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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MF GLOBAL HOLDINGS LTD., *et al.*,	:	Case No. 11-15059 (MG)
Debtors.	:	(Jointly Administered)
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, ARTON SINA, and SCOTT KISCH, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	Adv. Pro. No. 11-02880 (MG)
Plaintiffs,	:	
v.	:	
MF GLOBAL HOLDINGS LTD., et al.,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO CLASS CERTIFICATION

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INTRODUCTION

On October 31, 2011, two of the defendants in this case—Holdings Ltd. and Finance USA—filed chapter 11 petitions in this Court on the same day MF Global's former broker-dealer affiliate MFGI entered into a court-ordered SIPA liquidation under the control of the SIPA Trustee, acting as a liquidating fiduciary.[1] Whatever their previous relationship may have been, from that day forward, the Debtor Defendants and MFGI were legally and practically independent of one another, including with respect to the layoffs they each separately conducted in the following weeks.

Throughout this case, the Plaintiffs have sought to assert claims against the Debtor Defendants on behalf of a class of both former Debtor Defendant employees and former MFGI employees. But the Plaintiffs refuse to confront the clear operational independence—as a matter of both fact and law—between the MFGI SIPA Trustee and the Debtor Defendants when the challenged layoffs occurred.

The Plaintiffs' refusal to address this central issue continues in their class certification motion. For example, while the Plaintiffs' WARN Act claims arise from the notice (or lack thereof) provided in connection with layoffs the Debtor Defendants and MFGI independently conducted after the October 31, 2011 filing dates, the moving brief focuses largely on operations at Holdings USA and MFGI pre-filing. And when the Plaintiffs do address the actual layoffs, they simply gloss over or omit entirely the relevant facts showing the MFGI SIPA Trustee acted independently to lay off their entire MFGI workforce. For example, despite the fact that they

[1] MF Global Holdings Ltd. ("Holdings Ltd.") and its various affiliates throughout the world were known as "MF Global." Holdings Ltd., MF Global Holdings USA Inc. ("Holdings USA"), and MF Global Finance USA, Inc. ("Finance USA") are, collectively, the "Debtor Defendants." Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles, Arton Sina, and Scott L. Kisch are, collectively, the "Plaintiffs." Plaintiffs Thielmann, Desparois, Sivova, Glover-Bowles, and Sina are, collectively, the "MFGI Plaintiffs." Non-party MF Global Inc. is "MFGI" and James W. Giddens, in his role as trustee for MFGI under the Securities Investor Protection Act ("SIPA"), is the "SIPA Trustee."

assert WARN Act claims, the Plaintiffs omit to mention that the Debtor Defendants provided WARN Act notice to their employees while the SIPA Trustee did not. Rather, at the time he conducted the layoffs, the SIPA Trustee simply provided MFGI employees with a terse letter, drafted by the SIPA Trustee's counsel, and explaining that the layoffs were made "as a result of" MFGI's SIPA liquidation proceeding.

Before the Plaintiffs can certify a WARN Act class action, they must somehow reconcile the fact that different members of their proposed class (and different plaintiffs) received *different* notice in connection with *different* layoffs by *different* employers. This they cannot do. The Plaintiffs' class certification motion must be denied for the following reasons.

First, because the MFGI Plaintiffs' employment status is relevant to the class certification analysis, the Court can and should consider the question and make appropriate factual findings and legal determinations to the extent necessary to decide this motion. Should the Court reach the issue, the facts and the law are clear: the Debtor Defendants were not the MFGI Plaintiffs' "employer" for WARN Act purposes or otherwise.

Second, because the MFGI Plaintiffs cannot recover without establishing the Debtor Defendants' liability for the SIPA Trustee's layoffs—a question wholly irrelevant to former Debtor Defendant employees in the Plaintiffs' proposed class—the MFGI Plaintiffs' claims are atypical of their proposed class. For the same reason, the MFGI Plaintiffs face a unique defense and are, therefore, inadequate class representatives.

Third, because the Plaintiffs attempt to certify a class of both former Debtor Defendant employees and former MFGI employees, whose claims raise different legal and factual issues, the proposed class claims do not raise common issues susceptible to common proof; and common issues certainly do not predominate.

Finally, apparently recognizing that they cannot meet their burden to certify their proposed class, the Plaintiffs seek to place the onus on the Court to "carve out" "appropriate" sub-classes from the overbroad proposed class. The Court is under no obligation to do so and should decline to certify a class or subclass of former MFGI employees, given the unavoidable conclusion that the Debtor Defendants are not liable for the SIPA Trustee's layoffs, over which they had no control.

The Debtor Defendants respectfully request that the Court deny the Plaintiffs' motion for class certification in its entirety or, in the alternative, certify only an appropriately narrow class of former Debtor Defendant employees represented by Mr. Kisch.

BACKGROUND

A. The Relevant Parties

1. MF Global

Until October 31, 2011—when MFGI entered into its SIPA liquidation proceeding and Holdings Ltd. and Finance USA filed their chapter 11 petitions—MF Global was one of the world's leading brokers in markets for commodities and listed derivatives. (Declaration of Bradley I. Abelow in Support of Chapter 11 Petitions ("Abelow Decl.") at ¶¶ 1, 7, Oct. 31, 2011, ECF Doc. # 9.) Like other large, complex, financial institutions, MF Global was organized into multiple distinct legal entities for various operating, tax, legal, and regulatory reasons. Defendant Holdings Ltd. was the ultimate parent company of the MF Global entities. (Abelow Decl. ¶ 23.) Defendant Holdings USA, which filed its chapter 11 petition on March 2, 2012, was a subsidiary holding and service company providing administrative services to Holdings Ltd. and its domestic subsidiaries. (Declaration of Laurie R. Ferber in Support of Chapter 11 Petition ("Second Ferber Decl.") at ¶ 17, Mar. 2, 2012, ECF Doc. # 507.) Defendant Finance USA was a direct subsidiary of Holdings USA and primarily provided financing services to the various MF

Global entities. (Abelow Decl. ¶ 47.) Non-party MFGI was MF Global's U.S. regulated broker-dealer and futures commission merchant. (Second Ferber Decl. ¶ 12.)

2. The Plaintiffs

The Plaintiffs in this case are five former MFGI employees, who the SIPA Trustee laid off on November 11, 2011, and one former Holdings USA employee, who Holdings USA laid off on November 18, 2011.

Todd Thielmann worked as an MFGI floor broker, phone clerk, checkout clerk and runner, executing trades on behalf of MFGI from the Chicago Board of Trade ("CBOT") trading floor. (Ex. 1 at 12:2–24, 10:8–16.)[2] Mr. Thielmann's job duties consisted entirely of handling orders for MFGI and its customers on the CBOT trading floor. (*Id.* at 18:5–24; 69:10–70:9.) Mr. Thielmann reported directly to MFGI's senior vice president of agricultural products trading. (*Id.* at 26:17–28:13.) As of the petition date, MF Global's books and records reflected the fact that Mr. Thielmann was an MFGI employee. (Ex. 14.)

Pierre-Yvan Desparois worked for MFGI as an assistant vice president for credit risk. (Ex. 15 at MFG_WARN_1873.) He specialized in credit analysis for MFGI brokerage accounts and was responsible for producing credit reports recommending approval or denial of credit lines for customers seeking to trade commodity futures through MFGI's metals desk. (Ex. 2 at 18:23–20:5; 22:23–23:12, 24:17–25:13.) Mr. Desparois reported to the U.S. Head of Risk, an MFGI employee. (*Id.* at 20:11–24; Ex. 15 at MFG_WARN_1873–74.) As of the petition date, MF Global's books and records reflected that Mr. Desparois was an MFGI employee. (Ex. 12.)

Natalia Sivova worked for MFGI in the IT quality assurance department in New York. (Ex. 15 at MFG_WARN_1884.) Her responsibilities at MFGI included quality assurance

[2] "Ex. __," refers to the exhibits attached to the Declaration of Robert J. Baehr.

and development of various applications, including applications used in connection with MFGI's trading activities. (Ex. 3 at 37:6–38:14.) As of the petition date, MF Global's books and records reflected the fact that Ms. Sivova was an MFGI employee. (Ex. 13.)

Sandy Glover-Bowles worked as a staff accountant in MFGI's financial accounting department in Chicago. (Ex. 4 at 17:16–18:3.) She reported directly to an accountant in MFGI's financial accounting department in Chicago. (*Id.* at 19:2–18; Ex. 15 at MFG_WARN_1866–68.) She performed accounting work related to MFGI's accounts payable and its funding of payroll for its employees. (Ex. 4 at 18:19–19:1, 136:16–137:14.) On the October 31, 2011 petition date, MF Global's books and records reflected the fact that Ms. Glover-Bowles was an MFGI employee. (Ex. 11.)

Arton Sina worked for MFGI as a clerk confirming and settling equity trades in MFGI's equities operations in Chicago. (Ex. 5 at 22:7–23:4.) Mr. Sina reported directly to a vice president in MFGI's equities operations. (*Id.* at 27:10–12; Ex. 15 at MFG_WARN_1878.) On the October 31, 2011 petition date, MF Global's books and records reflected the fact that Mr. Sina was an MFGI employee. (Ex. 13.)

After the SIPA Trustee laid them off, the MFGI Plaintiffs filed claims in the MFGI SIPA proceeding for WARN Act violations and unpaid vacation pay, and served as class representatives in a class settlement of vacation pay claims in the SIPA case arising out of class members' alleged employment with MFGI. *See In re MF Global, Inc.*, 11-02790-mg (ECF Doc. # 8588) (Bankr. S.D.N.Y. Jan. 1, 2015). Each MFGI Plaintiff received $2,500 in service claims as compensation for service as a class representative in that case, in addition to their underlying vacation pay claim, from the settlement fund established by the SIPA Trustee. *Id.* at 12–13.

Scott L. Kisch worked for Holdings USA as an assistant vice president in the human

resources department, reporting to the director of human resources, Tom Connolly. As of October 31, 2011, MF Global's books and records reflected the fact that Mr. Kisch was a Holdings USA employee. (Plaintiffs' Ex. 17.) Holdings USA provided Mr. Kisch with notice under the WARN Act that he would be subject to a mass layoff at Holdings USA. (Ex. 16 at MFG_WARN_3956.)

B. Before the October 31, 2011 Petition Date, MF Global Operated Through Multiple Distinct, Affiliated Legal Entities.

1. The Relevant Legal Entities

Until October 31, 2011, when it filed its chapter 11 petition before this Court, Holdings Ltd. was a public company listed on the New York Stock Exchange under ticker symbol "MF." (Second Ferber Decl. ¶ 7.) As required, it issued consolidated financial statements on behalf of its subsidiaries, including Holdings USA, Finance USA, and MFGI. (*Id.* ¶¶ 5, 7.) Holdings USA was the service company for Holdings Ltd. and most of its domestic subsidiaries, including Finance USA and MFGI, providing them with various administrative services. (*Id.* ¶ 17.) Finance USA generally acted as the financing arm for MF Global's U.S. operations and also provided margin financing to certain MFGI customers. (Abelow Decl. ¶ 47.)

MFGI was a direct subsidiary of Holdings USA and registered with the SEC as a broker-dealer and with the CFTC as a commodities futures merchant. (Second Ferber Decl. ¶ 12.) It was regulated by the CFTC, the CME, the SEC, the NFA, FINRA, and the CBOE. (Abelow Decl. ¶ 22.) It provided execution and clearing services for its broker-dealer and commodities futures clients. (*Id.* at ¶ 7.)

2. Shared Services and Flow of Funds Among the MF Global Entities

a. Holdings USA Provided HR, Payroll, and Benefits Administrative Services to Holdings Ltd. and Its Domestic Subsidiaries.

As the service company for Holdings Ltd. and its domestic subsidiaries, Holdings USA provided administrative services in connection with human resources, payroll, and benefits, including recruiting and "onboarding" services for new employees. (Second Ferber Decl. ¶ 17.)

With respect to recruiting and "onboarding," when a domestic MF Global entity needed to hire a new employee, Holdings USA administered the recruiting and hiring processes, including issuing offer letters. (Ex. 6 at 125:8–126:25; 39:5–25.) After a prospective employee accepted an employment offer, Holdings USA also provided "onboarding" services, such as training and orientation, confirming references and required licenses, and administering background checks. (*Id.* at 39:5–25.) When new hires began work, as HR administrator, Holdings USA was responsible for ensuring that the Oracle HRS system accurately reflected each new employee's proper employer. (*Id.* at 78:4–25.)[3] Each legal entity was assigned a general ledger code in the consolidated books and records and the Oracle HRS system denoted each employee's employer by general ledger code. (Ex. 7 at 86:6–12; Ex. 10.)

Holdings USA also provided payroll and benefits services for the domestic MF Global entities. Among other things, Holdings USA acted as paymaster for the domestic MF Global entities, issuing payroll checks to employees on behalf of their respective employers. (Ex. 8 at 40:11–23; Ex. 6 at 23:2–25.) And Holdings USA sponsored various benefits plans and programs, including the 401(k), dental, vision, and long- and short-term disability insurance

[3] MF Global had a customized Oracle enterprise software system used to maintain books and records for accounting, tax, HR, and other purposes. (Ex. 6 at 151:15-22.) A key record in this case, known as the "Oracle 10/27 List," is a download from the Oracle human resources system ("Oracle HRS") from the days before the October 31, 2011 petition date, listing, among other things, the domestic employees of the various MF Global entities and denoting the legal entity by whom each was employed. (Ex. 8 at 25:20-26:8.)

programs, for the domestic MF Global entities' employees. (Ex. 6 at 26:4–19, 29:11–30:6.) Although Holdings USA administered and made payments under these programs, each MF Global legal entity was responsible for funding benefits for its own employees. (*Id.*)

Because Holdings USA, as part of its HR administration services, was responsible for maintaining accurate information—including employer information—in the Oracle HRS system and because that system denoted each employer entity by a numerical code, the Plaintiffs suggest that Holdings USA simply "assigned [a] code" in the "Oracle computer systems" to each employee. (*See*, *e.g.*, Pls.' Br. at 4–5.) But the employer ledger codes in Oracle HRS for each employee reflected the real-world employment relationships between the various MF Global entities and their employees. Although Holdings USA was responsible for ensuring that Oracle HRS accurately reflected those real-world relationships, Holdings USA did not "assign" those relationships. Rather, direct supervisors and business leaders within each legal entity decided to recruit and hire employees, based on their budgets and business needs. (Ex. 6 at 137:18–139:20.) Holdings USA simply administered that process: structuring the recruiting process to help present applicants to the respective businesses, who would then assess candidates and select who to hire. (*Id.*)

Business realities determined employment relationships at MF Global. Different legal entities conducted different businesses and employed the people to perform work related to or supporting those businesses. (*Id.* at 69:17–70:25.)[4] Because certain MF Global entities engaged in regulated businesses and many MF Global employees were themselves licensed by or registered with various regulators, or otherwise directly subject to regulatory requirements, regulatory requirements in many cases dictated which entities conducted certain business and, in

[4] In some cases, employees performed work for multiple legal entities. Those employees were generally employed by the largest of the legal entities for which they performed work.

turn, employed certain employees. (*Id.*) For example, a floor broker like Mr. Thielmann—who was registered with the NFA and executed trades for MFGI at the CBOT—worked for MFGI, the regulated futures commission merchant and broker-dealer. (Ex. 1 at 69:24–70:09; Ex. 6 at 134:14–19.) Employees who conducted activity in support of a regulated entity generally worked for that regulated entity, as well, even if their particular function wasn't regulated or didn't require registration. (Ex. 6 at 69:17–70:17.) Similarly, Holdings USA employed people to perform work in connection with the various services it provided for the U.S.-based MF Global entities. For example, Holdings USA employed senior HR professionals who performed HR work for multiple entities. (*Id.* at 23:2–24:17.) In short, as one would expect, employees were generally employed by the legal entities for whom they provided services.[5]

b. Each Legal Entity Paid for Shared Services and Pre-Funded Its Own Payroll.

Holdings USA's shared HR, payroll, and benefits services—and other services shared among the various legal entities—were accounted for, allocated to, and funded by the legal entities benefitting from the services. (Ex. 6 at 23:2–25.) Most shared services were allocated proportionally based on each entity's headcount, creating intercompany balances that were cash settled monthly. (*Id.* at 24:3–17; Ex. 8 at 172:24–174:11.)

Payroll was one exception to this process. Each legal entity pre-funded payroll for its employees for each pay period. (Ex. 7 at 93:13–94:15.) Each legal entity—including the Debtor Defendants and MFGI—maintained separate corporate bank accounts at JP Morgan. (*Id.* at 71:9–72:16.) Holdings USA also maintained a separate master payroll account. (*Id.* at 62:4–21.)

[5] The Plaintiffs point to a handful of isolated exceptions where, they claim, employment relationships "were not always aligned with job duties." (Pls.' Br. at 5.) Even if this were true, that the rational process for determining employment relationships within a complex organization may have generated a small handful of anomalous results does not suggest the system was irrational or arbitrary. To the contrary, as the Plaintiffs recognize, in the vast majority of cases, an employee's employment relationships, as reflected in Oracle HRS, corresponded with that employee's job functions.

Each pay period, Holdings USA's treasury department worked with accounting, and an outside payroll vendor, Ceridian, to determine each entity's funding requirements based on the lists of each entity's employees in MF Global's books and records and those employees' gross and net pay, deductions and taxes. (*Id.* at 74:25–78:19.) Once the treasury and accounting departments determined funding requirements, they made the necessary wire transfers from each entity's respective corporate account to Holdings USA's master payroll account. (*Id.* at 84:9–18.) Each pay period, treasury, accounting, and Ceridian performed this pre-funding process over the course of the few workdays leading up to each pay day. (*Id.* at 82:3–7, 83:19–84:4.)

Once the master payroll account was funded, Holdings USA issued checks or made direct deposits into employee bank accounts from the master payroll account under a single payroll tax I.D. (Ex. 6 at 110:15–21.) As a result, although the employees of the various MF Global legal entities received paychecks (or direct deposits) from Holdings USA as paymaster, their respective employers pre-funded payroll. This process continued for at least one pay period after October 31, 2011, with the SIPA Trustee funding payroll on MFGI's behalf for MFGI employees until arrangements could be made for the SIPA Trustee to administer payroll for his employees. Thus, consistent with pre-filing practice and with the post-filing separation between the entities, the SIPA Trustee pre-funded the MFGI Plaintiffs' final paychecks from MFGI on November 15, 2011. (Ex. 8 at 95:7–96:20; Ex. 9 at 133:4–134:11.)

C. The MF Global Liquidation Proceedings and the Resulting Layoffs

1. MFGI's SIPA Liquidation and the Debtor Defendants' Bankruptcy Cases

On October 31, 2011, Judge Engelmeyer entered an order commencing MFGI's SIPA liquidation, appointing James W. Giddens as SIPA Trustee "for the liquidation of the business" under SIPA, and removed the case to this Court. The SIPA Trustee retained the Hughes

Hubbard law firm as his legal counsel and Dick Siegel as an independent advisor. Immediately upon his appointment, the SIPA Trustee and his advisors began efforts to wind-down MFGI's affairs as required under SIPA. Order, *Securities Investor Protection Corp. v. MF Global, Inc.*, No. 11-civ-07750 (PAE), ECF Doc. # 3 (S.D.N.Y. Oct. 31, 2011).

Also on October 31, 2011, Holdings Ltd. and Finance USA filed chapter 11 petitions in this Court. For a time, Holdings USA continued to operate outside of bankruptcy as a pass-through entity, providing administrative services and paying the wind-down expenses of the affiliated debtors, but it ultimately filed for bankruptcy protection as well, on March 2, 2012, in order to continue the orderly wind-down of Holdings Ltd. and its affiliates. (Second Ferber Decl. ¶¶ 17–18.)

After the filings, the Debtor Defendants and their advisors entered into arms'-length negotiations with the SIPA Trustee and his advisors regarding potentially sharing services and resources between the estates. (Ex. 8 at 31:19–36:7.) They ultimately adopted a framework to respect the divisions between different corporate entities' employees and properly allocate costs, particularly due to limited liquidity. (*Id.* at 36:9–37:3.) The Debtor Defendants and the SIPA Trustee based this framework on pre-petition divisions between MFGI and other MF Global entities, based on the employment relationships reflected in the Oracle 10/27 List. (*Id.* at 37:14–38:15.) While the estates shared the services of certain employees, neither had authority to retain, fire, or direct the activities of any employees on behalf of another.

2. Holdings USA Issues WARN Act Notices and Conducts Layoffs of its Employees.

Immediately after the filings on October 31, during the first week of November 2011, the Debtor Defendants and their financial advisor, FTI Consulting, Inc., began determining whether their employees should be laid off or retained to assist with the wind-down of operations, in an

effort to preserve liquidity and critical resources and to pursue maximum recoveries for stakeholders in the bankruptcy process. (Ex. 8 at 23:24–25:14, 26:21–27:8.) At the same time, Holdings USA human resources employees began preparing for potential layoffs of Holdings USA and Holdings Ltd. employees, including by drafting WARN Act notices and template employee termination letters. (*Id.* at 24:10–25:14; Ex. 6 at 64:5–14, 65:19–66:16, 212:2–213:2.)

After consulting with senior management, Tom Connolly, Director of Human Resources, caused the Debtor Defendants to issue WARN Act notices to their employees on Thursday, November 17, 2011. (Ex. 16 at MFG_WARN_3938, 3948–49.)[6] Those notices, which were not provided to MFGI employees, explained that, due to unforeseeable business circumstances, Holdings USA, Holdings Ltd., and its debtor subsidiaries had not been able to provide employees a full 60-days' notice, and that they were instead providing as much notice as practicable. (*Id.*) Holdings USA laid off the bulk of its employees over the first three weeks of November.

3. The SIPA Trustee Conducts Layoffs of MFGI Employees Without Notice.

In the first weeks after MFGI's SIPA liquidation began, at the SIPA Trustee's request, Holdings USA and its employees continued to provide certain HR services to the SIPA Trustee with respect to MFGI's employees. (Ex. 6 at 56:13–58:2, 240:3–18.) But, while Holdings USA provided administrative services, the SIPA Trustee and his advisors maintained complete control over MFGI employees, including communications to them from Holdings USA HR professionals. (*Id.* at 240:20–243:3; Ex. 9 at 112:16–113:22.) For example, around the time he caused Holdings USA to issue WARN Act notices, Mr. Connolly forwarded a draft WARN Act notice to the SIPA Trustee's counsel, Hughes Hubbard, recommending the SIPA Trustee provide

[6] Employees of MF Global Capital LLC, MF Global Market Services LLC, and MF Global FX Clear LLC also received the notices.

similar notice to MFGI employees before conducting any layoffs. (Ex. 6 at 213:21–214:10.) The SIPA Trustee chose not to do so. (Ex. 9 at 65:12–66:9, 115:15–117:10.)

After reviewing the Oracle 10/27 List and consulting with his advisors, the SIPA Trustee determined which MFGI employees' services were necessary to assist with MFGI's liquidation. The SIPA Trustee then laid off the entire MFGI work force, including the MFGI Plaintiffs, on November 11, 2011, effective November 15, 2011. (*Id.* at 117:11–119:9.) The SIPA Trustee then offered employment to those former MFGI employees whose service he had determined would be necessary to the liquidation. (*Id.* at 120:11–123:16.) The SIPA Trustee's advisor, Mr. Siegel, took the lead role in determining which MFGI employees should be offered employment with the SIPA Trustee, but the decision ultimately rested with the SIPA Trustee. (*Id.*)

As MFGI's human resources administrator, Mr. Connolly and other Holdings USA human resources professionals administered the SIPA Trustee's layoffs according to detailed instructions from Hughes Hubbard. (Ex. 6 at 49:10–21, 98:19–99:7.) As directed by Hughes Hubbard and under the supervision of Hughes Hubbard attorneys, Mr. Connolly and his colleagues gathered MFGI employees *en masse* in large conference rooms in New York and Chicago, and advised the MFGI employees verbally that they were being laid off and would be paid through November 15, 2011. (*Id.* at 97:20–98:17.) At those meetings, MFGI employees were given terse termination letters drafted by Hughes Hubbard attorneys, some of which were printed on Holdings USA letterhead. (Exs. 17 & 18.) The laid off MFGI employees received their final paychecks, administered by Holdings USA and funded by the SIPA Trustee, on November 15, 2011. (Ex. 8 at 95:7–96:20; Ex. 9 at 133:14–134:11.)

ARGUMENT

I. PLAINTIFFS BEAR THE BURDEN TO PROVE CLASS CERTIFICATION IS APPROPRIATE.

First, the Plaintiffs must demonstrate that all of the requirements of Rule 23(a) are satisfied. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Rule 23(a) sets forth four prerequisites for certifying a class: (1) the class is so numerous that joinder of all members is impracticable (i.e., numerosity); (2) there are questions of law or fact common to the class (i.e., commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (i.e., typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (i.e., adequacy). Fed. R. Civ. P. 23(a)(1)-(4).

Second, the Plaintiffs must show that the putative class falls within one or more of the three categories set forth in Rule 23(b). *McLaughlin*, 522 F.3d at 222. Here, they seek certification of a class under Rule 23(b)(3). Accordingly, they must demonstrate that common "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (i.e., predominance). Fed. R. Civ. P. 23(b)(3).

As demonstrated below, based on the record developed through discovery, the Plaintiffs cannot establish commonality, typicality, adequacy, or predominance and, as a result, their motion should be denied.

II. MF GLOBAL HOLDINGS NEITHER EMPLOYED NOR LAID OFF THE MFGI PLAINTIFFS.

A. The Court Can and Should Make Factual Findings Regarding the MFGI Plaintiffs' Employment Status for Purposes of This Motion.

A class cannot be certified unless the Plaintiffs satisfy their burden to "affirmatively

demonstrate" that all of the requirements necessary to certify a class have been met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "Rule 23 does not set forth a mere pleading standard[;]" rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). In addition, the plaintiff must "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)," in this case predominance. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

Accordingly, the Court must conduct a "rigorous analysis" to determine that every Rule 23 requirement is met with *evidence*, such as "affidavits, documents, or testimony." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 33 & n.3, 41 (2d Cir. 2006) (*In re IPO*). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes*, 131 S. Ct. at 2551. But the Court's obligation is in no way lessened "just because of some or even full overlap of that requirement with a merits issue." *In re IPO*, 471 F.3d at 41.

In this case, considering the "merits" issue of the MFGI Plaintiffs' employment status is essential to the required "rigorous analysis" of the Plaintiffs' class certification motion.[7] The Plaintiffs seek to certify a class that includes both (a) former MFGI employees who the SIPA Trustee laid off without providing any WARN Act notice ("MFGI Class Members") and (b) former Debtor Defendant employees who the Debtor Defendants laid off after providing them

[7] The Plaintiffs repeatedly refer to the question "[w]hether or not Defendants were a WARN Act 'employer'" and assert that it "lies outside the bounds of the present motion." (Pls.' Br. at 9.) But the Debtor Defendants do not dispute—at this procedural stage of the litigation—that they were "a WARN Act 'employer'" *with respect to their own employees who they laid off*. The relevant question, rather, is whether the MFGI Plaintiffs can show that the Debtor Defendants are liable for layoffs that the SIPA Trustee conducted—in other words, whether the Debtor Defendants can be treated as *the MFGI Plaintiffs' employer* for WARN Act purposes. In this brief, we sometimes refer to the "question of the MFGI Plaintiffs' employment status," as a shorthand for the question whether the Debtor Defendants can be held liable under the WARN Act for the SIPA Trustee's layoffs of the MFGI Plaintiffs.

with WARN Act notice ("Debtor Class Members").[8] And the MFGI Plaintiffs seek to represent that proposed class. As a result, the MFGI Plaintiffs' employment status is highly relevant to the typicality of their claims and their adequacy as class representatives. Moreover, the broader questions about the proper treatment of the MFGI Class Members' claims are relevant to the questions whether the proposed class raises common issues and whether common issues predominate. Accordingly, the Court should "rigorously analyze" these issues and, if necessary, can and should make any necessary factual findings and legal conclusions for the purposes of deciding this motion.

The Plaintiffs argue that the Court lacks authority to make factual determinations regarding the MFGI Plaintiffs' employment status, relying on the Supreme Court's decisions in *Amgen* and *Dukes*. (*See* Pls.' Br. at 9.) But those cases say just the opposite: the Court can and should make factual findings on this motion with respect to those issues relevant to class certification, even if the Court's analysis "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551–52 (noting that "[t]he necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation"); *see also Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). Accordingly, the Court can and should make factual determinations regarding the MFGI Plaintiffs' employment status to the extent necessary to decide this motion.

[8] The Plaintiffs refer to these two categories of class members as those "listed with the name MFGI" in the Oracle 10/27 List and those "listed with the name of one of the non-MFGI MF Global entities" in the Oracle 10/27 List. (Pls.' Br. at 13-14.) However one characterizes the distinction, the parties agree that the Plaintiffs' proposed class contains two distinct categories of proposed class members.

B. The MFGI Plaintiffs Cannot Show that the Debtor Defendants Should Be Treated as Their Employer for WARN Act Purposes.

Under the WARN Act, "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order . . . ." 29 U.S.C. § 2102. Accordingly, direct WARN Act liability attaches to "[a]n employer" that "order[s] a . . . mass layoff" without providing the required notice. The record is devoid of any evidence that the Debtor Defendants "ordered" the SIPA Trustee's layoffs. Since the Court dismissed the MFGI Plaintiffs' claims against MFGI, however, the MFGI Plaintiffs now argue that they may hold the Debtor Defendants liable on a "single employer" liability theory. (*See, e.g.*, Third Am. Compl. at ¶¶ 17–23.)

Under single employer liability, the question is whether the Debtor Defendants "w[ere] the *decisionmaker*[s] responsible for the employment practice giving rise to the litigation." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 503–04 (3d Cir. 2001) (emphasis added). And, in the context of a WARN Act claim, the "employment practice giving rise to the litigation" is "the allegedly illegal employment practice of *terminating employees without following the WARN Act*."[9] *In re Tweeter OPCO, LLC*, 453 B.R. 534, 543–44 (Bankr. D. Del. 2011) (emphasis added). Thus, to establish single employer WARN Act liability, a plaintiff must prove that the defendant was the "decisionmaker responsible" for "terminating employees without following the WARN Act." This standard is consistent with the policy underlying single employer liability, which is "most implicated where *one entity actually had control* over the labor relations of the other entity, and, thus, *bears direct responsibility for the alleged wrong*."

[9] Notably, as is clear from the court's formulation of the test in *In re Tweeter*, the single employer liability analysis on a WARN Act claim presupposes that there has been an underlying WARN Act violation. But, as this Court has already held, because the SIPA Trustee was not an employer, the layoffs he conducted were not subject to the WARN Act. Thus, former MFGI employees' claims against the Debtor Defendants are doomed to fail for the additional reason that they cannot establish vicarious liability without an underlying WARN Act violation.

Murray v. Miner, 74 F.3d 402, 405 (2d Cir. 1996) (emphasis added).

In short, whether the MFGI Plaintiffs seek to assert direct WARN Act claims or vicarious "single employer" liability WARN Act claims against the Debtor Defendants, they must demonstrate the Debtor Defendants either "order[ed]" or were the "decisionmaker[s] responsible for" their layoffs. The MFGI Plaintiffs cannot meet that burden. To the contrary, the SIPA Trustee both possessed and exercised complete control over the MFGI Plaintiffs' layoffs. Under federal law and subject to a federal court order, the SIPA Trustee possessed control over MFGI's liquidation, and he exercised that control by determining which MFGI employees to lay off, what form of notice to provide them, and directing his HR administrator to execute those lay off decisions.

Unable to show that the Debtor Defendants either ordered or controlled their layoffs, the MFGI Plaintiffs instead argue that "MF Global" operated as a single employer *before* MFGI's SIPA proceeding began. As an initial matter, this theory simply ignores the factual and legal significance of MFGI's court-mandated SIPA liquidation proceedings. Any interrelationship between the Debtor Defendants and MFGI before MFGI's SIPA liquidation commenced cannot establish that "MF Global" acted as a single employer *at the time the SIPA Trustee conducted his layoffs*. *See Murray v. Miner*, 74 F.3d at 405 (holding that, to assert single employer liability, "the two entities must constitute a single employer *at the time the unlawful act was committed*" (emphasis added)).

But even if the MFGI Plaintiffs could, in theory, premise WARN Act liability on the pre-SIPA liquidation relationship between Holdings USA and MFGI, the record shows Holdings USA simply provided MFGI with HR and other administrative support services, which is not sufficient to support single employer liability. *See In re AFA Inv., Inc.*, No. 12-AP-50710

(MFW), 2012 WL 6544945, at *5 (Bankr. D. Del. Dec. 14, 2012) (allegations that parent "provided the [subsidiary] with managerial, financial, operational and administrative support" is not sufficient to establish single employer liability).

The Plaintiffs attempt to convert Holdings USA's administrative support services into control because, they argue, Holdings USA's name was on the MFGI Plaintiffs' offer letters, paychecks, and W-2 forms. But this was simply a function of Holdings USA's support services as HR administrator and paymaster, which, again, are insufficient. The Plaintiffs also submit various statements about employees' subjective understanding of their employment status. (Pls.' Br. at 6.) But the Plaintiffs identify no authority suggesting that an individual employee's subjective understanding can transform the nature of her employment under the WARN Act. Rather, the *sine qua non* of single employer liability is control, which the Plaintiffs cannot prove.

III. THE MFGI PLAINTIFFS CANNOT ESTABLISH TYPICALITY, ADEQUACY, COMMONALITY OR PREDOMINANCE.

A. Because the MFGI Plaintiffs Are Subject to Unique Defenses, Their Claims Are Not Typical of the Proposed Class and They Are Not Adequate Class Representatives.

"Regardless of whether the issue is framed in terms of the typicality of the representative's claims or the adequacy of its representation there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 180 (2d Cir. 1990).

With respect to typicality, both the proposed class representatives' claims and the defendants' defenses to those claims, must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Accordingly, a proposed class representative's claims will not be considered typical of the class where she will be '"subject to unique defenses which threaten to become the focus of the litigation."' *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.

1992) (citation omitted). Likewise, with respect to adequacy, a proposed class representative must demonstrate that she "possess[es] the same interest and suffer[ed] the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) (internal quotation and citation omitted); *see also Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 234 (S.D.N.Y. 2010) (explaining that "[a]dequacy of representation is evaluated . . . by examining the interests of the named plaintiffs"). A proposed class representative subject to a unique defense necessarily has different interest from absent class members not subject to the same defense, rendering the proposed representative inadequate.[10] *See, e.g.*, *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 320–21 (S.D.N.Y. 2003).

To prevail on their WARN Act claims against the Debtor Defendants, the MFGI Plaintiffs must show that Debtor Defendants were responsible for layoffs the SIPA Trustee controlled and directed. And, as the record shows, they cannot do so. But even if the Court declines to make a finding at this stage regarding the MFGI Plaintiffs' employment status, they are plainly subject to a unique defense not shared by the entire class. As a result, their claims are not typical of, and they cannot adequately represent, a class that includes absent class members who do not face that barrier to recovery. *See Rapcinsky v. Skinnygirl Cocktails, L.L.C.*, No. 11 Civ. 6546 (JPO), 2013 WL 93636, at *9 (S.D.N.Y. Jan. 9, 2013).

B. Because the Key Contested Question in This Litigation Is Not Amenable to Common Proof, Individual Inquiries Will Predominate.

To demonstrate class certification is warranted, the Plaintiffs must both establish commonality under Rule 23(a) (*i.e.* that there are questions of law or fact common to the class) and predominance under Rule 23(b)(3) (*i.e.* that common questions predominate over any

[10] For the same reason, Mr. Kisch, who is not subject to this unique defense, cannot adequately represent those members of the proposed class who the SIPA Trustee laid off. *See Presser v. Key Food Stores Cooperative, Inc.*, 218 F.R.D. 53, 59 (E.D.N.Y. 2003) (finding that plaintiff who did not sign release could not adequately represent class of plaintiffs who had signed releases and, thus, were subject to a defense).

questions affecting individual members). Because the Plaintiffs seek to certify class including both MFGI Class Members and Debtor Class Members, they cannot meet their burden to establish commonality or predominance.

In seeking to establish commonality, the Plaintiffs argue that there are common questions regarding "'whether the employer complied with the statutory notice requirements of WARN.'" (Pls.' Br. at 15 (quoting *Guippone v. BH S&B Holdings LLC,* No. 09 civ. 1029 (CM), 2011 WL 1345041, at *5 (S.D.N.Y. Mar. 30, 2011)).). But commonality "does not mean merely that [the class members] have all suffered a violation of the same provision of law." *Dukes*, 131 S. Ct. at 2551.

In this case, the purportedly "common" question of whether the class members' "employer" provided the requisite notice will require entirely distinct legal and factual inquiries for the MFGI Class Members and Debtor Class Members, who were laid off by different employers pursuant to different notices. For the MFGI Class Members—who the SIPA Trustee laid off without WARN Act notices—the question is whether the Debtor Defendants are their "employer" under the WARN Act; for the Debtor Class Members—who the Debtor Defendants laid off with WARN Act notice—the question is whether the notice provided complied with the WARN Act.

To establish commonality, the Plaintiffs must identify a "common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. In this case, answering the Plaintiffs' proffered "common" question with respect to one class members group—say, by determining whether the Debtors Defendants'

notices complied with the WARN Act—will have no bearing on the other groups' claims. [11] Under these circumstances, the mere fact that the entire class asserts WARN Act claims against the same defendants does not establish commonality. *Id.* (what matters to establishing commonality '"is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."' (citation omitted) (emphasis in original)).

For the same reasons, the Plaintiffs are far from meeting Rule 23(b)(3)'s even more demanding predominance requirement, which requires that a plaintiff "establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (citation and internal quotations marks omitted). As discussed above, none of the so-called "common issues" the Plaintiffs identify are subject to generalized, classwide proof.

IV. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO "CARVE OUT AN APPROPRIATE CLASS."

In an implicit recognition that their proposed class fails to meet the standards for class certification, the Plaintiffs request, in the alternative, that the Court take it upon itself to "'carve out an appropriate class—including the construction of subclasses,'" under Rule 23(c)(5), consisting of the MFGI Class Members and the Debtor Class Members. (Pls.' Br. at 11 (quoting

[11] By the same token, the Plaintiffs raise several arguments why they believe the Debtor Defendants are, in fact, liable for the layoffs of the MFGI Class Members. Whatever the merits of those arguments—whether, for example, the SIPA Trustee acted beyond his authority by conducting his layoffs (*see* Pls.' Br. at 7-8 (asserting that "the SIPA Trustee understood that he had no authority to interfere with or terminate an employment relationship between an employee and Holdings USA"))—they are irrelevant to Debtor Class Members' claims and, thus, likewise fail to establish commonality. The Plaintiffs other purportedly "common" contentions are similar exercises in question begging. For example, the Plaintiffs argue that the class shares the "common" issue of whether "Defendants were required by the WARN Act to give the Plaintiffs and the Class Members at least 60 days advance written notice of their terminations." (Pls.' Br. at 16.) But determining the Debtor Defendants' respective obligations, if any, to the Debtor Class Members and the MFGI Class Members will require entirely different legal and factual inquiries.

Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993)).) While the Court "is not bound by the class definition proposed in the complaint" and "is empowered . . . to carve out an appropriate class," the Court "is not obligated" to do so, as the Plaintiffs' own cases recognize. *Lundquist*, 993 F.2d at 14 (internal quotations omitted). Under these circumstances, the Court should not exercise its discretion to carve out a subclasses of MFGI Class Members represented by the MFGI Plaintiffs.[12]

As discussed above, the MFGI Plaintiffs cannot succeed on their claims—either directly or vicariously—without proving the Debtor Defendants ordered or controlled their layoffs, which they cannot do. *See supra* section II.B. For the same reasons, to the extent that the MFGI Plaintiffs' claims are, in fact, typical of the MFGI Class Members' claims, and those claims, in fact, raise common legal and factual issues, then the MFGI Class Members claims will fail, for the same reasons. Based on the evidence in the record, there is simply no plausible possibility that further litigation will demonstrate the Debtor Defendants possessed or exercised control over the SIPA Trustee's layoffs or over the notice given with respect to those layoffs. Accordingly, the Court need not exercise its discretion to carve out and certify a futile subclass of plaintiffs with no viable claims led by class representatives with no viable claims.

Even if the Court accepts the Plaintiffs' distorted view of single employer liability and the MFGI Plaintiffs' employment status, however, certification of a subclass of MFGI Class Members would nonetheless be inappropriate. Unable to establish any control relationship, the Plaintiffs suggest the Debtor Defendants and MFGI should be treated as a single employer based on their employees' individual, subjective understanding of their employment status, such as

[12] The Debtor Defendants do not object to certification of a single, properly-defined class of Debtor Class Members represented by Mr. Kisch. In that case, any appropriate class definition would have to exclude other former Debtor Defendant employees who have released WARN Act claims or who continued employment with the SIPA Trustee or the Debtor Defendants.

whether certain individuals "encounter[ed] distinctions between the MF Global entities in the course of their work;" "knew which MF Global sub-entity they were assigned to;" "th[ought] their employment relationship was altered while they were employed;" or "were so informed [or] told by MF Global that their employer was other than the MF Global entity named in their Agreements." (Pls.' Br. at 6.) But, if liability is question of individual employees' experience, knowledge, thoughts, information they were told, or "distinctions" they "encountered," then determining liability would require individual treatment and class treatment is inappropriate. *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 92 (S.D.N.Y. 2010) ('"Clearly, if proof of the essential elements of the cause of action require[s] individual treatment, then there cannot be a predominance of questions of law and fact common to the members of the class"') (citation omitted). The commonality and predominance requirements are not met where liability determinations "require an individualized inquiry into the circumstances of each plaintiff's work and his or her relationship" as the Plaintiffs suggest here. *Suvill v. Bogopa Serv. Corp.*, No. 11-cv-3372 (SLT) (RER), 2014 WL 4966029, at *11 (E.D.N.Y. Sept. 30, 2014).

In short, objective legal principles and undisputed evidence demonstrate the Debtor Defendants are not liable under the WARN Act for the SIPA Trustee's layoffs of MFGI employees. As a legal matter, the Second Circuit has held that single employer liability can only be asserted based on a relationship at the time of the alleged violation. And, as a factual matter, it is undisputed (a) that MF Global's books and records reflected that MFGI employed each MFGI Class Member, (b) that MFGI funded their salaries, (c) that the SIPA Trustee controlled MFGI under an appointment from a federal district court at the time the MFGI Class Members were laid off; (d) that the SIPA Trustee's operated under a court-ordered mandate to liquidate MFGI's operations; (e) that the SIPA Trustee made the decision to lay off each of the MFGI

Class Members; and (f) that the SIPA Trustee controlled the form of notice provided to the MFGI Class Members in connection with those layoffs.

The Plaintiffs attempt to escape these uncontested facts and the legal conclusions flowing from them by offering a series of largely irrelevant evidence about certain individuals' subjective opinions, belief, and understanding about their employment status. Either way, however, the MFGI Class Members claims are not appropriate for class certification.

CONCLUSION

The Debtor Defendants respectfully request that the Court deny the Plaintiffs' motion, or in the alternative, certify a class limited to Debtor Class Members laid off from their positions in November 2011, who have not previously released their claims and who did not continue employment with the SIPA Trustee or the Debtor Debtors post-termination, and appoint Mr. Kisch as the sole class representative.

Dated: August 3, 2015
New York, New York

/s/ Melissa A. Hager

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