Presentment Date & Time: June 7, 2013 at 12:00 p.m.
Objection Deadline: June 6, 2013 at 4:00 p.m.

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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)
Debtor.	:	(Jointly Administered)
In re	:	
MF GLOBAL, INC.	:	Case No. 11-02790 (MG) (SIPA)
Debtor.	:	

SAPERE WEALTH MANAGEMENT LLC, GRANITE ASSET MANAGEMENT AND SAPERE CTA FUND, L.P. OBJECTION TO DUAL NOTICE OF PRESENTMENT OF STIPULATION TO LIFT THE AUTOMATIC STAY TO PERMIT PAYMENTS OF DEFENSE COSTS UNDER CERTAIN INSURANCE POLICIES

Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund, L.P. (collectively, "Sapere") hereby objects to the Dual Notice of Presentment of Stipulation to Lift the Automatic Stay to Permit Payments of Defense Costs Under Certain Insurance Policies (the "Stipulation") (ECF Doc. No. 1466) submitted to this Court on May 31, 2013.

BACKGROUND

On February 3, 2012, the Chapter 11 Trustee for MF Global Holdings, Ltd. ("Holdings") and MFG Assurance Company, Ltd. ("MFGA") submitted a Notice of Presentment of Stipulation and Order Between the Chapter 11 Trustee and MFG Assurance Company Limited Regarding Payment of Loss and Reimbursement of Covered Costs and Expenses (the "Initial Stipulation") (ECF Doc. No. 409). The MFGA Policies and those excess of it are "Errors and Omissions" policies ("E&O"), the purpose of which is to cover losses sustained by customers of Holdings and its subsidiaries, especially MF Global, Inc. ("MFGI"). Sapere objected to the Initial Stipulation, and this Court ordered further briefing as to whether the insurance policy proceeds at issue were a part of Holdings' and/or MFGI's estates and, if so, whether the automatic stay imposed by 11 U.S.C. § 362 should be lifted to allow for payment of defense costs. Sapere argued that the automatic stay should not be lifted to allow for payment of defense costs for several reasons. One is because the right to the entirety of the policies' proceeds vested as a matter of law, as shown by Second Circuit precedent, in Sapere and other commodities customers not later than October 31, 2011, when MFGI was insolvent and the segregated account funds were illegally desegregated in an amount in excess of the proceeds. Another reason was that both Holdings and MFGI are in liquidation. Expending the policies' proceeds on defense costs reduces the liquidation estates, and does so to the benefit of one class of persons (former directors, officers and employees) over another (i.e., commodities customers).

On April 25, 2012, this Court issued its Order Lifting Automatic Stay to Permit Payments of Defense Costs Under Certain Insurance Policies (the "Lifting Order") (ECF Doc. No. 652). The Court imposed a $30 million "soft cap," thereby limiting the amount of policy proceeds that could be disbursed.

On April 25, 2012, Sapere appealed this Court's Lifting Order. On November 14, 2012, the District Court entered judgment affirming this Court's Lifting Order. Sapere filed a notice of appeal to the United States Court of Appeals for the Second Circuit (the "Second Circuit") on December 3, 2012. That appeal is currently pending in the Second Circuit.

On May 31, 2013, the Chapter 11 Trustee, MFGA, the SIPA Trustee, and U.S. Specialty Insurance Company ("U.S. Specialty") (collectively, the "Movants") submitted the present Dual Notice of Presentment of Stipulation to Lift the Automatic Stay to Permit Payments of Defense Costs Under Certain Insurance Policies (the "Present Stipulation") whereby the Movants seek to amend this Court's Lifting Order to increase the soft cap from $30 million to $40 million. This Court should deny the relief requested in the Present Stipulation because there is not cause to increase the soft cap. Also, even if there were, this Court does not have jurisdiction to amend its Lifting Order because Sapere appealed that order to the Second Circuit, which appeal is pending.

FACTS

On October 31, 2011, Holdings filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York (Case No. 11-15059 (MG) (Jointly Administered)). Also on October 31, 2011, the United States District Court for the Southern District of New York (Case No. 11-cv-7750 (PAE)) determined that MFGI was in need of protection afforded by the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa *et seq.* The District Court ordered MFGI liquidated and appointed a SIPA liquidation trustee (the "SIPA Trustee"). Pursuant to SIPA, the liquidation case was removed to the United States Bankruptcy Court for the Southern District of New York (Case No. 11-2790 (SIPA) (MG)), where both it and the Holdings case are pending.

MF Global's scandalous downfall involved the "vanishing" of $1.6 billion in commodities customers segregated account funds held in accounts at MFGI—funds that were required by federal, state and common law to remain segregated and to be protected as sacrosanct assets belonging to the commodities customers. The amount of commodities customer segregated funds improperly desegregated has, on multiple occasions, been admitted to have exceeded $1.6 billion on October 31, 2011. The shortfall resulted from the misuse of commodities customers' funds in responding to the known and ignored liquidity demands that Holdings confronted from its speculative gambles on billions of dollars in distressed foreign sovereign debt. Those risky transactions required Holdings to obtain cash to meet margins and other liquidity needs, with an enormous amount of the cash coming from the segregated accounts of MFGI's commodities customers.

On December 13, 2011 Sapere initiated a civil action (amended on December 18, 2012) against former MF Global directors, executives and employees for tortious conduct under state and federal law including, among other things, common law torts, RICO violations, violations of the Commodities Exchange Act, breaches of fiduciary duties, fraud, and other state law violations. Sapere's action is one of three actions currently in the Southern District of New York consolidated under the caption *DeAngelis v. Corzine et al.*, 11-cv-07866 (VM) (the "MF Global Litigation"). The other two actions are class actions generally referred to as the Commodities Customer Class Action and the Securities Class Action. Sapere's claim asserts a right to compensatory and punitive damages for the unlawful acts that led to the $1.6 billion shortfall in customer funds. Additionally, Sapere has an allowed claim against MFGI's estate for the funds taken from Sapere's segregated accounts. In the MF Global Litigation, various officers, directors and employees have allegedly sought defense costs from policies issued by MFGA and U.S.

Specialty. Although this Court previously lifted the automatic stay and set a soft cap of $30 million for the payment of defense costs, the Movants now seek to raise the soft cap to $40 million.

MFGA issued a series of E&O insurance policies to Holdings providing coverage from May 31, 2011 to May 31, 2012 (the "MFGA Policies").[1] The MFGA Policies combine to provide a collective coverage of $120,000,000 in E&O Liability insurance to MFGI and cover MFGI's liability to Sapere and other commodities customers for the shortfall in customers' segregated account funds. Relevant to this objection, the MFGA Policies contain the following definitions and provisions:

- The *insurer* shall pay on behalf of the *insured* for all *loss* arising out a *wrongful act* which gives rise to a *claim* first made against an *insured* by a third party during the *policy period* (or discovery period, if applicable) and reported in writing to the insurer pursuant to the terms of this policy.
- *Claim* means . . . any written demand from any person or entity seeking monetary damages or other relief, including non-pecuniary relief, from an *insured* for the results of any specified *wrongful act*.
- *Insured* means the *insured entity* and the *individual insured(s).*
- *Insured entity* means the *policyholder* [Holdings] and its *subsidiaries* [MFGI] and in the event a bankruptcy proceeding shall be initiated by or against the *Insured entity*, the resulting debtor in possession (or equivalent status outside the United States).
- *Individual Insured* means any past, present or future natural person employed by the *insured entity* in the ordinary course of the *services* of the *insured entity* and whom the *insured entity* compensates by way of salary or wages and has the right to govern or direct the performance of that person's duties.
- *Loss* means: (i) *defense costs*; and/or (ii) damages, *aggravated damages* as permitted by law, judgments (including pre/post judgment interest), restitution orders of a compensatory nature, *claimant's costs*, *co-defendant's costs*, legal costs and expenses awarded against any *insured* . . .

[1] The MFGA Policies have policy numbers 1-18001-00-11, 1-18002-00-11, 1-18003-00-11, 1-18004-00-11, 1-18005-00-11, 1-18005-01-11, 1-18006-00-11, 1-18009-00-11, 1-18010-00-11, 1-18011-00-11, 1-18011-01-11, and 1-18012-00-11.

- *Wrongful act* means any actual or alleged act, error or omission by the *insured*, or by any other person for whose act, error or omission the *insured* is legally responsible, arising out of the provision of, or failure to provide, the *services*.

- *Services* means financial or professional services or other activities performed by the *insured*, or by any other person for whose act, error or omission the *insured* is legally responsible performed for customers or clients (or a prospective customer or client) of the *insured* . . .

On multiple occasions, the SIPA Trustee for MFGI has acknowledged that as of October 31, 2011, there was an approximate $1.6 billion shortfall in the segregated accounts of MFGI's commodities customers. In fact, as recently as June 4, 2013, in the SIPA Trustee's Third Six Month Interim Report for the Period December 5, 2012 Through June 4, 2013 (SIPA ECF Doc. No. 6548), the SIPA Trustee acknowledged that there is likely to be a shortfall of approximately $205 million in 4(d) customer accounts and between approximately $80 million and $140 million in 30.7 accounts. The acknowledged loss greatly exceeds the $120 million MFGA Policies' limits.

In addition to the MFGA Policies, U.S. Specialty issued a Directors and Officers Liability insurance policy (the "U.S. Specialty Policy") to Holdings that provides for hundreds of millions of dollars of D&O insurance to the former directors and officers of the MF Global enterprise. Relevant to the present objection, the U.S. Specialty Policy includes the following definitions and provisions:

- The Insurer will pay to or on behalf of the *Insured Persons Loss* arising from *Claims* first made during the *Policy Period* or Discovery Period (if applicable), against the *Insured Persons* for *Wrongful Acts*, except when and to the extent that the *Company* has paid such *Loss* to or on behalf of the *Insured Persons* as indemnification or advancement.

- *Insured Person* means any past, present or future director, officer, managing member or manager of the *Company*, including any person in a position which is the functional equivalent of a director, officer, managing member or manager with respect to any entity included within the definition of *Company* or *Outside Entity* located outside the United States.

- *Insured Person* [includes] any past, present or future employee of the *Company*, but only with respect to: (a) *Securities Claims*; or (b) any other *Claim* during such time that such *Claim* is made and maintained against at least one other *Insured*.

- Insurer will not be liable to make any payment of *Loss* in connection with a *Claim* for any *Insured's* actual or alleged rendering of or failure to render any professional services, or any act, error or omission relating thereto; provided, that this exclusion will not apply to: (i) *Claims* for *Loss* payable under INSURING AGREEMENT (A); or (ii) *Securities Claims*.

- The Insurer will pay, to or on behalf of the *Insured Persons*, *Pre-Claim Inquiry Costs* or *Liberty Protection Costs* arising from *Pre-Claim Inquiries* first received by eh *Insured Persons* during the *Policy Period* or the Discovery Period (if applicable) . . .

- *Pre-Claim Inquiry* means any pre-*Claim* verifiable request for an *Insured Person* of a *Company* to appear at a meeting or interview or produce documents in connection with his or her *Wrongful Act* or such *Company's* business, but only if such request is from an *Enforcement Body* or is from a *Company*, including the board of directors (or legal equivalent) of the *Company* or any committee thereof, and arises from an inquiry or investigation by an *Enforcement Body* or as part of a *Derivative Investigation.*

As argued herein, this Court should deny the relief that the Movants request because the E&O policy proceeds vested in the commodities customers when their segregated accounts were illegally desegregated, and they would be irreparably harmed if those policy proceeds were instead used to fund the defenses of the various officers and directors. Likewise, because of the existence of the D&O Liability coverage offered by the U.S. Specialty Policy, no other party would be prejudiced. Further, when Sapere filed its notice of appeal of this Court's Lifting Order, this Court was divested of jurisdiction to grant the relief requested. Accordingly, this Court should not increase the soft cap as requested in the Present Stipulation.

ARGUMENT

This Court should deny the relief request in the Present Stipulation because there is not cause to modify the automatic stay to allow for payment of defense costs as is required by 11 U.S.C. § 362. Further, even if cause were to exist, this Court does not have jurisdiction to do so

because Sapere's pending appeal of this Court's Lifting Order has divested this Court of jurisdiction to amend or modify that order.

I. The Amendment to the Lifting Order Will Reduce the Estate of MFGI for the Purpose of Benefitting One Class of Persons (Former Officers, Directors and Employees) Over Another (Commodities Customers) and Thus Is Not in The Best Interests of the Estate.

The E&O policies apply only to situations involving losses sustained by customers. Beyond cavil, the proposed amendment of the Lifting Order will reduce MFGI's estate by the amount of the increase in disbursed E&O insurance proceeds. That loss to the estate—especially where, as here, the MFGI estate still is "short" hundreds of millions of dollars of commodities customers' segregated funds—is not in the best interests of the estate.

The proposed amendment of the Lifting Order will merely shift monies from one class of persons (MFGI's commodities customers) to another (former directors, officers and employees). That is not a benefit to the estate. Thus, good cause does not exist to lift the stay for purposes of the proposed amendment to the Lifting Order.

II. The Proceeds of the Errors and Omissions Insurance Policy Should be Used to Pay for the Shortfall in Commodities Customers Accounts.

Sapere maintains its position, as it continues to argue on appeal, that it is improper to modify the automatic stay imposed by 11 U.S.C. § 362 because the entirety of the $120 million in E&O Policies' proceeds vested in Sapere and other commodities customers the moment that their segregated funds were illegally desegregated, the Director and Officer Defendants will be able to mount a rigorous defense without use of the E&O Policies' Proceeds, and the McCarron-Ferguson act and New York Insurance Law § 3420 do not dictate a distribution in favor of the Director and Officer Defendants.[2] Because Sapere and other commodities customers will suffer

[2] Sapere hereby incorporates by reference each of its arguments previously made regarding the treatment of the E&O Policy proceeds before this Court (*In re MF Global Holdings, Ltd.*, Case No. 11-15059 (MG), Docket Nos.

irreparable harm, and other parties will not be prejudiced, if this Court amends the soft cap in its Lifting Order to $40 million, this Court should deny the relief requested in the Present Stipulation.

A. Sapere and Other Commodities Customers have Vested Rights in the MFGA Policy Proceeds.

Pursuant to this circuit's controlling precedent, Sapere and other commodities customers have vested rights in the entirety of the MFGA Policies' proceeds. *In re F.O. Baroff*, 555 F.2d 38, 40 (2d Cir. 1977). In *Baroff*, the court held that New York Insurance Law was designed to ensure that injured parties with unsatisfied claims against a debtor's estate receive the insurance policy proceeds before any general creditors of the estate. *Id.* at 43. The court in *Baroff* did not require that the injured party obtain a judgment or adjudication against the insolvent insured party. In fact, the court flatly rejected the proposition that an injured person was required to obtain a judgment against the bankrupt insured as a condition to recovering the insurance proceeds. The court wrote:

> [I]n formulating the mechanism whereby an injured person could receive the benefit of his insurer's insurance "in case judgment against the insured . . . shall remain unsatisfied," section 167(1)(b) [now 3420(a)(1)] simply reflected the general principles that the Legislature had in mind when it adopted section 167(1)(a). The legislative history of section 167(1) [now 3420(a)(1)] makes clear that it was not intended to establish any difference in the substantive rights of one who has procured a judgment against his injurer before bankruptcy and one who has not.

Other courts in this circuit have arrived at similar conclusions. *See, e.g.*, *Baez v. Med. Liab. Mut. Ins. Co.*, 136 B.R. 65, 66 (S.D.N.Y. 1992) ("[U]pon the filing of a bankruptcy petition, the insured is divested of his interest in the proceeds of the policy to

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419, 482, 574, and 661; and *In re MF Global, Inc.*, Case No. 11-02790 (MG) (SIPA), Docket Nos. 1477, 1478); the District Court (*Sapere Wealth Management LLC et al v. Freeh, et al.*, Case No. 12-mc-143 (KBF), Docket Nos. 1, 14, 22, 30); and in the Second Circuit (*Sapere Wealth Management LLC v. Freeh*, Case No. 12-4732, Docket No. 52).

the extent that those proceeds are needed to compensate the injured party, which proceeds at that point vest in the injured party.")

Although *Baroff* creates no such requirement, to the extent that liability must be established or admitted, the SIPA Trustee has acknowledged on multiple occasions that the shortfall in commodities customer segregated account funds far exceeded the MFGA Policies' limits of $120 million, and was actually approximately $1.6 billion. MFGI's liability to its commodities customers for the shortfall in their accounts is strict liability. *Sonn v. Smith*, 68 N.Y.S. 217 (N.Y. App. Div. 1901); s*ee also Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 213 N.E.2d 873, 876-77 (N.Y. 1965). Therefore, regardless of the existence of an adjudication, as claimants in the SIPA liquidation, Sapere and other commodities customers have injuries that fall within the scope of the MFGA Policies. The rights to the MFGA Policies' proceeds vested in the injured SIPA commodities customer claimants when MFGI was placed into liquidation on October 31, 2011. For these reasons, and those reasons set forth more fully in Sapere's other submissions, it is erroneous to increase the soft cap to allow for defense payments because Sapere and other commodities customers have vested rights in those proceeds, and to allow for any other distribution would result in irreparable harm.

B. Other Parties will not Suffer Harm if the Soft Cap is not Increased

Sapere and other commodities customers have experienced, and will continue to experience, significant harm due to payment of defense costs allowed by the Lifting Order, whereas other parties—namely, the individual insureds named in the MF Global Litigation—will not be prejudiced if the soft cap is not raised to $40 million. This is because adequate D&O coverage exists for former officers, directors, and employees of MF Global to mount a vigorous defense in any pending litigation. Any individual named as a defendant in Sapere's civil action

pending in the Southern District of New York, *DeAngelis v. Corzine, et al.*, Case No. 11-cv-7866 (VM), would be eligible for coverage under the D&O Policies issued by U.S. Specialty and would not require coverage under the MFGA Polices.[3] Critically, the MFGA Policies are "wasting policies," meaning that funds spent defending directors and officers deplete policy limits, thereby reducing the available funds left to compensate injured parties such as Sapere. If the soft cap is increased, those funds will be improperly spent on the former officers and directors of MF Global and will no longer be available to the commodities customers who have a vested right and a significant interest in the MFGA Policies' proceeds.

The existence of U.S. Specialty's D&O coverage minimizes the possibility of prejudice to other parties. This is because all Individual Insureds sued by commodities customer plaintiffs are "Insured Persons" pursuant to the "Side A" liability cover of the U.S. Specialty D&O Policy. Item (b) of Endorsement 11 to the U.S. Specialty Policy extends coverage to any former MF Global employee who is a co-defendant in an action against a "director, officer, managing member, or manager" of any insured entity. Every former employee who is sued is a co-defendant with someone who is a former director, officer or manager of Holdings or one of its subsidiaries. Each employee named as a co-defendant is an Insured Person under the U.S. Specialty Policies with defense funds available just as every other Insured Person and will not suffer harm if the automatic stay remains intact. Because MFGI's commodities customer

[3] Insuring Agreement A (i.e., "Side A" coverage) in the D&O Policies states that the insurer "will pay to or on behalf of the *Insured Person Loss* arising from *Claims* first made during the *Policy Period* . . . against the *Insured Person* for *Wrongful Acts*, except when and to the extent that the *Company* has paid such Loss to or on behalf of the *Insured Persons* as indemnification or advancement." Endorsements 9(2) and 11, respectively, define "*Insured Persons*" broadly to include "any past, present or future officer, director, managing member or manager of the *Company*, including any person in a position which is the functional equivalent of a director, officer, managing member or officer" *plus* "any past, present or future employee of the *Company*, but only with respect to . . . any other *Claim* during such time that such *Claim* is made and maintained against at least on other *Insured*." Further, Endorsement 9 to the U.S. Specialty Policy extended *Insured Person* to include managing members and managers, which would also likely extend coverage to all named civil defendants.

claimants would suffer great harm by lifting the automatic stay and other parties would not, this Court should not increase the soft cap to $40 million.

C. New York Insurance Law and the McCarran-Ferguson Act do not Support an Increase of the Soft Cap.

Under New York law, an injured party's rights vest at the time of the filing. *Baez v. Med. Liab. Mut. Ins. Co.*, 136 B.R. 65, 68 (S.D.N.Y. 1992). The injured party need not obtain adjudication to obtain vested rights, nor must the injured party wait for the whims of an insurance company's claims determination process. Indeed, the federal liquidation scheme prohibits a commodities customer from obtaining such a judgment and instead remits the customer to filing a proof of claim in the SIPA liquidation. Imposing an adjudication requirement would subvert and eviscerate New York Insurance Law Section 3420(a).

Further, none of the cases addressing New York Insurance Law § 3420 or insurance policy proceeds under New York law invoke the McCarran-Ferguson Act. *See, e.g.*, *Baroff*, 555 F.2d at 38 (analyzing the application of § 3420's precursor, § 167, as it applied to a broker-dealer in SIPA liquidation); *Baez*, 136 B.R. at 68 (analyzing the application of § 3420 without consideration of McCarran-Ferguson).

New York law does not automatically remove or except the MFGA Policies' proceeds from the bankruptcy process. In this case, the result under New York law is consistent with the clear principles of bankruptcy. This is because the commodities customers have vested rights to the entirety of the MFGA Policies' proceeds under New York law and also as priority creditors within the SIPA liquidation. The MFGA Policies should not be distributed to general creditors of MF Global (nor is anyone requesting such a result), but should be distributed pro rata to parties that have vested rights under New York law *and* are also similarly situated commodities customer claimants of MFGI in the SIPA liquidation. Because there is no conflict between New

York law and bankruptcy law, there is no need to invoke any special exception to bankruptcy law or to apply the McCarran-Ferguson Act. As applied in this case, SIPA and bankruptcy law do not "invalidate, impair or supersede" New York Insurance Law § 3420(a)(1). 15 U.S.C. § 1012 (b).

In any event, if application of the McCarran-Ferguson resulted in reverse preemption, it does not alter the result that MFGI and its commodities customers had a concrete, vested interest in the MFGA Policies' proceeds before any director, officer or employee incurred defense costs, including pre-claim investigation costs. That is, "reverse preemption" by McCarran-Ferguson in this setting would *still* result in a distribution of proceeds in favor of MFGI before any Individual Insureds. Accordingly, the application of McCarran-Ferguson provides no support for initially lifting the automatic stay, nor does it support increasing the soft cap to $40 million.

III. The Bankruptcy Court does not have Jurisdiction to Grant the Relief Requested.

The filing of a notice of appeal is an "event of jurisdictional significance" that divests the court of jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The same principle applies in bankruptcy court proceedings, and the bankruptcy court does not have jurisdiction to hear matters that are the subject of a pending appeal. *In re Winimo Realty Corp.*, 270 B.R. 99, 105 (S.D.N.Y. 2001) (holding that filing a notice of appeal divests the bankruptcy court of jurisdiction in order to "avoid confusion or waste of time from having the same issues before two courts at the same time"); *In re Karen de Kleinman*, 150 B.R. 524, 527 (Bankr. S.D.N.Y. 1992) (holding that the bankruptcy court did not have jurisdiction to grant the relief requested because a notice of appeal had been filed). An act that expands or alters an order that is the subject of appeal, or decides an issue that is identical to the one being appealed, is

impermissible and not within the bankruptcy court's jurisdiction. *In re Winimo Realty Corp.*, 270 B.R. at 106.

Here, Sapere filed its notice of appeal of this Court's Lifting Order to the District Court on April 25, 2012, thereby divesting this Court of jurisdiction over matters pertaining to that order. Sapere filed its notice of appeal of the District Court's affirmation of this Court's Lifting Order to the Second Circuit on December 3, 2012, thereby divesting the District Court of jurisdiction. Accordingly, as the appeal is still pending in the Second Circuit, this Court does not have jurisdiction to amend or modify the Lifting Order, and is unable to grant the relief that the Movants request in the Present Stipulation. To hold otherwise would create "confusion or waste of time from having the same issues before two courts at the same time," which the court in *Winimo Realty* expressly advised against.

Further, the relief requested in the Present Stipulation is a request to amend or modify the Lifting Order—it is not simply a request to enforce that order. The Present Stipulation addresses an identical issue that is currently the subject of appeal in the Second Circuit. As Sapere has appealed whether it was proper to lift the automatic stay and allow for a soft cap of $30 million for the payment of defense costs, to amend the soft cap and increase it to $40 million would be a substantive modification or amendment—not mere enforcement of the Lifting Order. As the court in *Winimo Realty* held, an act that "expands or alters" an order that is the subject of appeal is not within the bankruptcy court's jurisdiction following the filing of a notice of appeal. To increase the soft cap by $10 million is certainly act that "expands or alters" the initial soft cap of $30 million and, accordingly, this Court does not have jurisdiction to grant the relief requested in the Present Stipulation.

CONCLUSION

For the foregoing reasons, this Court should deny the relief requested in the Stipulation. This Court should also grant such other relief that it deems just and proper.

Dated: May 6, 2013
New York, New York

Respectfully submitted,

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