your objection as to the -- it was included as  
8 an injunction. Are you withdrawing your objection as to the  
9 provisions for the injunction that are included in the plan?

10           MS. GOLDEN: Yes. The short answer is yes. Your  
11 Honor, I do want to note that at our request last night, we  
12 noticed that there were some of the standard language that  
13 are normally in these provisions that inadvertently we think  
14 was left out, and those are the general carve-outs for gross  
15 negligence, willful misconduct, and that attorneys cannot be  
16 limited for their malpractice liability under the New York  
17 disciplinary rules. And counsel has added that, and we have  
18 a copy of the revised paragraph to the order which I believe  
19 was handed up to Your Honor.

20           I do want to note that the U.S. Attorney's office  
21 did join our objection, and I know that Mr. Cordaro is going  
22 to want to address the Court on his remaining issue.

23           THE COURT: Okay. What -- let me on the release.

24           MS. GOLDEN: Sure.

25           THE COURT: It seemed to me at the disclosure

1 statement hearing, and it seems to me today that however  
2 denominated, what is really intended is what I refer to as  
3 an exculpation clause, referring to post petition conduct by  
4 fiduciaries of the estate. I think initially there was some  
5 issue whether it intended to cover non-estate fiduciaries,  
6 but as -- at the time of the disclosure statement hearing,  
7 changes were made. And the way I read it, it really does  
8 only cover estate fiduciaries. Do you agree with that?

9 MS. GOLDEN: Yes, Your Honor.

10 THE COURT: Okay. And it only covers post  
11 petition conduct.

12 MS. GOLDEN: That is how we read it, Your Honor.

13 THE COURT: What confuses me somewhat is there --  
14 the language that the injunction uses is not language that  
15 I've seen before or approved before. Certainly with respect  
16 to the language about post petition conduct, yes, okay, but  
17 it refers to, and I don't have the precise language in front  
18 of me right now, you know, limited to claims or interests  
19 treated in the plan.

20 The language that I'm much more familiar with that  
21 I've approved before that my colleagues approved before,  
22 would be something like the following, none of the debtors  
23 or any of their respective officers, directors, managers,  
24 members, accountants, financial advisors, investment  
25 bankers, agents, restructuring advisors, attorneys and

1 representatives acting in such capacity shall have or incur  
2 any liability to any entity for any act taken or omitted to  
3 be taken in connection with and subsequent to the  
4 commencement of the Chapter 11 cases, the formulation,  
5 preparation, dissemination, implementation, confirmation, or  
6 approval of the plan, or any compromises or settlements  
7 contained therein, the disclosure statement related thereto,  
8 or any contract instrument, release, or other agreement, or  
9 other document provided for or contemplated in connection  
10 with the consummation of the transactions set forth in the  
11 plan.

12 And then the proviso that says, you know, gross  
13 negligence, willful misconduct, criminal conduct includes  
14 the language from the New York Code, you know, the  
15 professional conduct. That's the language I see all the  
16 time. That's the language I approve. I don't know whether,  
17 Mr. Bennett, you're intending something different than that?  
18 It's when I see something that's different that I ask  
19 myself, what is intended to be covered? Is it something  
20 different?

21 MR. BENNETT: Actually it is. First of all, we  
22 did -- we said at the disclosure statement hearing --

23 THE COURT: Because initially you had language  
24 much closer to what I've read.

25 MR. BENNETT: We did, and we said we were taking

1 it out, because we're not seeking to create the exoneration  
2 provisions that you normally see in plans. We recognize the  
3 plan proponents couldn't get it anyway, and we decided that  
4 we didn't need it as a plan term as all.

5 The plan injunction is made necessary by the fact  
6 that in this case we have revested debtors, that because  
7 they're not reorganized revested debtors, aren't protected  
8 from a discharge. So you need a provision that says that  
9 the paperclip salesman whose \$50 claim is supposed to be  
10 treated in the plan, in accordance with the plan terms,  
11 can't go to some state court and sue for \$50 at the  
12 reorganized debtors.

13 We've also learned, I guess professionals have  
14 learned because they have bruises up and down all sides of  
15 their bodies, that one way people try to get around an  
16 injunction that would protect only the debtors is to go  
17 after the people that are doing the work.

18 And so as part of the injunction that protects the  
19 implementation of the plan, we are saying that well, the  
20 first part, which says that no person holding a claim  
21 treated under the plan can get to the debtor, covers their  
22 prepetition claim against the debtor, well they also can't  
23 try to elevate that prepetition claim by accusing someone of  
24 post petition conduct, and thereby getting at the rest that  
25 is to be distributed to everybody else.

1 So that's what this provision is -- this provision  
2 is actually dramatically narrower than a general exoneration  
3 provision. We said we weren't going to put in an  
4 exoneration provision, we mean it. This was not intended to  
5 be a hidden exoneration provision. It's a narrowly tailored  
6 provision just to protect the property that's intended to be  
7 distributed in accordance with the plan and for nothing  
8 else.

9 So, yes, it's narrower than what you've previously  
10 seen, but it's narrower, not broader, not as broad. And  
11 it's different for a different purpose.

12 THE COURT: Have you seen it before somewhere?

13 MR. BENNETT: It's a variation of the kinds of  
14 things that were done, for example, in Lehman where there  
15 was a liquidating trust -- where there was a -- not a  
16 liquidated trust, there was a debtor that was liquidating,  
17 but not reorganizing, but they thought there was enough  
18 reorganization going on, they may have gone the other way.

19 But in liquidating cases where you don't have a  
20 discharge and you need to protect --

21 THE COURT: Oh, I understand what you're trying to  
22 accomplish. The words just --

23 MR. BENNETT: Yeah, that's --

24 THE COURT: -- I haven't seen.

25 MR. BENNETT: I don't know whether those exact

1 words have been used before. I'm pretty sure that's the  
2 form we started with, and we added things that we -- of  
3 subtracted things that we thought we needed to do for this  
4 particular case.

5 THE COURT: Ms. Golden, and you're satisfied with  
6 it?

7 MS. GOLDEN: Yes, Your Honor. I mean, I think  
8 part of our initial concern which wasn't articulated  
9 expressly in our objection, was that the provision -- the  
10 provisions are, for lack of a better word, a little opaque  
11 and difficult to read. So it was hard to sort of determine  
12 what people were getting at.

13 And I think Lehman's release -- Lehman had more  
14 standard release provisions. They had more of them, but  
15 they did have more of the language that we're used to  
16 seeing. But that all said, based on what Mr. Bennett has  
17 articulated to the Court, the U.S. Trustee is satisfied.

18 THE COURT: And does the United States have a  
19 different position on this, Mr. Cordaro? You've withdrawn  
20 your objection, but they joined it.

21 MS. GOLDEN: Yeah, he has a separate objection as  
22 well.

23 MR. CORDARO: Good morning, Your Honor, Joseph  
24 Cordaro, Assistant United States Attorney.

25 Actually, the concern of the United States at this

1 point is not with the injunction provision anymore. It's  
2 actually with a provision that's in the plan confirmation  
3 order that has its genesis in a different provision of the  
4 plan, and it's the provision of the plan that addresses  
5 independent contractors and other people who will be working  
6 on the plan pre-effective date, and whether they get  
7 releases.

8 And so our objection really has now moved over to  
9 something different, because now there's a provision in the  
10 confirmation order that provides that the plan trustee and  
11 directors, potential directors of the debtors could be  
12 exonerated, or would not face liability to the government  
13 for any acts taken or omissions during the gap period of the  
14 -- I think the 14 days post confirmation and prior to  
15 effective.

16 So that really is not -- I don't think that's  
17 something that's in the injunction provision of the plan  
18 that we're discussing now, but something that is of concern  
19 to the United States, because it is a non-debtor release. I  
20 can elaborate further at this time.

21 THE COURT: Well, here's what -- would the parties  
22 who are covered by the provision, I mean, it would be pretty  
23 standard for them to get contractual indemnification that  
24 they wouldn't assume the responsibility and the task of what  
25 they're supposed to do unless they were assured that they

1 were going to be indemnified for good faith conduct. Do you  
2 disagree with that?

3 MR. CORDARO: I don't disagree with that, Your  
4 Honor, but as far as I read this provision, I think it goes  
5 further than indemnification.

6 THE COURT: Let me just stop you there because --

7 MR. CORDARO: Uh-huh.

8 THE COURT: -- and I think the position, what I'd  
9 understood, and I'll give you a chance to elaborate on your  
10 problem with it, is if you put in the indemnification  
11 requirement, you also build in an injunction to keep anybody  
12 from suing for that which would be -- they would be  
13 protected by.

14 MR. CORDARO: Well, Your Honor, I think that in  
15 this case here, what we have, we have a provision in the  
16 plan confirmation order that addresses non-debtor releases,  
17 in essence. And it essentially says that --

18 THE COURT: Can I -- let me just stop you. Maybe  
19 I'm too narrow-minded about this, but whenever I talk about  
20 non-debtor releases --

21 MR. CORDARO: Uh-huh.

22 THE COURT: -- I talk about prepetition claims.  
23 All right? Find some other label to attach. This is what  
24 Mr. Masumoto and I had a conversation, discussion about this  
25 at the disclosure statement. Ordinarily, it's exculpation

1 for post petition, okay. And people -- because, yeah, I  
2 mean, the 2nd Circuit has a series of rulings that deal with  
3 when a Court can -- doesn't have the jurisdiction to order a  
4 third party non-debtor release. And that was part of the  
5 objection that was included in your objection, and the U.S.  
6 Trustee's objection.

7 When you get to post petition conduct that could  
8 only occur in connection with the case, such as this,  
9 there's arising in jurisdiction. So I don't think the  
10 argument about no jurisdiction to do it is a proper  
11 argument. You may have some other basis for doing it, but  
12 give me an example, specifically of what it is you are  
13 trying to preserve the ability to do.

14 MR. CORDARO: Yes, Your Honor. I think that the  
15 exculpation provision as written here in paragraph 80 might  
16 insulate the plan trustee or the directors from any criminal  
17 conduct or any civil fraud. I don't know if there's any tax  
18 implications --

19 THE COURT: Doesn't it have a carve out for gross  
20 negligence, willful misconduct or criminal conduct? I mean,  
21 so -- I mean, your concern about criminal conduct, isn't  
22 that already taken care of?

23 MR. CORDARO: I'm not --

24 (Pause - counsel confer)

25 MR. CORDARO: Okay. I see some language that was

1 added at the U.S. Trustee's request last night apparently  
2 and a different provision of the injunction. So it does  
3 talk about willful misconduct or gross negligence, but I  
4 guess the concern here is that this provision in paragraph  
5 80 which is more specific as to the plan trustee and the  
6 directors may be read to supersede a more general provision  
7 that deals with gross negligence or misconduct. And  
8 specifically it's simply the last five lines of that  
9 paragraph.

10 THE COURT: Let me go over it again.

11 MR. CORDARO: Thank you, Your Honor.

12 THE COURT: Paragraph 80 of the confirmation?

13 MR. CORDARO: Yes, Your Honor.

14 (Pause)

15 THE COURT: Go ahead, Mr. Cordaro. So, Your  
16 Honor, we read this as a -- even though it's for a  
17 telescoped amount of time, as a rather broad exculpation of  
18 the plan trustee and any potential directors. And we think  
19 that it -- it wouldn't necessarily be cured by  
20 indemnification in the event of any liability to the  
21 government for any of the acts of these folks. And although  
22 it is limited to connection with matters necessary to  
23 implement the plan or contemplation of the plan trustee's  
24 duties, again, there could be conduct in there that could  
25 result in liability to the government in its police and

1 regulatory capacity that could be exculpated by this  
2 provision, and that is why we would like it deleted.

3 THE COURT: Did you and try and work out any  
4 language with Mr. Bennett or his colleagues that would  
5 clarify this point from the standpoint of the government?

6 MR. CORDARO: Yes, Your Honor. In fact, all of  
7 these paragraphs -- the -- all of the carve out paragraphs  
8 from 78 to 81 had been negotiated with Jones Day, and  
9 paragraph 80 itself is the product of much negotiations that  
10 has caused it to get larger and larger and larger, and as  
11 you can see, there are subheadings now, but we have stuck on  
12 that last clause.

13 THE COURT: Give me an example of what it is that  
14 you're -- you know, the issue that you think would give rise  
15 to this problem for you?

16 MR. CORDARO: Standing here, Your Honor, and I  
17 want to make clear that I'm answering this hypothetical.

18 THE COURT: I understand.

19 MR. CORDARO: That if there were criminal conduct,  
20 potential fraud. I don't know if any tax issues could arise  
21 as a result of actions taken by directors or the plan  
22 trustees that could implicate a responsible person. I  
23 haven't thought that out standing right here.

24 THE COURT: Well, in terms of criminal conduct, I  
25 don't think anything that's in this order that would affect

1 the government's ability to -- you're not a part to this  
2 order, and if somebody's violated a law, you can prosecute  
3 them, I don't think they can -- I mean, there may be an  
4 argument about intent because they have relied -- reliance  
5 on advice of counsel or something of that nature.

6 What is in this language that would preclude the  
7 government from bringing a criminal prosecution?

8 MR. CORDARO: Your Honor, again, it's just the  
9 language is rather broad and talks about the liability or  
10 the preceding paragraph talks about liability to the  
11 government, and then this carve-out, this carve-out to the  
12 carve-out, essentially says, except for the plan trustees,  
13 and the potential directors during this particular period.  
14 So we would just want to be sure is that we're not talking  
15 about carving them out or creating a safe harbor from the  
16 government for that gap period for criminal conduct or, you  
17 know, civil fraud or anything of that nature that implicates  
18 the government's police and regulatory power.

19 THE COURT: Mr. Bennett, what's wrong with that  
20 position? Is anybody looking for a free pass from criminal  
21 or police and regulatory power?

22 MR. BENNETT: No. First of all, let's -- just so  
23 there's absolutely no confusion what this provision is  
24 about, is that we have three directors who want to find the  
25 plan administrator. That process is ongoing. They want to

1 meet with the debtor's employees and calm everybody down,  
2 and get some transition work done, so that when there is an  
3 effective date, which we hope will be, you know, 12 or 14  
4 days from now, that everybody will be completely up to  
5 speed. And that's a hundred percent about -- I'm trying to  
6 think about how to put in an additional carve-out for  
7 criminal activity --

8 THE COURT: So why can't you put in a proviso --

9 MR. BENNETT: -- because this is -- it says --

10 THE COURT: -- that says --

11 MR. BENNETT: It actually -- actually, Your Honor,  
12 the carve-out --

13 THE COURT: -- as to the government --

14 MR. BENNETT: Well --

15 THE COURT: -- you should not restrict their  
16 exercise of criminal police or regulatory power.

17 MR. BENNETT: Okay. Notice though that the -- all  
18 right. I'm going to need to figure this out because -- only  
19 because of how, as you've -- as is indicated, paragraph 80  
20 is the product of negotiations, and it's kind of --

21 THE COURT: It looks like it's the product of  
22 negotiations.

23 MR. BENNETT: Right. And so --

24 THE COURT: It's a little bit stuck on here, a  
25 little bit here.

1 MR. BENNETT: I'm not in a position to argue.

2 I --

3 THE COURT: But look Mr. Cordaro says -- as I  
4 understand, Mr. Cordaro, your issue is about police or  
5 regulatory powers or criminal, correct? Am I right, Mr.  
6 Cordaro?

7 MR. CORDARO: That's correct, Your Honor. And, of  
8 course, when I say police and regulatory, if there's civil  
9 liability to the government, I'm interested in that too.

10 THE COURT: Right.

11 MR. CORDARO: And I use the example of civil fraud  
12 again. Again, I don't want -- and that's the problem here,  
13 Your Honor, because we're concerned that when a provision  
14 like this gets put in then there's an opening to start  
15 bantering over what hat the government is wearing, and what  
16 the government can and cannot do.

17 THE COURT: I can't help that. I mean, if -- I  
18 certainly understand, and I don't think I would have the  
19 power to do otherwise, to put -- to approve a provision that  
20 would eliminate or affect the government's criminal police  
21 or regulatory powers. Okay. I don't think -- Mr. Bennett,  
22 are you trying to do that or?

23 MR. BENNETT: I'm trying to get people to go to  
24 meetings, which they are not going to get paid to go to, and  
25 which would just be a great idea for everybody concerned, at

1 which, by the way, they don't have the power to do anything.  
2 So that's -- so to go back to -- everything's in context.  
3 If we start to say there's a huge exception to this  
4 principle, then the answer from people who are taking these  
5 jobs, that are going to pay fine, but not super  
6 spectacularly when they ultimately get them, is going to be,  
7 you want me to do what for free, before I'm even hired. And  
8 by the way, their indemnification provisions kick in, of  
9 course, when they're hired, which is on the effective date.

10 So I think that what I -- what the debtors'  
11 position -- what the proponent's position is, is that  
12 obviously we're going to live with whatever Your Honor does,  
13 we're not going to take an appeal, if that's what we're  
14 going to have to do. However, I would say that in order to  
15 facilitate what we're trying to accomplish, I do not think I  
16 will lessen the affect of this provision by adding a proviso  
17 at the very end, you know, kind of an additional proviso,  
18 but I think that's the best way to do it I think of while  
19 standing here --

20 THE COURT: Additionally provided that --

21 MR. BENNETT: -- that it doesn't cover any  
22 criminal liability.

23 THE COURT: Well, it's got to be criminal, police  
24 or regulatory. I mean, you can -- you know, you may get --  
25 because I don't think I can affect -- there may be a dispute

1 later on, I hope not, as to what's police or regulatory, but  
2 I don't think I can do that. Okay?

3 MR. BENNETT: Then we'll add the modification.

4 THE COURT: If --

5 MR. BENNETT: If that means Your Honor --

6 THE COURT: -- it's a civil liability, may be a  
7 different story.

8 MR. BENNETT: Okay.

9 THE COURT: But -- and there may be a dispute as  
10 to what's police and regulatory and what's criminal, I  
11 understand.

12 MR. BENNETT: Okay.

13 THE COURT: Okay. So for two weeks, they're going  
14 to ask for advice of counsel, and make sure that they're  
15 acting in reliance on advice of counsel.

16 MR. BENNETT: I should be happy because it sounds  
17 like they're going to ask for more advice of counsel.

18 THE COURT: Yes, you'll love it.

19 MR. BENNETT: But I will make the change. That'll  
20 be --

21 THE COURT: Are you satisfied with that, Mr.  
22 Cordaro? I mean I think -- I don't agree -- I mean, there  
23 may be a dispute, and I hope there isn't any, I hope this  
24 never becomes an issue as to what's police, regulatory,  
25 criminal it's going to be clear, right. Sometimes you get a

1 dispute what's police or regulatory power.

2 Civil liability I do think, just like anybody  
3 else, the government could be impacted by this, but I mean I  
4 think -- are you satisfied if you get this proviso added  
5 that carves out any exercise by the government of police or  
6 regulatory or criminal powers?

7 MR. CORDARO: I'm more satisfied than I am now,  
8 Your Honor, and I'm not trying to be flip with the Court at  
9 all.

10 THE COURT: I understand.

11 MR. CORDARO: I would prefer to have the provision  
12 deleted, but that does give me some comfort.

13 THE COURT: Okay. All right. That's what I'm  
14 going to direct. Work with Mr. Bennett, and see if you can  
15 come up with one more clause that will accomplish this,  
16 okay?

17 MR. CORDARO: Thank you, Your Honor. And there  
18 was only one other --

19 THE COURT: Go ahead.

20 MR. CORDARO: -- issue that I wanted to mention  
21 that in this carve-out language, the government is defined  
22 as the United States and its agencies. There have been plan  
23 confirmation orders approved, Getty I believe is one of  
24 them, where the definition of government extends to  
25 governmental units in Section 101 of the Bankruptcy Code,

1 and we had some discussions about this. The United States  
2 would prefer that if -- that the government be defined as  
3 the United States and the states, we think with the same  
4 regulatory goals, and we haven't reached agreement on that,  
5 and I just wanted to --

6 THE COURT: We hope we don't have anybody from any  
7 state or --

8 MR. CORDARO: That is true.

9 THE COURT: -- complaining. I'll let them defend  
10 their own rights, they're not here, so you're protected.  
11 Okay?

12 MR. CORDARO: Thank you, Your Honor.

13 THE COURT: Thank you. Before you sit down, Mr.  
14 Cordaro, to the extent that you were objecting to the scope  
15 of the exculpation other than what we've just talked about  
16 now, are you withdrawing your objection? Because you joined  
17 the U.S. Trustee's objection. Do you withdraw your  
18 objection?

19 MR. CORDARO: Yes, Your Honor. The remainder of  
20 that carve-out language addressed our concerns.

21 THE COURT: Thank you very much.

22 MR. CORDARO: Thank you, Your Honor.

23 THE COURT: Ms. Golden?

24 MS. GOLDEN: Okay, Your Honor. And now the  
25 remainder of the United States Trustee's objection is in

1 connection with the plan provision which carves out -- which  
2 allows the payment of the professional fees of the plan  
3 proponents and indentured trustees.

4 Your Honor, I know that you read our brief, and so  
5 rather than reiterating everything that's in the brief, I  
6 will try and highlight our position, and certainly try and  
7 distinguish our position.

8 THE COURT: It took me like 15 pages to get to the  
9 fact that Judges Gerber and Peck have ruled otherwise, and  
10 other than saying you disagree, you didn't really dissect  
11 their opinions, and say why you think they were wrong. I  
12 know you were being nice about it, but you know, I kept  
13 reading and reading and reading, and I was, are they ever  
14 going to point out that two of my colleagues have gone the  
15 other way on this issue?

16 MS. GOLDEN: Well, obviously, Your Honor, we  
17 disagree with your two colleagues. In Adelphia, we objected  
18 at the time, and we still do not think it was correctly  
19 decided. And Lehman, obviously, is on appeal as Your Honor  
20 probably knows.

21 THE COURT: Tell me what the status of that is.

22 MS. GOLDEN: It was -- this clerk's office just  
23 docketed the appeal at the district court, and I think that  
24 the files are in transfer, a judge has been assigned, I  
25 think it's Judge Hellerstein, and the briefing schedule --

1 the briefs aren't -- the first briefs aren't due until later  
2 some time this month. So it's sort of in its very early  
3 stages.

4 Obviously, Your Honor, as I said, you know, we  
5 disagree with the rulings on those two decisions. We view  
6 this strictly as an issue of statutory construction, and  
7 that the specific statute 503(b) supersedes the more general  
8 statute 1129(a)(4). The circumstances surrounding both  
9 those cases are very different than the circumstances  
10 surrounding this one.

11 In Adelpia -- well, first let me say that in both  
12 those cases, it was somewhat questionable whether  
13 independently the creditors that were making the claims for  
14 their payment would have been able to satisfy the 503(b)  
15 standard. In Adelpia, Judge Gerber didn't rule  
16 specifically pro or con on the 503 issue. He did state that  
17 1129(a)(4) is not an independent basis on which to grant the  
18 fees, and then looked to 1123(b)(6) what a plan may contain  
19 is appropriate and not inconsistent.

20 Certainly the concern in Adelpia was that the ad  
21 hoc creditors who were instrumental in negotiating the  
22 global settlement were -- the concern was that it was going  
23 to blow up and the entire case was going to tank.

24 In Lehman, we had a circumstance where every  
25 member of the creditor's committee was seeking a -- was

1 seeking to be reimbursed their independent professional  
2 fees' expenses. And Judge Peck obviously didn't necessarily  
3 reach the 503 issue. He ruled strictly on the  
4 permissibility under 1129(a)(4).

5 And again, Your Honor, we disagree with their --  
6 particularly with Judge Peck's view of the statutory  
7 construction. We believe that allowing such a broad view of  
8 1129(a)(4) -- first we believe that it isn't consistent with  
9 503. We believe that 503 really does set out the standard  
10 under which these types of payments should be made. And  
11 that 1129(a)(4) read as broadly as Judge Peck ruled, really  
12 opens the door to almost anything that's not illegal that  
13 people want to put in the plan.

14 And our view is that regardless of whether  
15 everyone consents, you can't consent to violate the  
16 Bankruptcy Code. And, you know, the circumstances here are  
17 different. Because here we have a situation that 503(b) was  
18 almost designed to address. I mean, it seemingly falls  
19 squarely within 503(b).

20 I know that at the January hearing, Your Honor  
21 indicated as much. We would not be surprised if the -- I'll  
22 just call them the creditors, made or were directed to make  
23 503(b) applications, that the Chapter 11 trustee would  
24 support them. And we think that there's really -- we don't  
25 understand the rationale why they were -- I mean, we

1 understand in a global sense, but in this particular case,  
2 we really don't understand why they're moving to have these  
3 paid under 1129(a)(4) other than because they want to have  
4 the not yet defined, perhaps --

5 UNIDENTIFIED: (indiscernible)

6 MS. GOLDEN: Thank you guys. Or presumably less  
7 rigorous standard of 1129(a)(4) to look at the fees.

8 THE COURT: Let me ask you this. What -- are  
9 there payments in your view that would be permitted under  
10 the reasonableness standard under 1129(a)(4) where you would  
11 not refer back to 503(b)?

12 MS. GOLDEN: Well, sure. I think that 1129(a) --  
13 well, in the context of creditors seeking reimbursement for  
14 their professional expenses, we would -- our position is we  
15 would always look back to 503. The general proposition for  
16 1129(a)(4) in the Court's view of the reasonableness of fees  
17 certainly, you know, financing fees are often contemplated  
18 under that. Payments that a reorganized debtor may have to  
19 make going forward are often contemplated under that.

20 THE COURT: Give me an example.

21 MS. GOLDEN: Well, let me think. Sometimes when  
22 KEIPs and KERPs are put into a plan and the payments are  
23 looked out, and the claims are really being paid by the  
24 reorganized estate, when they're approved in that context,  
25 11 -- our position, let me just say, is that they shouldn't

1 be approved in a plan. But when they are approved in a  
2 plan, the payments going forward would really be  
3 contemplated under that.

4 THE COURT: I'm not sure where that puts you,  
5 because you're saying it shouldn't be done, but --

6 MS. GOLDEN: Right, okay. I --

7 THE COURT: Okay.

8 MS. GOLDEN: I take it back. But certainly there  
9 are --

10 THE COURT: So, you know, the --

11 MS. GOLDEN: -- financing payments that can be  
12 approved.

13 THE COURT: I found very little law on it, other  
14 than my colleagues, and yes, there are some decisions  
15 elsewhere. The 5th Circuit in the Cajun Electric case, are  
16 you familiar with that?

17 MS. GOLDEN: No, I'm not, Your Honor.

18 THE COURT: In the 5th Circuit?

19 MS. GOLDEN: Let me take a look.

20 THE COURT: It's at 150 F.3d 503. And the issue  
21 in Cajun Electric was a payment by the plan proponents to  
22 creditors, who agreed to support the plan, the proposed  
23 plan. The bankruptcy court had approved it, the district  
24 court reversed, the 5th Circuit reversed the district court.  
25 And it wouldn't be a 503(b) because 503(b) is payments by

1 the estate, and Judge King talked about, well, this is  
2 payment by the plan proponents from their own, you know, own  
3 funds. And she's got some discussion, and I'm going to have  
4 some questions for Mr. Bennett, or whoever's going to argue  
5 this, because she talks about professionals would be  
6 compensated under 330, Section 330.

7 And so, I mean, one question I have, you can  
8 address it, but I certainly want to hear what the other side  
9 has to say. Could somebody write a plan provision that  
10 said, we're going to pay a million dollars to counsel to the  
11 debtor because we think they did a swell job, even though  
12 this wouldn't be -- I mean, the 330, Section 330 standards,  
13 could you get around Section 330 by writing it as a plan  
14 provision under 1129(a)(4)?

15 MS. GOLDEN: Well, Your Honor, I was actually in  
16 my notes going to bring that up. I mean, obviously, you  
17 know, the goal line has moved a little bit with each case.  
18 First we had the case with the ad hoc creditors in Adelphia,  
19 then the committee members in Lehman. And here we have the  
20 plan proponents who would presumably, based on indications,  
21 be able to satisfy --

22 THE COURT: Look, I'm not --

23 MS. GOLDEN: -- the burden and who's to say that  
24 the next --

25 THE COURT: Judge Gerber didn't --

1 MS. GOLDEN: -- case a creative lawyer would not  
2 try and put it in a plan?

3 THE COURT: Well, Judge Gerber didn't say it this  
4 way, but I mean if I had been the judge in Adelpia, I  
5 certainly would've been exhausted by the time, because of  
6 the fighting in that case, that anything to get them out of  
7 here, okay.

8 MS. GOLDEN: No question, and absolutely,  
9 absolutely, we -- you know, and we understand that.

10 THE COURT: And if that's the price of getting  
11 them out of here, fine.

12 MS. GOLDEN: We -- you know --

13 THE COURT: But that's not a good -- I don't know  
14 how you write that exception.

15 MS. GOLDEN: That is correct, but we do understand  
16 the -- Judge Gerber's gut feeling generally about the entire  
17 case, and how difficult it was.

18 THE COURT: You know, he went on to say -- he put  
19 some carve outs in his rule about, you know, what he wasn't  
20 going to approve payments for because of some of the  
21 arguably truly outrageous conduct that went on in the case.  
22 He was not going to pay for that, you know, approve payments  
23 for that.

24 MS. GOLDEN: Right.

25 THE COURT: But --

1 MS. GOLDEN: But we do think --

2 THE COURT: -- in the eyes of the beholder, but I  
3 don't know how you write a standard that could cover that.

4 MS. GOLDEN: It's tough, and we do think that  
5 certainly it would not be a surprise to us if somewhere down  
6 the line, you know, a creative attorney did try and do what  
7 you just mentioned, and put in a payment to retain  
8 professionals with -- trying to bypass Section 330.

9 THE COURT: The other issue where I've heard this  
10 raised about 1129(a)(4) really deals with payments to  
11 financial advisors, investment bankers, because they're not  
12 covered -- I mean, could a payment -- could 1129(a)(4) be  
13 used to approve payment to an investment banker for a party  
14 that was instrumental in getting the plan to -- a plan done?

15 It's not in the substantial -- the substantial  
16 contribution provision doesn't --

17 MS. GOLDEN: Is only attorneys and accountants.

18 THE COURT: -- have financial advisors, doesn't  
19 have investment bankers. And so I've seen the argument that  
20 well, you can't do it under -- it's -- I guess you can get  
21 into the legislative history whether they were intended, but  
22 the absence of it was intended to mean that --

23 MS. GOLDEN: That would --

24 THE COURT: -- they're not covered.

25 MS. GOLDEN: I believe that would be the U.S.

1 Trustee's argument. We do believe that there is somewhat of  
2 a hold there, in the sense that the statute only applies to  
3 attorneys and accountants, and the U.S. Trustee's positions  
4 are that those types of retained professionals, if financial  
5 advisors and investment bankers were to be compensated in  
6 the same manner, they would've been included in the statute.  
7 That would be the U.S. Trustee's position.

8 THE COURT: One could argue because you argue that  
9 the specific controls the general, which is one of the usual  
10 rules of statutory construction. And you can say the  
11 specific 503(b) is specific as to attorneys and accountants,  
12 it's silent as to investment bankers, therefore, it doesn't  
13 preclude the use of 1129(a)(4).

14 You're saying the absence of it in 503(b) means  
15 never.

16 MS. GOLDEN: Correct and --

17 THE COURT: The other side of it would be that the  
18 absence of it doesn't take it out of 1129(a)(4).

19 What I'm struggling with is, see, I understand  
20 your argument, okay.

21 MS. GOLDEN: I know.

22 THE COURT: But I'm trying to understand when  
23 1129(a)(4) if -- I mean, the kinds of things that 1129(a)(4)  
24 apply to are, for the most part, are the types of work that  
25 503(b) deals with. It just doesn't deal with all the

1 parties, it's all the potential participants.

2 MS. GOLDEN: I understand what you're saying, Your  
3 Honor.

4 THE COURT: So what's your -- your position is  
5 what? The absence of it in 503(b) means --

6 MS. GOLDEN: The absence of it --

7 THE COURT: -- never.

8 MS. GOLDEN: -- means that it's excluded in the  
9 context of the hypothetical that you raised.

10 Another thing that I do want to add in this case  
11 is also the way the provision -- you know, the provision is  
12 drafted. Obviously --

13 THE COURT: The provision meaning which?

14 MS. GOLDEN: The plan provision, excuse me.  
15 Obviously it takes it out of Your Honor's independent  
16 review.

17 THE COURT: Well, let's just stop -- let's  
18 assume --

19 MS. GOLDEN: Uh-huh.

20 THE COURT: -- that the fact that I've got about  
21 ten boxes of fee applications sitting in my chambers, not in  
22 this case, but in another big case, doesn't totally deter me  
23 from saying I'm not approving any payments that I don't get  
24 to review.

25 So let's assume this was changed to say that, you

1 know, the applications have got to be -- the procedure, the  
2 way they structured it has got to be changed --

3 MS. GOLDEN: Uh-huh.

4 THE COURT: -- so that they've got to file an  
5 application, and it's got to come to me, and yes, I'll see  
6 whether the U.S. Trustee or anybody else has an objection to  
7 it, but I'm not foreclosing my power to just say I agree  
8 with you in principal but not what you've done, you know,  
9 these specific tasks get cut out or whatever. So let's  
10 assume I agree with you to that extent.

11 MS. GOLDEN: The U.S. Trustee views whether or not  
12 there's a substantial contribution is truly an issue for the  
13 trier of fact. To the degree that Your Honor found that  
14 there was a substantial contribution made, then the review  
15 of the parameters of the time records and the reasonableness  
16 review, excuse me, my tongue just got twisted, would take  
17 place.

18 The way the provision is put in now, aside from  
19 the 1129 aspect, it actually goes further than the Adelpia  
20 and Lehman cases because if no one objected once the  
21 creditors put in their applications, Your Honor will -- the  
22 way it's drafted has no review power over reasonableness, if  
23 there's no -- is there is no objection.

24 And that goes further. That's a step further than  
25 both Adelpia where Judge Gerber said, take it back and do a

1 330 review, and Judge Peck said, I send it back to the  
2 parties to do a reasonableness review. He didn't say 330 or  
3 whatever. But here, you're basically precluded if nobody  
4 objects from doing a review of the time records.

5 And so in a practical level, the -- obviously the  
6 statutory and legal level we've discussed, but on a  
7 practical level, it -- we see, for lack of a better term,  
8 the slippery slope coming in, and each iteration seems to be  
9 broader and more permissive. And it appears that as it's  
10 going, what should be a rare and narrow circumstance,  
11 creditors and others are trying to make more commonplace and  
12 almost a matter of right, assuming that it's in the plan and  
13 people vote.

14 THE COURT: 1129(a)(4) on this point of what's the  
15 Court's role, and can it be taken away, the last phrase is  
16 subject to the approval of the Court as reasonable. And I  
17 must say, nobody cited Cajun, but Judge King in the Cajun  
18 case, there was an issue there about whether it had to be  
19 approved before or after confirmation, and the Court made  
20 clear -- the Court, Judge King and the 5th Circuit made  
21 clear, it's got be approved by the Court as reasonably  
22 before it's paid. Okay. And she said, "We note that  
23 1129(a)(4)'s requirement that the bankruptcy court determine  
24 whether payments subject to the subsection are reasonable,  
25 creates a relatively open-ended standard that is potentially

1       ambiguous. What constitutes a reasonable payment will  
2       clearly vary from case to case, and among other things, will  
3       hinge to some degree upon who makes the payments at issue,  
4       who receives those payments, and whether the payments are  
5       made from assets of the estate. In the typical case,  
6       payments that are not payable from or reimbursable by the  
7       bankruptcy estate should not engender anything like the  
8       judicial scrutiny devoted to those that are payable out of  
9       the bankruptcy estate." This was at 150 F.3d page 517.

10               So, I mean, she clearly read this section that  
11       Court review is required not we can come up with some  
12       procedure that, you know, does something different.  
13       Certainly when a Court is reviewing it, certainly when I'm  
14       reviewing it, I look to see whether there is -- is there any  
15       objection from any party, that's a big factor, but that  
16       doesn't come to the basic point of does 503(b) apply.

17               Let me hear from --

18               MS. GOLDEN: Certainly, Your Honor.

19               THE COURT: -- the proponents. Mr. Bennett.

20               So tell me about -- could you write a provision  
21       that says, pay Mr. Bennett a million dollars, it's  
22       reasonable because of this great result he's achieved, and  
23       thereby avoid all the requirements under 330?

24               MR. BENNETT: Well, I don't remember every word of  
25       Judge Gerber's decision, but I think one of the things that

1 Judge --

2 THE COURT: Let's not talk about Judge Gerber's  
3 decision or Judge Peck's decision.

4 MR. BENNETT: Okay.

5 THE COURT: Let's talk about what the statute  
6 provides because I'm not sure whether I agree or disagree.  
7 I'm reluctant to disagree with my respected colleagues who  
8 obviously thought a lot about the issue, but let's go back  
9 to basic first principles, look at the statute, try and  
10 mesh --

11 MR. BENNETT: That's fine, Your Honor.

12 THE COURT: -- 5 -- you know, 330, 503(b), and  
13 1129(a)(4).

14 MR. BENNETT: I have a hard time understanding how  
15 the word reasonable in 1129(a)(4) and the word reasonable  
16 that appears so many times in 330 is going to get anyone to  
17 any different result. So I --

18 THE COURT: Well, the issue is 503(b), which talks  
19 about, you know, it would --

20 MR. BENNETT: You asked about 330.

21 THE COURT: I know.

22 MR. BENNETT: And I'm --

23 THE COURT: And, you know, because you have to --  
24 503(b) references, I'm pretty sure, references -- well, what  
25 it does is in 503(b)(4) it essentially picks up --

1 MR. BENNETT: The attorney limitation.

2 THE COURT: -- the factors that 330 --

3 MR. BENNETT: Right.

4 THE COURT: -- would use.

5 MR. BENNETT: Right.

6 THE COURT: Because 330 is really limited -- go  
7 ahead, Mr. Bennett.

8 MR. BENNETT: As the Court indicated in the 5th  
9 Circuit, there's a step when you get to 1129(a)(4) which is  
10 deciding what reasonable is going to mean in a particular  
11 circumstance, and Your Honor is familiar with that. That  
12 happens lots of times when you're going through the  
13 Bankruptcy Code, when you're trying to determine whether  
14 someone has exercised reasonable misjudgment, for example.  
15 I mean, giving content to the word reasonable is something  
16 that you have to do all the time as judges.

17 THE COURT: Well, let me ask, could you write a  
18 plan provision that said that Morrison and Forester should  
19 be paid a bonus of a million dollars because of the  
20 excellent result achieved in the case?

21 MR. BENNETT: And you would --

22 THE COURT: And put that in -- and so you put it  
23 into the plan, and you say pursuant to Section 1129(a)(4),  
24 the plan proponents agree to pay Morrison and Forester,  
25 debtor's counsel, it would be covered by 330 --

1 MR. BENNETT: Right.

2 THE COURT: -- a bonus of a million dollars. And  
3 the creditors say, we're not happy about it, but we're --  
4 you know, it's -- in the context of this case, that's --  
5 it's not worth fighting about, fine, we'll vote in favor,  
6 we'll overwhelmingly vote in favor of the plan. Is that  
7 plan --

8 MR. BENNETT: And nobody -- and no creditor  
9 objects?

10 THE COURT: And no creditor -- is that plan  
11 provision -- well, the U.S. Trustee is a party in interest  
12 with standing to object.

13 MR. BENNETT: Well, my point -- one thing I -- I  
14 want to answer your question, but I want to say one thing we  
15 should remember about this case, and we're deciding this  
16 case, is we have overwhelming acceptance of creditors and  
17 not a single squawk about anything among the groups.

18 THE COURT: Well, I haven't heard from Sapere yet.  
19 They've squawked about everything in the case.

20 MR. BENNETT: Yes, they didn't squawk about this.

21 THE COURT: Okay.

22 MR. BENNETT: All right. First of all, and again,  
23 in the hypothetical you're suggesting, and I'll go to the  
24 general if you want me to. But in the hypothetical you're  
25 suggesting, you run into the word reasonable in 1129 in the

1 same way you would run into the word reasonable in 330, and  
2 my guess is, because one thing that no one mentioned that we  
3 ought to think about first which is, everyone's talking  
4 about superseding and superfluous, those are like the  
5 favorite words for this issue.

6 THE COURT: I haven't used them.

7 MR. BENNETT: And, no, I'm saying in the -- in a  
8 briefing. Then the argument, it was all about superseding,  
9 and then in the brief, it was about all making things  
10 superfluous.

11 What we're supposed to do first is see if we can  
12 get the provisions to work together, and whether there's any  
13 problem getting them to work together. We haven't talked  
14 about that at all. I think you're trying to do that right  
15 now. And I think by using the word reasonable in  
16 1129(a)(4), conflicts are very significantly minimized  
17 because there are reasonableness provisions all over the  
18 place.

19 And so for example, dealing with the counsel for  
20 the trustee's bonus, counsel for the trustee's fees are  
21 subject to a reasonable test, however they're going to be  
22 awarded under 330 or 1129(a)(4) it doesn't make a  
23 difference. Those --

24 THE COURT: I don't know. I mean, 1129(a)(4)  
25 doesn't have the list of factors in it that 330 has in it.

1 MR. BENNETT: Not until the person who has to  
2 decide how reasonableness should be determined with respect  
3 to professional -- what's the best place to get content for  
4 reasonableness in evaluating a professional fee. And I  
5 would say the harder question that you could ask would be --

6 THE COURT: Why isn't the best place to get  
7 reasonableness in the context of a payment of fees to, you  
8 know, for a committee member or an indentured trustee in  
9 503(b) that sets the bar for the additional requirements of  
10 substantial contribution?

11 MR. BENNETT: I'll give you two important reasons.

12 THE COURT: Go ahead.

13 MR. BENNETT: Number one, the making of a payment  
14 is not necessarily the allowance of an administrative claim  
15 followed by the making of a payment.

16 THE COURT: Well, you wrote a plan that  
17 specifically says, this payment is to be paid as an  
18 administrative expense.

19 MR. BENNETT: We --

20 THE COURT: You used the words. Once you use  
21 those words in a plan that says, the only place in the Code  
22 that talks about, I think that talks about, you know,  
23 allowing an administrative expense is 503(b).

24 MR. BENNETT: Well, not really.

25 THE COURT: Okay. Go ahead.

1 MR. BENNETT: Because in 503(b), in particular, in  
2 503(b) the word before the long list is including. And as  
3 we know I think from the first principles --

4 THE COURT: Well, it starts, 503(b) says, "After  
5 notice and a hearing, there shall be allowed administrative  
6 expenses."

7 MR. BENNETT: Okay. So --

8 THE COURT: So that tells me any time I'm going to  
9 deal with administrative expenses, I've got to look to  
10 503(b).

11 MR. BENNETT: Maybe it does, because it says  
12 including.

13 THE COURT: Yes.

14 MR. BENNETT: It doesn't say only the ones that  
15 follows, it says including the ones that follows. And one  
16 of the ways that you can harmonize 1129(a)(4) with 503 if  
17 you think you need to, is by saying, you know something, you  
18 can have administrative expenses that arise for other  
19 reasons. 1129(a)(4) may well be one of them. And this  
20 isn't an exclusive test for the only circumstances where  
21 something can wind up with administrative priority, it  
22 doesn't even pretend to be.

23 THE COURT: Okay. Here is what I -- I'm going to  
24 do what Judge Gerber did the first time around on plan  
25 confirmation, I'm going to require that -- I'm not deciding

1 the issue today, okay.

2 So the language in the confirmation order needs to  
3 be changed, and I'll give -- my clerks will give you this  
4 after, the creditor co-proponents' fee expense claims and  
5 the indentured trustee fee expense claims shall be paid in  
6 accordance with Section 2(a)(3) and 2(a)(4) of the plan  
7 respectively, notwithstanding anything to the contrary  
8 contained in the plan, requests for allowance and approval  
9 of creditor co-proponents' fee expense claims, and  
10 indentured trustee fee expense claims are subject to  
11 applicable requirements of law, and shall be made on  
12 application to this Court, which application shall be  
13 required to be filed no later than the deadline established  
14 for filing final fee applications with respect to  
15 professional fee claims. Nothing in the plan or this order  
16 shall constitute a determination of the entitlement of any  
17 party to receive payment of such claims, and the rights of  
18 the applicants, the United States Trustee in this court are  
19 expressly reserved with respect to any such applications.

20 And that's the language that's going to get  
21 substituted in the order. If there is an application for  
22 fee expense claims by the co-proponents or the indentured  
23 trustees, they should likewise include whatever showing they  
24 believe they can make to justify the payments on the basis  
25 of substantial contribution.

1           After receiving the applications and any further  
2 briefing on the issue, I'll decide whether fees should be  
3 awarded based solely on the reasonable standard, or whether  
4 only on a substantial contribution standard, and I will make  
5 the determination what the amount should be. I don't want  
6 it to do it in two steps, I want to do it one step, namely  
7 if you decide not to submit substantial contribution claims,  
8 fine, don't submit substantial contribution claims. You'll  
9 take your chances on -- I'm going to -- the one thing I am  
10 going to do, the procedure doesn't fly, okay, I read Cajun  
11 Electric -- I read the statute in Cajun Electric saying,  
12 I've got to be the one to make this determination, not  
13 somebody else, okay.

14           The when isn't so big a deal.

15           MR. BENNETT: Uh-huh.

16           THE COURT: Cajun Electric makes that clear.

17 Okay. But I'm going to be the one who decides I'll  
18 certainly -- it may be that when you submit these  
19 applications you will satisfy the U.S. Trustee that, you  
20 know, the -- that yes, a very strong case has been made for  
21 substantial contribution. I said when this issue first came  
22 up, it seems to me it's very likely that a strong case can  
23 be made for substantial contribution here.

24           So whether it covers every dollar that's sought or  
25 not may be a different issue. You know I think that the

1 U.S. Trustee in reviewing the application needs to take --  
2 keep in mind, I think something is very important with  
3 respect to any objection that the U.S. Trustee files, and  
4 I'm not suggesting they don't do this now, but it requires  
5 the exercise of judgment and discretion.

6 Sometimes, and I think both Ms. Golden and Mr.  
7 Masumoto have -- this has occurred in other cases, they  
8 recognize there may be a basis to assert an objection, but  
9 exercising judgment and discretion, they decide not to  
10 assert the objection. They don't support the application,  
11 they just simply say, we do not -- we're stating an  
12 objection to it, and then the Court go ahead and go to that  
13 in the rules.

14 So, you know, a purist might find that there's a  
15 legal principle we ought to fight to the death on here, but  
16 sometimes that makes no sense whatsoever. In the exercise  
17 of judgment and discretion, you either work it out and maybe  
18 the applicants don't get quite every penny they want, but  
19 you work out a satisfactory agreements. And that's  
20 certainly happened before and maybe it'll happen again, but  
21 if I have to go ahead and decide it I will. That's  
22 essentially what Judge Gerber -- tracks what Judge Gerber  
23 did at the time of confirmation in Adelpia.

24 I do have a -- so that's what -- the result is  
25 going to be. The question I have is, with respect to the

1 indentured trustees, and maybe somebody else wants to be  
2 heard, counsel for the indentured trustees. So let me ask,  
3 make your appearance and --

4 MR. ASHMEAD: Sure. Good morning, Your Honor,  
5 John Ashmead of Seward and Kissel for Wilmington Trust.

6 THE COURT: So, Mr. Ashmead --

7 MR. ASHMEAD: Uh-huh.

8 THE COURT: -- if you make an application --

9 MR. ASHMEAD: Uh-huh.

10 THE COURT: -- I want to see the language in the  
11 indenture --

12 MR. ASHMEAD: Uh-huh.

13 THE COURT: -- or indentures. I don't know, is it  
14 a single indenture?

15 MR. ASHMEAD: This is a single indenture, well,  
16 two series I think a single indenture, yeah.

17 THE COURT: Okay. I want to see the language in  
18 the indenture.

19 MR. ASHMEAD: Uh-huh.

20 THE COURT: I couldn't -- I don't know if I -- if  
21 it is anywhere, I couldn't find it.

22 MR. ASHMEAD: Uh-huh.

23 THE COURT: The reason I say that, am I correct  
24 that the indentured trustee is going to get paid no matter  
25 what. The issue is, who pays it.

1 MR. ASHMEAD: That's --

2 THE COURT: You have a charging lien against any  
3 recovery by the holders of these notes. So you're going to  
4 get -- your client is going to get paid, the only issue is  
5 who is going to pay it.

6 MR. ASHMEAD: That's absolutely correct, Your  
7 Honor. I mean if I -- I know you're sort of tired of the  
8 topic, but I'll just take one minute to hear from our  
9 perspective.

10 THE COURT: Okay.

11 MR. ASHMEAD: You know, 503(b) and we don't need  
12 to rehash the Lehman decision and the Adelphia decision, but  
13 we've always viewed it as one method of payment. It's  
14 rarely used. I've been representing indentured trustees for  
15 ten years of practicing for 22 years, I've never submitted a  
16 503(b) application in all that time that completely  
17 customary and normal method of the payment, whether I'm  
18 before this Court, Delaware, Texas, California, Florida, any  
19 place I've been has basically been it's been baked into the  
20 plan as a payment with you sending your invoice to the  
21 relevant parties, the U.S. Trustee, creditor's committee if  
22 there's an equity committee, the debtor, plan administrator  
23 if they have an objection, they bring it to the Court, if  
24 you can't resolve it, of course, you always reserve your  
25 rights to exercise your charging lien.

1           And you go that way, and there's only two  
2           circumstances, and I think that have to both be present  
3           where I would see an indentured trustee put in a 503(b)  
4           application is where there is no plan provision, the debtor  
5           just refuses to put one in there, and there's for better  
6           worse, there's really nothing to assert your charging lien  
7           against, right. There's a piece of paper, hope certificate  
8           or something being distributed. It's basically sort of a  
9           nonconsensual way to get paid if we have to go there.

10           Granted 503(b) is a very difficult standard to  
11           satisfy and we understand that. And that's why --

12           THE COURT: Here, I don't know what role the  
13           indentured trustee played. I certainly have, I think at  
14           this point, a pretty good understanding of the roles, the  
15           co-proponents have played and why they could -- they can  
16           assert a substantial contribution claim. Is there any basis  
17           on which the indentured trustee, in your view, in good faith  
18           can assert a substantial contribution claim here?

19           MR. ASHMEAD: I think there is but I think it's a  
20           very difficult standard. And basically indentured trustees  
21           don't bargain for that. They're not an economic  
22           stakeholder. They come in here and that's why they have  
23           that charging lien, I mean although the --

24           THE COURT: The problem I have is, is that under  
25           the American rule, absent very express authority to the

1 contrary, parties bear their own legal costs. Okay. And so  
2 when I look at 1120 -- when I look at the combination of  
3 503(b) and 1129(a)(4), I don't see anything that expressly,  
4 other than what's in 503(b) that would expressly be an  
5 exception to the American rule for indentured trustees.

6 MR. ASHMEAD: You're right, Your Honor, and that's  
7 why I believe it's in -- and there's nothing in 503(b) which  
8 says that's the only method or that indentured trustees or  
9 creditors if they want to get paid must file under that.  
10 And I think that's where you get into the 1129(a)(4)  
11 discussion or plans generally. And I think it is something  
12 that's in there, and if it wasn't in the plan, we are just  
13 going to be asserting your charging lien to be clear though,  
14 you know, the indentured trustees, you know, if they didn't  
15 have these rights, and of course they have their charging  
16 lien, they'd be engaging in a game of chance on whether or  
17 not they're going to get paid. And they have no reason to  
18 do that. They're not a true economic stakeholder. They're  
19 basically a contractual -- they have contractual obligations  
20 and duties to this broad class. And they have fiduciary  
21 duties that, of course, are kicked in upon a default.

22 And doing that, and doing their job, is all  
23 grounded in the knowledge that ultimately generally by hook  
24 or by crook they're going to get paid, or they would have no  
25 reason to do it. They would not be acting as a volunteer.

1           You know, of course, Ms. Golden just reminded me  
2 of, yes, of course, we have the contractually -- in the  
3 indenture, we have the right to be paid --

4           THE COURT: Yes. And --

5           MR. ASHMEAD: -- by the debtor and we understand  
6 that.

7           THE COURT: -- if you were representing -- this  
8 was a secured, you know, if these were secured notes --

9           MR. ASHMEAD: Uh-huh.

10          THE COURT: -- and the creditors, this group of  
11 creditors was over secured --

12          MR. ASHMEAD: Uh-huh.

13          THE COURT: -- you'd be entitled to post petition  
14 interest and fees if there's a fee provision. But that's  
15 not the situation here.

16          MR. ASHMEAD: No, we understand. And that's why  
17 at the end of the day, Your Honor, as you recognized in the  
18 very beginning, you have your charging lien or else you'd be  
19 really in trouble.

20          Look, we have no problem submitting an application  
21 for reasonableness review. We need to understand that at  
22 the end of the day, we have our charging lien, and right to  
23 be paid. We are not submitting a 503(b) application --

24          THE COURT: Why should you be -- why should the  
25 indentured trustee be any different than other unsecured

1 creditors, substantial unsecured creditors who have their  
2 own counsel, and having been blessed with this plan  
3 provision to pay their counsel fees?

4 MR. ASHMEAD: Because I think it's a function of a  
5 negotiation between the major constituencies in the case,  
6 the economic stakeholders and their representatives, the  
7 debtor, the creditor's committee, sometimes there's an  
8 equity committee, and the large players, and they recognize,  
9 and they don't have to agree, and if they don't, we don't  
10 have that provision. If they agree, we have it. So it's  
11 like any other provision.

12 THE COURT: So if they want to get you to help  
13 deliver your clients in support of a plan they'll support  
14 paying --

15 MR. ASHMEAD: Well --

16 THE COURT: -- your fees.

17 MR. ASHMEAD: I understand. I think -- I don't  
18 know that we deliver people, obviously we make sure that  
19 people are informed and we try to help in the organization.  
20 Indentured trustees often, as you probably know, serve as  
21 the chair of the committee, and in this committee, we're the  
22 last original member remaining. And as I think the Chapter  
23 11 Trustee would attest and even Mr. Bennett, we played a  
24 role sort of when there were some very bumpy periods at  
25 times to try to be a bridge between the different folks and

1 keep things going on and moving in an efficient way, which  
2 we think --

3 THE COURT: That might well support a substantial  
4 contribution claim --

5 MR. ASHMEAD: It --

6 THE COURT: -- if you acted not in your capacity  
7 as a committee member but --

8 MR. ASHMEAD: It might, but we don't want to be  
9 subject to that standard because that's sort of a game of  
10 chance for us --

11 THE COURT: All right.

12 MR. ASHMEAD: -- that we didn't sign up for.

13 THE COURT: All right.

14 MR. ASHMEAD: I think, you know, another thing not  
15 to be lost here, and we certainly think that the plan  
16 proponents, co-proponents have -- will knock a substantial  
17 contribution requirement out of the park in our view,  
18 whether or not they should be subject to that. We think  
19 what they did here is obvious, it's patent.

20 I will also say, none of this is new. I've been  
21 doing this 22 years, this is the way indentured trustees and  
22 outside parties that negotiate things with the debtor get  
23 paid.

24 THE COURT: Well, I guess in Lehman they raised  
25 it, but this seems to be a new bug --

1 MR. ASHMEAD: It's a new bug, it's not --

2 THE COURT: -- of the U.S. Trustee.

3 MR. ASHMEAD: -- new what's being done here. It's  
4 the 22 years I've been practicing, this is the way it's been  
5 done.

6 So I understand that the U.S. Trustee's concern  
7 about fees and expenses of the case, and I appreciate that,  
8 but that's from our perspective where we stand. I think  
9 that the bond debt --

10 THE COURT: Do you have an estimate of what your  
11 fees and expenses are?

12 MR. ASHMEAD: I think that the estimate we gave a  
13 couple of months ago, and it's a little up from there for my  
14 firms' fees, it was like \$600,000 or 650 or something. It's  
15 probably up a little bit. We did a lot of work the last two  
16 months, but I'm sure it's not double that. This is not  
17 millions of dollars. Our bond debt is over a billion  
18 dollars. I think our fees and expenses will be less than  
19 one-tenth of one percent of the bond debt. And I  
20 understand, although I don't engage in this in trading, that  
21 the bonds are trading, at give or take 70 cents on the  
22 dollar.

23 So it's a real infinitesimal amount ultimately,  
24 Your Honor, thank you.

25 THE COURT: It's also an infinitesimal amount that

1 the bondholders are going to have to bear from your charging  
2 lien if the fees aren't paid by the estate.

3 MR. ASHMEAD: Understood, Your Honor. Again, and  
4 I think as the committee put in its response to the  
5 objections, this is a provision that is subject to  
6 negotiation and the parties that have the economics at stake  
7 agree to this, and then people on vote on it. And it is --  
8 I always viewed as sort of it's a -- it's not a benefit to  
9 us because we have our charging lien.

10 THE COURT: Yeah.

11 MR. ASHMEAD: It's a benefit and part of the  
12 overall deal with your bondholders and the other parties in  
13 getting a deal done.

14 THE COURT: I would certainly hope that the U.S.  
15 Trustee exercising judgment and discretion would take into  
16 account the position of the economic stakeholders in the  
17 case, which here was overwhelmingly to support the plan. It  
18 isn't to say there isn't a legal argument that can be  
19 constructed and pressed, but in deciding whether to simply  
20 not object, not agree, but not object, I think that's where  
21 judgment and discretion and overwhelming support of  
22 creditors comes into play. All right. Thank you very much.

23 MR. ASHMEAD: Thank you, Your Honor.

24 THE COURT: All right. So, Mr. Bennett, my clerks  
25 will give you this changed language. I'm not -- I don't

1 know what I'm -- you know, I'm -- I have more than enough to  
2 do than without having to deal with this issue going  
3 forward, take another crack at -- you know, give the U.S.  
4 Trustee the details on fees and the application and maybe  
5 you'll resolve that. And if you're able to reach an  
6 agreement, contact my chambers, and we'll see whether we  
7 alter the schedule at all.

8 MR. BENNETT: All right. We'll do the best we  
9 can.

10 THE COURT: Okay. All right. Sapere's objection.  
11 Mr. Grabowski.

12 MR. GRABOWSKI: Good morning, Your Honor, Jon  
13 Grabowski on behalf of Sapere CTA Fund.

14 This objection, as we noted, in our papers, and  
15 has been noted in the papers of the proponents of the plan  
16 and the statutory creditor's committee is substantially  
17 similar to the priority motion we made, you know, over a  
18 year ago.

19 THE COURT: How is it different?

20 MR. GRABOWSKI: It's different in two respects.  
21 As Your Honor probably recalls that Your Honor ruled that  
22 our first priority motion, the order that applied to that  
23 was not a final order.

24 THE COURT: That was because -- I -- go ahead. I  
25 did, I said it wasn't final.

1 MR. GRABOWSKI: So in that sense, to the extent  
2 that's not final, we're seeking to --

3 THE COURT: Are there any changed circumstances  
4 that would -- that you think should leave the Court to  
5 reconsider what it ruled on?

6 MR. GRABOWSKI: Yes, Your Honor. The second  
7 reason would be the key factual developments that have been  
8 put into the record in this proceeding and the SIPA  
9 proceeding.

10 THE COURT: You identified in your objection  
11 things that you said were facts, all of which I think were  
12 known basically from the start of the case.

13 MR. GRABOWSKI: Well, Your Honor, I would just  
14 note that, you know, when we first made the objection, Your  
15 Honor noted it had a concern that the only things we were  
16 relying upon were media reports and the like. Now, we have,  
17 you know, substantive facts put into the record by the  
18 trustees, you know, that show that MF Global Holdings, the  
19 parent company was exercising control over the FCM, and you  
20 know, one of the basis for Your Honor's denying our motion  
21 was that we didn't have facts that established that.

22 So that's the second respect as to why we, you  
23 know, are reiterating our objection at this time.

24 THE COURT: Anything else?

25 MR. GRABOWSKI: No, I would just urge the Court

1 that I think the first time when Your Honor ruled on this,  
2 Your Honor looked to whether there were facts that establish  
3 that Holdings was an FCM, whereas our argument is a Best  
4 Foods argument, whereas you know, here you have a parent  
5 company exercising control over --

6 THE COURT: You may have -- look, you filed a  
7 proof of claim.

8 MR. GRABOWSKI: Yes, Your Honor.

9 THE COURT: Not you, your clients filed proofs of  
10 claim. Claims objections have been filed, they're scheduled  
11 to be heard. You may or may not have a claim that should be  
12 allowed against Holdings, and I know that's scheduled for  
13 some time this month.

14 MR. GRABOWSKI: Yes, Your Honor, it's scheduled  
15 for a couple of weeks. I think what we're saying is that,  
16 you know, our out of pocket loss should receive priority.  
17 And if you look at the purpose of the Commodities Exchange  
18 Act and the bankruptcy --

19 THE COURT: I don't know about the purpose, but  
20 the statute's very clear, it only applies in Chapter 7, and  
21 this is not a Chapter 7. Do you disagree with that?

22 MR. GRABOWSKI: Well, I disagree that it -- I  
23 agree that the petitioner filed in Chapter 11. I disagree  
24 with the substance of the analysis.

25 THE COURT: You never made a motion to convert the

1 case.

2 MR. GRABOWSKI: We did not make a motion to  
3 convert the case, but in Your Honor's last opinion, you went  
4 through that analysis. And I would say, here we're  
5 objecting to the plan on the basis that it violates the law,  
6 you know, if Your Honor feels that it's properly converted  
7 to the Chapter 11 case, we would support such a conversion,  
8 but.

9 THE COURT: Well, it is Chapter 11 case. I think  
10 you misspoke. You haven't made a motion to convert the  
11 case.

12 MR. GRABOWSKI: We have not made a motion to  
13 convert the case.

14 THE COURT: All right.

15 MR. GRABOWSKI: So I mean to wrap up, I would just  
16 that, you know, our argument has been set forth in our  
17 papers, the facts we rely on are set forth in our papers,  
18 and has been -- are before the Court in the SIPA Trustee's  
19 investigative report and the recently filed --

20 THE COURT: What is the remaining amount of your  
21 clients' unpaid claims?

22 MR. GRABOWSKI: For out of pocket loss?

23 THE COURT: Yes.

24 MR. GRABOWSKI: It's approximately \$70 million.

25 THE COURT: Remaining?

1 MR. GRABOWSKI: Yes.

2 THE COURT: How much have you recovered so far?

3 MR. GRABOWSKI: I think it's around 200 million,  
4 and the remaining is 70, approximately 70 million. So, you  
5 know, we're saying that for our of pocket losses, certainly  
6 we have other claims under state law, and the like, but for  
7 the out of the pocket loss, commodities' customers should  
8 receive priority, you know, on -- based on the facts that  
9 Holdings exercised control over the FCM.

10 THE COURT: Didn't the SIPA Trustee settle with  
11 the Chapter 11 trustee as to what the proper treatment of  
12 the MFGI claims against Holdings are?

13 MR. GRABOWSKI: I don't know if you want to speak  
14 to --

15 MR. BENNETT: Yes, we did, Your Honor.

16 THE COURT: And so, Mr. Grabowski, one of the  
17 things I don't understand about your position, this is  
18 certainly a change from when I issued my first ruling, but  
19 it seems to me that it would be the SIPIC Trustee in the  
20 MFGI proceeding who would be the proper party withstanding  
21 you assert that priority claims on behalf of the MFGI  
22 estate, but the trustees have already resolved those claims.  
23 I recently asked specifically about that. I mean it was --  
24 it wasn't -- I mean, your argument is premised on an  
25 improper transfer of segregated property from MFGI, right?

1 MR. GRABOWSKI: I mean, our argument is based on  
2 the totality of circumstances.

3 THE COURT: Well --

4 MR. GRABOWSKI: It's based on the Holdings' Board  
5 continually raising the levels of distressed debt.

6 THE COURT: Why isn't this -- why wouldn't this  
7 have been Mr. Giddens' claim and not yours, by yours, your  
8 clients?

9 MR. GRABOWSKI: Well, our --

10 THE COURT: It was, they've settled it, they've  
11 settled it on -- I don't know, it was recently approved that  
12 resolved -- and I specifically asked the question because  
13 the SFTC filed an opposition to your original motion,  
14 supported -- you know, said 761 didn't apply, but they made  
15 it clear that that didn't resolve forever whether there were  
16 other issues under 192.08 as to whether the SIPIC trustee  
17 was entitled to a priority in recovery from the Holdings'  
18 estate. And I specifically asked about that, and was told,  
19 well, that's what we've settled, we settled it. And how is  
20 it that you get to upset a settlement?

21 MR. GRABOWSKI: I don't think we're trying to  
22 upset a settlement.

23 THE COURT: I think you are trying to upset a  
24 settlement.

25 MR. GRABOWSKI: That relates to MFGI's claims

1 against Holdings.

2 THE COURT: No, no, no, no, not correct, not  
3 correct. The SIPA estate -- the SIPIC estate settled its  
4 claim, there were claims going back and forth, and they  
5 reached a resolution of it. And part of the resolution was  
6 that the SIPIC estate, the MFGI estate agreed as to how  
7 their claim would be treated, and it was resolved.

8 MR. GRABOWSKI: Well, Your Honor, we have our own  
9 claim against Holdings, and we're saying that's not --

10 THE COURT: Well, that's not before me today.  
11 When we get to your claim and the objection to your claim  
12 I'll deal with it.

13 MR. GRABOWSKI: But, Your Honor, how our claim is  
14 treated is before Your Honor, with respect to the priority  
15 out of pocket loss, and that's what we're asserting. And to  
16 look at that, you know, I would just point to, you know, our  
17 Best Foods argument, and the purpose of the Commodities  
18 Exchange Act.

19 THE COURT: The Best Food argument might give you  
20 a vicarious liability claim against the parent company, but  
21 not --

22 MR. GRABOWSKI: Best Foods --

23 THE COURT: -- that the matter gets treated under  
24 specific provisions of the Bankruptcy Code that don't apply  
25 here.

1 MR. GRABOWSKI: Your Honor, Best Foods also, and  
2 there's two lines of analysis in Best Foods. There's one  
3 that relates to, you know, vicarious liability and such.  
4 And there's also whether a subsidiary is responsible or  
5 excuse me, a parent is responsible for a subsidiary's  
6 obligations under a statute --

7 THE COURT: Yeah, but not how --

8 MR. GRABOWSKI: -- under the circumstances.

9 THE COURT: And they might be. I mean, you've got  
10 a tort claim against the parent, maybe they're responsible,  
11 maybe there's vicarious liability for it or not. I'm not  
12 deciding that today. You're asking for specific -- the only  
13 thing you've asked for, the only thing you assert in your  
14 objections, the same thing you asserted the first time, that  
15 761 et seq of the Bankruptcy Code apply to the  
16 administration of the Holdings' estate. That's the only  
17 thing you've asserted.

18 Okay. Anything else you want to add?

19 MR. GRABOWSKI: That's it, Your Honor, thank you.

20 THE COURT: Mr. Bennett, do you want to respond?

21 MR. BENNETT: I'll be very brief, Your Honor.

22 There may well be a dozen bases to reject the objection, to  
23 overrule the objection. I would just want to say that one  
24 would be factual that it is certainly true that there are  
25 some statements in the motion that are accurately quoted

1 from reports that have been submitted, and are actually in  
2 context. But I just want to say that's not true of all of  
3 them, and I know you know that.

4 And in any event, there -- that all is hearsay.  
5 There's no declarations, there are no evidence it was  
6 supported, filed as part of the motion.

7 I would say as to the -- it's sometimes hard to  
8 find, but if you really drill down on the objection it's an  
9 objection to a classification of a claim. It's an assertion  
10 of priority. I think there's effectively an admission in  
11 the pleading that the only way they get there is if for some  
12 reason Holdings Limited is a commodities future merchant or  
13 a commodities broker I think the term is used. And Your  
14 Honor set out that definition before and -- in your earlier  
15 opinion. And there is no provision in that definition that  
16 says someone who controls tortuously or not tortuously but  
17 someone who controls a commodities futures merchant or  
18 commodities broker, it's not one of the possibilities.

19 And so I think the -- since the allegations all go  
20 to control and influence, and since that doesn't actually  
21 help them with respect to causing Holdings limited to become  
22 a commodities future merchant or commodities broker, that's  
23 the end of it. Those provisions don't apply. So calling  
24 this a non-tax priority claim is just something that has no  
25 meaning in the context of this case.

1           There is the additional reasons, of course, the  
2 provision they're appealing to, is only applicable in  
3 Chapter 7 cases, and this isn't one of them. But it's just  
4 -- it's not a commodities futures merchant, and therefore,  
5 we don't have anything to talk about.

6           The other part of their motion that I think that  
7 you could decide to deal with or not decide to deal with is  
8 the general assertion of the -- of veil piercing, which you  
9 heard here. And I -- and what does veil piercing get you?  
10 Well, veil piercing as Your Honor pointed out, gets you a  
11 claim, but that's it. It's your claim.

12           The other aspect to this, though, is that the veil  
13 piercing allegations are of the general sort, which you  
14 would expect that right if it existed was in the hands of  
15 Mr. Giddens. And Mr. Giddens has been accused of many  
16 things, but lack of aggressiveness is not one of them.

17           He has not asserted that the corporate veil  
18 between the broker dealer and the parent ought to be  
19 pierced, and that these estates ought to be substantively  
20 consolidated on some basis. And so -- and that's not really  
21 an objection to this plan.

22           So I think to the extent that kind of -- shadowing  
23 in the back there is the idea that these things ought to be  
24 on some basis one entity as opposed to two is number one,  
25 not supported by any facts. And number two, not germane to

1 the real objection which was the classification point.

2 So we find numerous rules to overrule it. We  
3 believe it should be overruled. It was also, these issues  
4 were dealt with before.

5 THE COURT: Right.

6 MR. BENNETT: Thank you.

7 THE COURT: Mr. Kobak, can you just address what  
8 was resolved between the two estates, at least what was  
9 resolved with respect to the MF Global, Inc.

10 MR. KOBAK: We essentially resolved I think  
11 substantially all the claims between the two estates. Part  
12 of the agreement we have, as I know Your Honor remembers, is  
13 a provision that if at the end of the day there's a  
14 shortfall, they agree in principle to support a reallocation  
15 on certain terms. So essentially the ultimate relief that  
16 Mr. Sapere (sic) is looking for, for out of pocket loss, you  
17 know, should be achieved through that mechanism.

18 THE COURT: Is the end in sight?

19 MR. KOBAK: Well, I think a lot depends on our  
20 settlement with Chase and what happens in the class actions  
21 that are pending.

22 THE COURT: All right. Thank you, Mr. Kobak.

23 MR. KOBAK: Thank you, Your Honor.

24 THE COURT: All right. Anybody else wish to be  
25 heard? Ms. Goldstein?

1 MS. GOLDSTEIN: Good morning, Your Honor. Irena  
2 Goldstein, Proskauer Rose for the statutory creditor's  
3 committee.

4 As set forth in our statement, the committee  
5 strongly supports confirmation of the plan. Obviously the  
6 creditor body also strongly supports confirmation of the  
7 plan. We believe the plan is the most efficient means for  
8 distributing funds to creditors, limits administrative  
9 expenses, and provides both large and small creditors with  
10 the opportunity to find out what's going on with the  
11 liquidation, and also provides that there could be a  
12 management change, to the extent the creditor body changes.

13 And to make clear, we also really support the  
14 indentured trustee getting paid under the plan. That was a  
15 bargained-for provision. The indentured trustee has served  
16 as a chair of our committee.

17 THE COURT: Who bargained for it? That's what --  
18 I mean, the co-proponents wrote a plan. I mean, it provides  
19 for paying themselves --

20 MS. GOLDSTEIN: Right, and then there were  
21 other --

22 THE COURT: -- their fees.

23 MS. GOLDSTEIN: The original plan changed, and  
24 that is one of the provisions that changed. And also other  
25 provisions that changed under the leadership of the

1 indentured trustee was the fact that there will be changes  
2 to management if the creditor body changes, and that there  
3 will be transparency in what happens in this litigation, I  
4 mean in the liquidation.

5 So those -- there were active -- the plan  
6 proponents filed a plan, the creditor's committee reviewed  
7 it, gave some changes. Most of the changes were accepted,  
8 and that's who did the bargaining along with the Chapter 11  
9 trustee.

10 THE COURT: You know in Lehman, I mean Judge Peck  
11 specifically pointed that this was the result of, this is  
12 the provision for compensation of some of these parties, was  
13 a result of extensive negotiation. But here, I mean, the  
14 plan proponents wrote a plan that provided for them paying  
15 themselves, and it basically, you know, asked the creditors  
16 supporting it, but they probably figured it isn't that much  
17 money in the context of things, let's just get this over  
18 with. I mean, it's just -- there may be a separate issue  
19 about reimbursement to the indentured trustee.

20 So, I mean, I have to say there's a certain  
21 skepticism in which I approach with, to saying, this was a  
22 result of a negotiated plan. They wrote it. They wrote it  
23 to pay themselves.

24 MS. GOLDSTEIN: They did write it, and they did  
25 agree to pay themselves, and then they did agree to pay the

1 indentured trustee.

2 THE COURT: Yeah, why not, they're getting paid  
3 too, so. Okay. Anything else?

4 MS. GOLDSTEIN: No.

5 THE COURT: All right. Anybody else wish to be  
6 heard?

7 (No response)

8 THE COURT: All right. Pending before the Court  
9 is the amended and restated joint plan of liquidation  
10 pursuant to Chapter 11 of the Bankruptcy Rule for MF Global  
11 Holdings, Inc., MF Global Finance USA, MF Global Capital  
12 LLC, MF Global FX Clear LLC, MF Global Market Services LLC,  
13 and MF Global Holdings USA, Inc. The plan is -- was at ECF  
14 Docket No. 1267. It's proposed by -- it was proposed --  
15 well, it's proposed by the plan proponents, which include  
16 certain creditors of the estate, that's the creditor co-  
17 proponents and the Chapter 11 Trustee.

18 On October 31, 2011, MF Global Holdings filed a  
19 voluntary petition for relief under Chapter 11 of the  
20 Bankruptcy Code. Other than Holdings, each of the debtors  
21 is a direct or indirect subsidiary of Holdings. Holdings'  
22 Chapter 11 case is being jointly administered with the  
23 Chapter 11 proceedings in the above-mentioned subsidiaries.

24 On November 7, 2011, the United States Trustee  
25 appointed an official committee of unsecured creditors, and

1 the Chapter 11 Trustee has been appointed as the Chapter 11  
2 Trustee for the estate of each of the debtors.

3 Prior to the petition date, Holdings and its  
4 affiliates, through its regulated and unregulated broker  
5 dealers and future commissions merchants was a brokerage  
6 firm in markets for commodities and listed derivatives. MF  
7 Global Group had approximately 2,870 employees worldwide.  
8 MF Global, Inc., an indirect subsidiary of Holdings provided  
9 brokerage services to customers and affiliates, and engaged  
10 in principle and proprietary trading in securities futures,  
11 purchase and resale agreements, as well as stock bond  
12 borrowing and stock bond loan activities. MFGI is currently  
13 being liquidated in a separate proceeding before this Court,  
14 pursuant to the provisions of the Securities Investor  
15 Protection Act.

16 I won't recount the series of events that led to  
17 the ultimate bankruptcy proceedings and the SIPIC proceeding  
18 of the debtors in MFGI. The Court finished its reading very  
19 late last night of the report that the Chapter 11 Trustee  
20 filed yesterday, that recounts many of the events, some of  
21 which have been discussed in prior opinions of the Court.

22 On January 10, 2013, the creditor co-proponents  
23 filed a plan of liquidation for the debtors and a  
24 corresponding disclosure statement that was at ECF Docket  
25 No. 995. Following the filing of its initial plan, the

1 Chapter 11 Trustee agreed to become a plan proponent and the  
2 Chapter 11 Trustee's professionals worked with counsel for  
3 creditor co-proponents to update the plan and disclosure  
4 statement with current and other necessary information.

5 On February 2, 2013, the plan proponents filed a  
6 joint plan of liquidation and the corresponding disclosure  
7 statement, ECF Docket Nos. 1031 and 1029. The joint plan  
8 went through several more iterations with amended versions  
9 filed on February 12th, 2013 and February 15, 2013.  
10 Corresponding disclosure statements were filed with these  
11 new versions of the joint plan.

12 On February 19, 2013, the Court approved the  
13 disclosure statement to the joint plan of liquidation put  
14 forth by the plan proponents. See ECF Docket No. 1103.

15 The joint plan and disclosure statement were both  
16 subsequently amended on February 20, 2013. See ECF Docket  
17 No. 1111. After the original plan was filed, the plan  
18 proponents engaged in discussions with JPMorgan Chase Bank,  
19 N.A., a member of the creditor's committee and a lender and  
20 administrative agent under the debtors' prepetition  
21 liquidity facility.

22 JPMorgan informed the plan proponents that it  
23 intended to file an objection to the original plan, based on  
24 the proposed settlement of intra-company claims. I'll refer  
25 to it as the original intra-co settlement.

1           On February 27, 2013, the Court ordered the  
2 creditor co-proponents and JPMorgan to submit to mediation  
3 before my colleague Judge Peck. The mediation was  
4 ultimately successful. JPMorgan and the plan proponents  
5 entered into a stipulation settling disputes between  
6 JPMorgan Chase Bank, N.A., and the plan proponents. That's  
7 at ECF Docket No. 1192.

8           Pursuant to the terms of the settlement, the plan  
9 proponents agreed to amend the original plan and disclosure  
10 -- and original disclosure statement to include among other  
11 things, a revised version of the original intra-co  
12 settlement.

13           On March 8, 2013, the plan proponents filed a  
14 motion, that's ECF Docket No. 1182, wherein they 1) sought  
15 approval of a supplement to the original disclosure  
16 statement, in which among other things included the revised  
17 intra-co settlement; and 2) amended the plan through a "plan  
18 adjustment".

19           On March 22, 2013, the Court granted the  
20 supplement motion. That's at ECF Docket No. 1193. The  
21 original disclosure statement as modified by the disclosure  
22 statement supplement, I'll just refer to it as the  
23 disclosure statement now.

24           On April 1, 2013, the plan proponents filed a  
25 plan, which upstates the original plan to include the

1 changes set forth in the plan adjustment. Four objections  
2 to the plan and one reservation of rights were filed. I'll  
3 deal with these -- the objections by the U.S. Trustee, the  
4 United States government, and Sapere Wealth Management, and  
5 by Sapere, it also includes, there are a number of hedge  
6 funds that were part of that objection.

7 In addition, there was a limited objection filed  
8 by Occidental Energy Management. That was at ECF 1239. It  
9 was a commodity customer of MFGI. They filed a claim  
10 against the debtors' estate, and that claim -- that limited  
11 objection was withdrawn last night. That's at ECF Docket  
12 No. 1282.

13 With respect to the objection of Sapere et al, the  
14 Court previously rejected Sapere's argument in a written  
15 opinion reported at 465 B.R. 736 (Bankr. S.D.N.Y 2012).  
16 Nothing in Sapere's latest of its numerous objections filed  
17 in this case to almost every issue that has arisen in the  
18 case, has persuaded to the Court to change its prior ruling.  
19 Therefore, the Sapere objection is overruled.

20 As explained -- let me just add. With respect to  
21 Sapere's objection, the Court also believes that the right  
22 to assert how the Holdings case should have been  
23 administered was an issue for the SIPIC Trustee, Mr.  
24 Giddens. As the Court has referenced in the prior colloquy  
25 and the questions to Mr. Kobak, that issue was resolved

1 between the SIPIC estate and the Chapter 11 estate. I think  
2 that's another reason why Sapere's objection is overruled.

3 As the Court earlier in the hearing, the U.S.  
4 Trustee's objection with respect to the language in the  
5 injunction, that objection has been withdrawn, and the  
6 objection of the U.S. Attorney to that portion, they joined  
7 in the U.S. Trustee objection, that portion has likewise  
8 been withdrawn.

9 The remaining, and the U.S. Attorney, and the co-  
10 proponents need to work to resolve the one issue that I  
11 discussed earlier in the hearing, and I'll review any final  
12 order to make sure I'm satisfied with the language that's  
13 approved.

14 So I guess with respect to that objection of the  
15 U.S. Attorney, it's sustained in part, and overruled in part  
16 with the change that is going to be drafted. The one  
17 remaining U.S. Trustee objection, with respect to the  
18 reimbursement of fees and expenses of the creditor co-  
19 proponents and the indenture trustee is going to be  
20 deferred, on the basis of the additional language which I  
21 read into the record earlier, we'll supply to counsel, to  
22 put into the confirmation order.

23 And as I said, I'm reserving on that decision  
24 after I see the applications and any further briefing. I  
25 think what we'll do is the language will indicate when those

1 applications are due, but I think I'm going to want to have  
2 a status conference with the U.S. Trustee and the creditor  
3 co-proponents and the indentured trustee's counsel before it  
4 actually comes on hearing, and we'll see what the status of  
5 that is, whether they're able to resolve the issue.

6 All right. The plan constitutes a separate  
7 Chapter 11 plan of liquidation for each debtor. The letter  
8 is assigned to each of the debtors, and a numbered each of  
9 the classes of claims against or interests in the debtors,  
10 for consistency, similarly designated classes of claims and  
11 interests are assigned the same number across each of the  
12 debtors. Any non-sequential enumeration of the classes is  
13 intentional to maintain consistency.

14 Claims against and interests in the debtors are  
15 classified in up to nine separate classes. Class 1 consists  
16 of priority non-tax claims; Class 2 consists of secured  
17 claims; Class 3 consists of JPMorgan secured set off claims;  
18 Class 4 consists of convenience claims, that's claims less  
19 than \$500,000; Class 5 consists of liquidity facility  
20 unsecured claims; Class 6 consists of general unsecured  
21 claims; Class 7 consists of subordinated claims; Class 8  
22 consists of preferred interest; and Class 9 consists of  
23 common interest.

24 Creditors of the debtors voted overwhelmingly in  
25 support of the plan. Depending on the debtor, Classes 3

1 through 9 may have been entitled to vote, all classes who  
2 voted on the plan either voted to accept the plan or did not  
3 return any ballots. No classes voted to reject the plan.

4 Classes 1 and 2 for each debtor were unimpaired,  
5 and were deemed to have accepted the plan. Classes 8A and  
6 9A which are claims against Holdings for preferred and  
7 common interests were impaired and deemed to have rejected  
8 the plan.

9 The plan generally follows a waterfall scheme  
10 based on the priority of claims and interests in each class.  
11 Administrative and priority claims are paid first out of  
12 available unencumbered funds. Secured claims are paid to  
13 the extent of the security interests and collateral, and the  
14 proceeds thereof. Unsecured claims are paid before  
15 subordinated claims. Subordinated claims are paid before  
16 preferred interests, and preferred interests are paid before  
17 common interests.

18 As described in more detail on the disclosure  
19 statement, and with some exceptions for certain debtors, the  
20 plan proponents expect that under the plan, priority non-tax  
21 claims, secured claims and the JPMorgan's secured set-off  
22 claims will be paid in full. Convenience claims and  
23 unsecured claims will be paid in part. And subordinated  
24 claims and interests generally will receive no distribution.

25 The plan incorporates the revised intra-co

1 settlement, which resolves all intra-company claims between  
2 the debtors, the aggregate amount of which exceeds \$2  
3 billion. It provides that Holdings' right to receive  
4 distributions on account of a portion that its intra-company  
5 claim against Finance USA shall be subordinated to the  
6 rights of the holders of the liquidity facility, unsecured  
7 claims against Finance USA to receive distributions, until  
8 such liquidity facility unsecured claims are paid in full.

9 Pursuant to the settlement, Holdings agree to  
10 subordinate to the holders of Class 5B claims, its right to  
11 receive distributions on account of 275 million of its 1.887  
12 billion intra-company claim against Finance USA.

13 The Court concludes that the requirements for  
14 confirmation of the plan have been satisfied. The one  
15 exception is the change that will be incorporated in the  
16 confirmation or defers the issue of reimbursement of fees  
17 and expenses of the creditor co-proponents and the  
18 indentured trustee.

19 Subject to seeing the final language in the  
20 proposed confirmation order, the Court is confirming the  
21 plan. Other than the fee provision which is being deferred,  
22 the Court finds that all of the requirements for  
23 confirmation of the plan under Sections 1122, 1123 and 1129  
24 of the Bankruptcy Code, to the extent they are applicable  
25 here, have been satisfied.

1 I will not discuss each of the requirements  
2 contained in those Bankruptcy Code sections, other than to  
3 say the Court has considered each of the requirements to the  
4 extent that they are applicable in the circumstances. The  
5 Court expressly finds that the plan proponents have  
6 established by a preponderance of the evidence that all  
7 applicable requirements for confirmation have been  
8 satisfied.

9 The Court finds and concludes that the plan  
10 complies with all of the applicable provisions of the  
11 Bankruptcy Code, save for the issue that I'm reserving on.  
12 The plan was proposed in good faith, and is not by any  
13 means, forbidden by law, and the plan properly designates  
14 classes of claims and interests. Furthermore, the Court  
15 concludes that the plan is feasible and has a reasonable  
16 likelihood of success.

17 Where the objections about the language of the  
18 objection -- of the injunction, but that has now been worked  
19 out.

20 For all of the foregoing reasons, the Court will  
21 go ahead and confirm the plans of liquidation. I know that  
22 the Chapter 11 trustee wants to be heard. Before doing  
23 that, I just want to congratulate all of the professionals  
24 in the case. It's been a long road to get to this point.  
25 There is still a lot that is going to remain to be done. I

1 think it was -- is a signal accomplishment that you were  
2 able to get to where you are today, and have a plan  
3 confirmed. So I congratulate everybody.

4 I think there have been a lot of difficult issues  
5 in the case, and I think while there have been very strongly  
6 held views and differences, counsel have worked exceedingly  
7 well together to resolve most of the issues in the case,  
8 limiting what the Court had to decide.

9 So I'm pleased that you have all reached this  
10 point.

11 MR. BENNETT: Thank you, Your Honor. We will try  
12 to get an order to you right after the lunch hour. We'd  
13 like to get it into today if we possibly can, and not  
14 hopefully thereafter.

15 THE COURT: Okay. Mr. Freeh, you wanted to be  
16 heard?

17 MR. FREEH: Yes, thank you, Your Honor.

18 Thank you very much, Your Honor, Louis Freeh,  
19 Chapter 11 Trustee, and I learned a long time ago not to add  
20 too much after the Court's made a decision, but I do want to  
21 echo Your Honor's remarks, and just commend all the parties  
22 for really an extraordinarily amount of good and positive  
23 work under very complex and unique circumstances.

24 I was before a Senate Committee testifying about  
25 lessons learned several weeks into the matter, so this case

1 was treated in a very different manner both publicly, and I  
2 think with the various stakeholders.

3 I do firmly believe that the customers in the case  
4 will be made whole. I think that's the result of a lot of  
5 good work. I want to basically thank the Court for its  
6 supervision and its willingness to be available to assist in  
7 the bumps that you eluded to. We try not to burden the  
8 Court with as many of those as were resolved, the extra-  
9 judicially but we knew you were there, and that access was  
10 very appreciated, and I think served the interests of the  
11 parties.

12 As you know, I did my preliminary report. We  
13 filed our investigative report yesterday, and if Your Honor  
14 wants to have a separate examination or hearing on that, I'm  
15 certainly available as my staff is to answer questions.

16 THE COURT: There was a lot to digest late last  
17 night, I'm sure I'm --

18 MR. FREEH: There was indeed.

19 THE COURT: -- going to back and read it again.

20 MR. FREEH: I'm sorry you had to read it late last  
21 night.

22 THE COURT: No, don't be sorry, it's a very  
23 thorough report. Yeah.

24 MR. FREEH: So again, I want to just thank the  
25 parties, my counsel and financial advisors, the U.S.

1 Trustee, Mr. Bennett and his group, the SEC, and we're very  
2 cognizant of the fact that a lot of work has to be done here  
3 to finish these matters, and collect, and pay out lots of  
4 interest, but we think we've taken it to a very good point  
5 and a successful point in 17 months of work in an  
6 exceedingly complex manner.

7 So again, I just want to thank the Court, the UK  
8 administrators, as well as the parties that came into the  
9 case in the form of the ad hoc committee were all very  
10 constructive, and we were able to resolve most of the  
11 important issues. So again, thank you, Your Honor, for your  
12 help and supervision.

13 THE COURT: Thank you. Anybody else want to be  
14 heard?

15 (No response)

16 THE COURT: All right. We're adjourned. Thank  
17 you very much, everybody.

18 (Proceedings concluded at 12:02 PM)

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I N D E X

R U L I N G S

IDENTIFICATION	PAGE
Confirmation of Plan	81

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
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**CERTIFICATION**

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: April 7, 2013

**Sheila  
Orms**

Digitally signed by Sheila Orms  
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