

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:

6 MF GLOBAL HOLDINGS, LTD.,

7 Debtor.

8 - - - - - x

9 Adversary No.: 11-02790-mg

10 In the Matter of:

11 MF GLOBAL, INC.,

12 Debtor.

13 - - - - - x

14

15 United States Bankruptcy Court

16 One Bowling Green

17 New York, New York

18

19 June 28, 2013

20 2:03 p.m.

21

22 B E F O R E :

23 HON MARTIN GLENN

24 U.S. BANKRUPTCY JUDGE

25

1 Adversary proceeding: 11-02790-mg MF Global, Inc., (CC: Doc
2 no. 6520, CC: Doc no. 6577, 6574) Hearing RE: Objections to
3 Dual Notice of Presentment of Stipulation to Lift the
4 Automatic Stay to Permit Payments of Defense Costs Under
5 Certain Insurance Policies
6
7 11-15059-mg (Doc no. 1466) Hearing RE: Objections to Dual
8 Notice of Presentment of Stipulation to Lift the Automatic
9 Stay to Permit Payments of Defense Costs Under Certain
10 Insurance Policies.

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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 Inc., Number 11-2790.

Mr. Kobak, or who is going to begin here?

MR. KOBAK: Good afternoon, Your Honor. James Kobak, Hughes, Hubbard & Reed. I think technically it's the insurer's --

THE COURT: Okay.

MR. KOBAK: -- motion.

THE COURT: All right.

MS. AHARI: Good afternoon, Your Honor. Leslie Ahari, Troutman Sanders, on behalf of US Specialty Insurance Company and XL Specialty Insurance Company.

We have before the Court a dual notice of presentment of stipulation to lift the automatic stay to permit the payment of defense costs under certain insurance policies.

As the Court may recall, back in April of 2012, the Court entered an order permitting the insurance companies to pay up to \$30 million towards defense costs being incurred by the insureds in connection with the MF Global litigation pending against them.

Since that time, it's become necessary to ask -- to seek leave to raise the cap to \$40 million. Under the Court's April 25th, 2012 order, the Court indicated that

1 this -- the soft cap of 30 million could be raised either by
2 -- by stipulation or agreement between the SIPA trustee, the
3 Chapter 11 trustee and the insurers, or by order of the
4 Court. The SIPA trustee, the Chapter 11 trustee and the
5 insurers were able to agree a couple of months ago to raise
6 the soft cap to \$40 million and so signed the stipulation,
7 and that has been presented to the Court.

8 We believe the stipulation is essentially self-
9 implementing under the terms of the Court's previous order
10 and not subject to objection because, as I recall, the Court
11 back in April really didn't want to hear anything further on
12 this, didn't want to hear further objections.

13 THE COURT: I guess I also didn't expect 30
14 million was going to be burned through this quickly, but --

15 MS. AHARI: Fifteen months, actually, Your Honor,
16 is -- is not that quick of a time.

17 THE COURT: It's a lot of money.

18 MS. AHARI: It is where there are over 50 insureds
19 who are drawing on the policies. There are a number of
20 lawsuits pending against them. There are a number of
21 governmental investigations, and -- and now we have a
22 governmental suit that's been filed. So in -- I think in
23 the big scheme of things it's -- it's really not -- I don't
24 think an unreasonable amount of money that's been incurred.

25 So in light of that, there were objections that

1 were filed, one by Sapere. Sapere's objection essentially
2 raises the same arguments that they raised at the time that
3 the Court considered this issue back in April of 2012, and
4 the same arguments were made before the District Court up on
5 appeal and the District Court rejected those arguments. The
6 appeals --

7 THE COURT: What about their argument that I don't
8 have jurisdiction to -- to deal with this?

9 MS. AHARI: I think under the very case that they
10 cite, the Winamo Realty case, the divestiture rule with
11 respect to jurisdiction I don't believe applies when the
12 matter that's being considered doesn't alter or amend the
13 previous order. All we're doing here is implementing and
14 enforcing the Court's previous order. And under the exact
15 --

16 THE COURT: Previous order is unstayed. No -- no
17 court has stayed it either.

18 MS. AHARI: No court has stayed this order. No,
19 Your Honor. This Court declined to stay its order and then
20 the District Court also declined to stay the order.

21 So we believe that the stipulation is actually
22 self-implementing under the terms of the Court's original
23 order because the Court indicated that the soft cap could be
24 adjusted by agreement of the parties, and that's exactly
25 what happened. So we don't believe that the Court is

1 divested of jurisdiction to sign the stipulation.

2 THE COURT: A couple of issues that are of concern
3 to me. The first is that -- well, how much has been spent.
4 Has all -- has the full 30 million been exhausted so far?

5 MS. AHARI: There -- we have bills -- between all
6 of the towers, we do have bills that exceed \$30 million at
7 this point.

8 THE COURT: How much do the bills -- how much --
9 how much in bills have you received so far?

10 MS. AHARI: We've -- well, I've literally received
11 bills every day.

12 THE COURT: Okay.

13 MS. AHARI: We're estimating that we have about 32
14 million in bills currently. That amount has not yet been
15 paid because of the soft cap and the need to enter into this
16 stipulation.

17 Currently, what's been paid is -- is closer to \$27
18 million.

19 THE COURT: I guess a couple of things that -- and
20 you'll remind me about this, but I -- that it -- that have
21 changed. I think at the time in April of 2012, neither of
22 the debtors had yet asserted claims which would have
23 provided coverage under the policies. Am I right about
24 that?

25 MS. AHARI: Do you mean claims that were asserted

1 against the debtors for which they would be entitled to
2 coverage or claims that they asserted against the
3 individuals?

4 THE COURT: Well, the policies had entity
5 coverage, correct?

6 MS. AHARI: Limited entity coverage. Yes.

7 THE COURT: Okay. But I thought that at the time
8 of the initial motions the -- a claim on the entity coverage
9 hadn't yet been triggered. It was anticipated, but had not
10 yet been triggered, and that since then it has. Am I right
11 in that?

12 MS. AHARI: Your Honor, under the directors and
13 officers policy, the only entity coverage that's provided is
14 for securities claims against MF Global.

15 THE COURT: Uh-huh.

16 MS. AHARI: And to my knowledge no securities
17 claim has been asserted against any MF Global entity that
18 would trigger the coverage.

19 THE COURT: Well, that's because of the
20 bankruptcy, but --

21 MS. AHARI: That's true. But -- but I don't --

22 THE COURT: Okay.

23 MS. AHARI: For the -- for the ENO policies --

24 THE COURT: Yes.

25 MS. AHARI: -- professional liability policies --

1 THE COURT: Yes.

2 MS. AHARI: -- I believe at the time back in April
3 of 2012 Sapere was claiming that MF Global Inc was liable
4 for the missing customer funds. I'm not aware that -- that
5 any lawsuit has been filed against an MF Global entity,
6 perhaps because of the stay, up until --

7 THE COURT: Well, but claims --

8 MS. AHARI: -- yesterday.

9 THE COURT: -- proofs of -- proofs of claim have
10 been filed in the bankruptcy.

11 MS. AHARI: The proofs of claim have been filed.
12 That's correct. But a proof of claim, the determination of
13 a proof of claim doesn't require a finding of wrongful
14 conduct by the debtor.

15 THE COURT: Okay. I'll let others address this
16 because I thought that there is a change in the posture of
17 the case between the time I first decided the insureds'
18 motion and now.

19 And the other thing that's really -- the amount --
20 the fact that the directors and officers are -- have
21 exhausted \$32 million at this stage is of real concern to
22 me. These are wasting policies and every dollar spent on --
23 and this was true at the time of the first decision. Every
24 dollar spent on defense is one dollar less available to
25 satisfy claims.

1 You know, in a bankruptcy matter, anything that
2 will deplete the debtor's assets that involves professional
3 fees, I've got to review the fee applications. And here, of
4 course, I don't, and no court has.

5 So the insurers have received bills for \$32
6 million in claims and it paid approximately 27 million,
7 according to you, and no court has ever reviewed those bills
8 to determine whether the estates' assets should be depleted
9 by that amount. Is that a fair statement?

10 MS. AHARI: I think it's fair to say that no court
11 has reviewed the bills. That's correct.

12 THE COURT: And that's of concern to me because --
13 so now you're seeking to raise it to \$40 million and, you
14 know, if there isn't a resolution of claims -- you know,
15 typically, early on in litigation, you know, there's a
16 flurry of activity at the start and -- and the bills are run
17 up. But the real bills start when discovery is going. But
18 -- but the parties have been in mediation and they've spent
19 \$32 million and they haven't taken a deposition yet.

20 Okay. And if the litigation goes forward, the
21 burn rate -- if this much has been burned in what is
22 essentially fairly preliminary, I could only fathom what's
23 going to happen if the litigation really goes forward full
24 bore. And they're wasting policies and the two estates are
25 potential -- you know, potentially have the right to recover

1 on those -- on some of the policies, at least. And I'm not
2 sure I'm inclined to just let this go, agreement among --
3 you know, the stipulation or no stipulation, it's unchecked,
4 unreviewed by any court. That's what's bothering me.

5 I'm -- look, when I wrote the opinion, I obviously
6 -- I -- I believed that New York law was such that the
7 officers and directors who were insureds were entitled to a
8 defense. But at some point -- and I thought I was being
9 very generous with a \$30 million cap because I didn't want
10 people coming back in here six months later saying, you
11 know, judge, you set \$10 million as the cap. That's --
12 that's not reasonable. That's unrealistic. These are huge
13 cases. So I thought I was going overboard to keep this from
14 coming back by setting it at 30 million, given the towers
15 and the amount of insurance.

16 But here you are asking for the cap when -- when
17 it's already 32 million in bills. Boy, they're going to be
18 at 40 million in no time at all, and I don't know that
19 that's appropriate. I -- I -- so I want to hear argument
20 from the objectors about it, and then I also -- I want to
21 hear from --

22 Mr. Kobak, I know that -- that Mr. Giddens has
23 entered into the -- you know, authorized entering into the
24 stipulation and I would like to hear from Mr. Bennett as
25 well. It's not all that crystal clear to me that I ought to

1 approve this.

2 MS. AHARI: Your -- Your Honor, may I respond --

3 THE COURT: Yes, you can.

4 MS. AHARI: -- further before --

5 THE COURT: Please. Yes.

6 MS. AHARI: Well --

7 THE COURT: Go ahead.

8 MS. AHARI: -- first, with respect to the Court's
9 concern that these bills have not been reviewed by a court,
10 the insurance companies have every incentive to control the
11 defense costs in this case. And we have reviewed these
12 bills very, very carefully. We have a person at my firm who
13 does the first level of review, and I pulled her time
14 records. She has spent over 500 hours reviewing every
15 single one of these bills. And then the bills are subjected
16 to a second and third level review, and they are also
17 subjected to a review by our insurance company clients
18 themselves. So the law firm does the first level review.
19 The insurance company does the second level review.

20 For -- for the D&O policies, just to give you an
21 example, of about 22 million of bills that were processed
22 and reviewed, of that amount the insurance company declined
23 to pay \$3.8 million, and the reason for that is that we were
24 able to negotiate rate discounts from virtually every single
25 firm that has been employed to represent the 50 plus people

1 who need counsel and who are potentially entitled to --

2 THE COURT: How many sets of lawyers are there?

3 MS. AHARI: There are approximately 34 law firms
4 involved. And many of those people haven't even been sued.
5 There are 26 people who are defendants in the litigation,
6 and then there are a number of other people who are not
7 defendants in any litigation.

8 THE COURT: So of the 32 million, how much of that
9 is reflected in the bills of the top five or the top -- you
10 know, just take the top five people?

11 MS. AHARI: I don't know the answer to that
12 question off the top of my head, Your Honor. But I think
13 it's fair to assume that the -- that the defendants, the
14 individual insureds who are involved in most of the
15 proceedings are obviously going to have the higher bills
16 because their attorneys are required to do much more.

17 THE COURT: Well, I think I -- you know, I want to
18 see a chart showing who's been -- who's billed what on
19 behalf of whose behalf. Okay. So if Mr. Corzine's counsel,
20 for example, I don't know what their bills have been. I
21 want to know what -- and I assume that some firms are
22 representing more than one --

23 MS. AHARI: That's correct, Your Honor.

24 THE COURT: -- individual. I mean, I want to know
25 who the firms are, who they're representing, how much in

1 bills they've submitted and how much they've been paid.

2 MS. AHARI: Okay.

3 THE COURT: I'm not asking at this stage to look
4 at the time records, but I do want to know. And if -- if --
5 I'll hear if -- if you or their counsel believe that that's
6 -- shouldn't be public information, I'll take it under seal.
7 But I'm not approving this motion without seeing what each
8 firm has billed and been paid. When I see that, I may have
9 more questions. But, I mean, I view the 32 million before
10 these cases have really gotten underway as extraordinary.

11 I -- look, there's a lot of insurance, but they're
12 wasting policies. The claims are enormous such that there
13 isn't enough in -- if there was coverage, and I know that
14 you're -- your insurers on operating on a reservation of
15 rights. I understand that. But let's assume there's
16 coverage. If the claims are anywhere near the magnitude of
17 what have been asserted, there -- the insurance barely
18 covers -- doesn't cover. Okay. And, you know, before any
19 counsel persuades me that I'm supposed to authorize payments
20 from insurance that will provide everybody with a defense,
21 but no money to pay claims, a lot more briefing and argument
22 is going to be required to -- to persuade me of that.

23 Okay.

24 MS. AHARI: Your Honor, may I make a --

25 THE COURT: Yes.

1 MS. AHARI: -- few more points?

2 THE COURT: Please. Go ahead.

3 MS. AHARI: With respect to the amount that has
4 been incurred, I -- I will say, yes. There are a number of
5 lawsuits that are pending against the insureds. In the
6 Federal District Court the lawsuits have been stayed since
7 February.

8 THE COURT: For the mediation before Judge
9 Weinstein.

10 MS. AHARI: Correct. But what has not been stayed
11 are the governmental investigations, and the vast majority
12 of the insureds, particularly those who have not been sued,
13 their costs have been incurred in the investigations. Those
14 are not stayed. Those are not subject to stay. Those have
15 been very active since the beginning.

16 THE COURT: And I guess what I would like to see
17 is on -- on this -- on this chart with the fees is if you
18 would break it down between governmental investigations and
19 defense of litigation. I just -- I may have a different
20 attitude about people being entitled to a defense in a
21 governmental investigation than -- what -- what I'm -- look,
22 what I'm really focused on and worrying about is, in
23 particular, the civil litigation which has barely gotten
24 going. I don't underestimate the amount of work that gets
25 done at the start of the case, understanding the facts,

1 getting the documents, reviewing the documents. But there
2 hasn't been a deposition taken yet.

3 To the extent that individuals are represented in
4 a governmental investigation and if they're called for
5 testimony and there's preparation and, you know, that -- I
6 have a different attitude about that. Okay. But I just --
7 we're -- we're -- 32 million is extraordinary.

8 MS. AHARI: Your Honor --

9 THE COURT: And I want to see what the
10 distribution of that is among the top handful of defendants.

11 Okay. Go ahead, Ms. Ahari.

12 MS. AHARI: Your Honor, essentially, by -- by
13 suggesting -- by the objectors and the SIPA trustee and the
14 other -- the liquidation administrator, by suggesting that
15 the Court should cut off the defense costs, whether it's at
16 30 million or 40 million or whatever the number is, I mean,
17 they're asking the Court to do something that hasn't been
18 done before. There have been a number of cases in front of
19 this court which are far more notorious than MF Global where
20 insurance was front and center, similar situation, limited
21 amount of insurance, many lawsuits, many governmental
22 investigations pending.

23 THE COURT: It's the one thing I haven't -- I have
24 not said I'm cutting anybody -- I'm cutting it off, but I'm
25 not prepared to approve it without more information. That

1 I'm making clear. I sign this order, it's another 10
2 million. If litigation goes forward, you'll all be back.
3 I'm not saying I'm not going to approve an increase. I'm
4 not going to approve an increase without additional
5 information. Okay.

6 This -- it would be one thing if the estates did
7 not have a claim on the insureds. But where the insurance
8 also may be available to satisfy claims against the estates,
9 they have an interest in the proceeds. I think I said in
10 the earlier opinion, clearly, the policies -- these were
11 policies that are property of the estate. The issue is the
12 -- about the proceeds of the insureds, is that property of
13 the estate.

14 Well, I think given the changed circumstances
15 since the initial decision, proceeds are -- are property of
16 the estate. That isn't to say that the insureds don't have
17 -- the individual insureds don't have a claim against it as
18 -- against the policies as well. But at this point it
19 becomes a competition between two or more claimants against
20 the insurance. I'm not saying I want to prove it, so don't
21 tell me that, you know, there's no other case, no cases.
22 I'm not saying it won't happen.

23 But there is -- and I -- I appreciate that your
24 firm and the insurers review the bills. That's not the same
25 thing as a court with responsibility for overseeing the

1 assets of an estate reviews and makes a judgment as to what
2 to approve and what not to approve because every dollar paid
3 out diminishes the availability, and I'll hear from others
4 about it. Are you disputing that -- that proceeds of the
5 policies at this stage, some amount of proceeds of the
6 policies are property of the estates?

7 MS. AHARI: I think with respect to the D&O
8 policy, there -- there are no claims against the entities
9 that potentially are going to trigger the D&O policies. In
10 addition, there's a priority of payments provision under the
11 D&O policy.

12 So I think with respect to the D&O policy, yes, I
13 would dispute that.

14 THE COURT: Okay.

15 MS. AHARI: With respect to the E&O policy, I
16 think there are going to be very serious coverage questions
17 as to any claims against MF Global Inc, including based on
18 what was made public yesterday with respect to the CFTC
19 proceeding. There's been an admission of liability. The
20 SIPA trustee consented to a settlement or agreed to a
21 settlement without the insurers' knowledge or consent. So I
22 think there will be very serious coverage questions with
23 respect to the entities under the E&O policy.

24 So even assuming that the individual insureds and
25 the entities are -- are essentially co-insureds under that

1 policy, the question of whether they'll be entitled to
2 coverage at the end of the day I think is very much an open
3 question.

4 THE COURT: Open question, but not for a day and
5 that there is no coverage of the entities and every dollar
6 that goes out the door is one dollar less available for the
7 -- with enormous claims against the estates.

8 MS. AHARI: But the estates have had the benefit
9 of the litigation stay against them. They haven't been
10 subjected to suits. They haven't been -- essentially, they
11 have lawyers. The estate's paying their lawyers fees. With
12 respect to the individuals, that's not the case. They have
13 been subjected to litigation. They are not protected by the
14 automatic bankruptcy stay. The governmental investigations
15 are proceeding. Those are not subject to a stay. The
16 individuals really have no choice in the matter.

17 THE COURT: So with --

18 MS. AHARI: And --

19 THE COURT: Look, I made clear that with respect
20 to the governmental investigations, I'm sensitive to the
21 needs of the individuals for representation.

22 With respect to the civil actions, I know through
23 personal experience that in many cases with a lot less
24 insurance than this, with many multiple defendants all with
25 claims against the same policies, how in order to minimize

1 the draw on the insurance, efforts are made to avoid
2 duplication or overlap of work, agreements are reached as to
3 firms taking the lead on certain issues, a whole variety of
4 things.

5 And I've also been involved in a case where the
6 insurance ran out. It was exhausted before the case ever
7 went to trial, and what the consequences of that are,
8 particularly for individual defendants who were not well
9 healed and don't have the resources themselves.

10 So here there's a lot of insurance, but not an
11 infinite amount. And what concerns me -- and I don't -- I
12 don't doubt -- I respect that you've indicated your firm
13 reviews the fees, that the insurers review the fees. We'll
14 -- I want to hear from other counsel, but at a minimum I --
15 I want to see a chart, and if you want to address whether it
16 needs to be filed under seal, that's fine. I want to see
17 which firm's representing -- which individuals have
18 submitted bills in what amount, have been paid what amount,
19 how much for governmental investigations, how much for civil
20 litigation.

21 MS. AHARI: We'll provide that chart, Your Honor,
22 and we do think it should be provided under seal.

23 THE COURT: That's fine. I recognize it's
24 sensitive information and I believe it satisfies Section
25 107(b) of the Bankruptcy Code for it to be filed under seal.

1 MS. AHARI: Okay. And with respect to the efforts
2 of defense counsel to coordinate, Ms. Doherty is prepared to
3 address that. She's in a much better position --

4 THE COURT: Okay.

5 MS. AHARI: -- to do that than I am, so I'll --
6 I'll defer to her on that --

7 THE COURT: Okay.

8 MS. AHARI: -- particular issue.

9 THE COURT: All right. Thank you.

10 MS. AHARI: Thank you.

11 MS. DOHERTY: Good afternoon, Your Honor. My name
12 is Therese Doherty. I'm with the law firm of Herrick
13 Feinstein, and I represent two of the individual insureds
14 who most people have not heard of. One of them is Sumit
15 Advani and the other is Matthew Besgen. And I'm going to
16 speak on behalf of those individual insureds as well as all
17 of them who have put in a response on this motion.

18 And I want to address some of your issues that
19 you've raised.

20 THE COURT: Are they defendants in any of the
21 civil litigation?

22 MS. DOHERTY: My clients?

23 THE COURT: Yes.

24 MS. DOHERTY: They are both defendants only in the
25 Sapere case --

1 THE COURT: Okay.

2 MS. DOHERTY: -- not in any of the other.

3 THE COURT: All right.

4 MS. DOHERTY: Sapere, as you know, named 26
5 individual defendants. They dropped seven of them and then
6 found seven more individual defendants, so they kept the
7 number at 26.

8 I also represent 12 other former officers,
9 employees of MF Global who are not defendants in any of the
10 actions, but who have put in claims and are participating as
11 witnesses and cooperating in all of the government
12 investigations.

13 So I would like to address --

14 THE COURT: Is -- is there coverage for
15 cooperators?

16 MS. DOHERTY: Absolutely.

17 THE COURT: Under what provisions of the policies?

18 MS. DOHERTY: Under the E&O and the D&O policy,
19 they provide cover to the employees, officers and directors
20 when there are governmental or regulatory investigations
21 relating to potential wrongdoing. There are -- and it's not
22 just the E&O. There are certain of my clients, and many of
23 the 50, because only 26 of them are defendants in the civil
24 actions, but the other 24 are involved in the regulatory and
25 governmental investigations. They are provided with

1 coverage under the E&O or the D&O or both, and there's
2 allocation issues.

3 And there's priority of payments, as we know,
4 under the D&O policy which provides that those defense costs
5 get paid before anything else and it gets paid as they are
6 incurred, not to some later date.

7 But let me just back up a little bit.

8 You're correct that the civil litigations that are
9 all pending before Judge Marrero have been stayed. And Ms.
10 Ahari addressed that there are all of the governmental
11 investigations.

12 With respect to the civil litigations, in the
13 customer representative class action complaint, they've
14 limited the number of defendants there to eight. The
15 securities class action is 11 defendants, but the Sapere has
16 26 defendants.

17 THE COURT: And they're the one who is objecting
18 to anything at --

19 MS. DOHERTY: Correct. So, you know, which way
20 would they like it; would they like all of these law firms
21 defending these individuals or would they want to limit it
22 and get rid of these law firms and get rid of the fees? I
23 personally, my clients would appreciate to be let go and --
24 and limit the fees.

25 Sumit Advani, for example, in all of this there is

1 one single allegation against him by Sapere; that one
2 sentence of him in the entire complaint is that he was a
3 member of the Holdings' ALCO committee. It's not even true,
4 and even if it were true, so what. Why is he here? There's
5 no reason.

6 So you are correct that that's been stayed since
7 February, but what has happened, when we were here last
8 April the governmental investigations, while it was six
9 months into, seven months into the MF Global fallout, the
10 governmental investigations really only started kicking in
11 gear after we were before Your Honor and Your Honor issued
12 that order.

13 There have been, as it's all been public, there
14 have been congressional hearings by two sub-committees.
15 There have been investigations by two United States
16 Attorneys. There's been investigations by the CFTC, by the
17 FCC, by FINRA, and it has involved depositions.

18 THE COURT: Have your clients been deposed in any
19 of the proceedings --

20 MS. DOHERTY: Yes.

21 THE COURT: -- or called before a grand jury or
22 any -- any of the above?

23 MS. DOHERTY: Interviews. There have been plenty
24 of interviews informally, formally, and depositions by the
25 governmental agencies, yes. And it's not just my clients.

1 It's a huge number and on multiple, multiple occasions, and
2 the number of emails that are involved in this that have
3 been produced by the trustees to the government are
4 astronomical, and we've only been focusing on certain time
5 periods, not even, you know, a year-and-a-half before the
6 demise of MF Global. There's been, you know, just certain
7 time periods.

8 THE COURT: As I said, I'm more sympathetic to the
9 issue of representation in connection with governmental
10 investigations. But go ahead.

11 MS. DOHERTY: Well, all of these individuals, the
12 50 of them, and the vast majority of them are -- you talk
13 about the big five. The vast majority of them, whether it
14 is people that are in the civil litigations like my clients
15 and plenty of other of the 26, they were not highly paid
16 employees. Many of them remain unemployed as a result of
17 the MF Global debacle. These people -- they're just simply
18 unable to bear the extraordinary costs of civil litigation
19 or the investigations. And it's inherently unfair for the
20 customer representatives or the trustees of Sapere to go and
21 name them and then seek to prevent them from defending
22 themselves.

23 You know, the estate assets, which you're here
24 looking to protect, the same is as our -- my clients are.
25 The estate assets are --

1 THE COURT: Every dollar that gets paid to
2 customers is one --

3 MS. DOHERTY: That's correct --

4 THE COURT: -- less dollar --

5 MS. DOHERTY: -- but all --

6 THE COURT: -- of potential liability.

7 MS. DOHERTY: That's absolutely correct, but all
8 of those estate assets are being used to fund those
9 litigations, and then they're seeking to prevent the
10 individuals from tapping into the insurance whose sole --
11 one of the sole reasons for that insurance is to protect
12 them. It's -- it's inherently unfair. And it's --

13 THE COURT: That's why --

14 MS. DOHERTY: -- unprecedented.

15 THE COURT: -- I want to see the breakdown between
16 what the costs have been in connection with governmental
17 investigations versus defense of civil litigation. I'm more
18 sympathetic to those individuals who have -- who have and
19 may still be incurring fees in connection with governmental
20 investigations. Okay. I'm not saying that when they get
21 named in a civil suit they lose their entitlement, but I'm
22 suffer -- I'm suffering from sticker shock.

23 MS. DOHERTY: I -- I appreciate that and I think
24 that Your Honor was focusing on the civil litigations and
25 not the extent of the massive investigations that have been

1 ongoing by several governmental entities that -- and as Ms.
2 Ahari said, I think that --

3 THE COURT: So I'll see the breakdown.

4 MS. DOHERTY: I'm not privy to that information.
5 You can see --

6 THE COURT: I'll see the breakdown --

7 MS. DOHERTY: -- the breakdown.

8 THE COURT: -- and we'll see. If I have to have
9 -- if we have to have another hearing, we'll have another
10 hearing.

11 MS. DOHERTY: For the individual insureds, they
12 would agree with Ms. Ahari that it's extremely, extremely
13 important that all of that information be kept under seal.

14 THE COURT: I've told you right off the bat that
15 I'm prepared to take it under seal.

16 MS. DOHERTY: Okay. Just let me address the
17 reasonableness of the defense costs because Your Honor made
18 that point very clearly last year when we were before you on
19 the original motion. The insurers have been advancing and
20 the insureds are only seeking reasonable defense costs.

21 And as Ms. Ahari said, the insurers really have
22 been diligent. They've negotiated discounts from law firms.
23 There are several law firms that have multiple clients. As
24 I said, Herrick Feinstein represents 14. There's another
25 firm that has -- there's a couple of firms that have five or

1 six individuals. There have been guidelines that are
2 enforced. There is a rigorous review of those bills and --

3 THE COURT: Not by me.

4 MS. DOHERTY: Excuse me.

5 THE COURT: Not by me.

6 MS. DOHERTY: Under the policies and the
7 guidelines that set forth in the policies, those have been
8 strictly enforced by the insurers.

9 THE COURT: Go ahead.

10 MS. DOHERTY: The defense counsel has strived to
11 be economical. We have, certainly on the civil suit side,
12 there's a leadership structure in place where there is main
13 counsel doing the work on motions to dismiss, for example.
14 There is a cooperation among all defense counsel on both the
15 civil side as well as the regulatory side. There is an
16 extreme effort to avoid unnecessary duplication and to
17 coordinate everything.

18 So I think that the costs and the numbers that we
19 are have to be looked at in light of the enormity of what
20 has been going on with respect to all of the civil
21 litigations that were consolidated, basically, in the MDL as
22 well as what's going on before all of the various
23 governmental entities.

24 And I would stress again that the E&O and the D&O
25 policies are there. The individual defendant -- the

1 individual insureds, not just the defendants, the ones that
2 are subject to the governmental inquiries are contractually
3 entitled to have their defense costs advanced.

4 THE COURT: Look, I -- I wrote a decision that
5 obviously, Sapere isn't happy with. It's been affirmed by
6 the District Court. It's on appeal in the Second Circuit.
7 But it was largely pro-individual insureds and I -- you
8 know, I believe I followed the law. But it's not a blank
9 check, not a blank check. And when I see \$32 million, I
10 want to see the breakdown, how much of it has been spent on
11 governmental investigations versus how much on civil
12 litigation.

13 And I think if the civil litigation is not
14 resolved, 40 million -- another 10 million isn't going to
15 take you very far. Okay. And the debtors do have an
16 interest in the proceeds and you don't -- the individual
17 insureds may have a right to coverage. They don't have a
18 right to a blank check. Let me be clear about it. I don't
19 know of any case that says the individuals get their defense
20 costs paid no matter how much they are, no matter what the
21 impact on the debtor estate will be.

22 MS. DOHERTY: To the contrary --

23 THE COURT: If we need to have another hearing and
24 more briefs, we'll do it. But --

25 MS. DOHERTY: I would just like to add that to the

1 contrary, there is no precedent for cutting off defense
2 costs in that context.

3 THE COURT: Well, there may be.

4 MS. DOHERTY: It would be extraordinary and
5 unprecedented and --

6 THE COURT: Okay.

7 MS. DOHERTY: -- I think that the obligation to
8 conserve the assets of the estate also falls on the
9 obligations of the --

10 THE COURT: So you're saying --

11 MS. DOHERTY: -- trustees and the plaintiffs.

12 THE COURT: -- your argument would lead to the
13 conclusion that it doesn't matter how much is spent. The
14 individuals are entitled to burn all of the policies if
15 that's what it takes to defend. That's your position.

16 MS. DOHERTY: I think that the obligation is upon
17 the plaintiffs and the trustees to also make sure --

18 THE COURT: Is it your --

19 MS. DOHERTY: -- that it's economically --

20 THE COURT: Answer -- answer this question. Is it
21 your position that the individual insureds are entitled to
22 have their defense reimbursed even if it burns the entire
23 amount of both the E&O and D&O policies?

24 MS. DOHERTY: We have a long, long way to go
25 before --

1 THE COURT: No. Answer --

2 MS. DOHERTY: -- we're there and yes --

3 THE COURT: -- my question.

4 MS. DOHERTY: Yes. Yes, I do. They're --

5 THE COURT: Okay.

6 MS. DOHERTY: -- entitled to have reasonable
7 defense costs under the policy. It's not a blank check.
8 It's reasonable defense costs in accordance with those
9 policies.

10 THE COURT: Okay. And your view is the Court has
11 no role in determining what are reasonable expenses, this
12 Court, the Bankruptcy Court, I have no role to play; that
13 this is left to the individual defendants -- and not all
14 defendants, to the individual insureds and the insurance
15 company lawyers to determine what are reasonable costs.
16 That's end of the -- end of the subject. That's your view?

17 MS. DOHERTY: I'm unaware of any precedent that --
18 that puts that to the court. Under the contractual rights
19 under the policies --

20 THE COURT: Is it your view?

21 MS. DOHERTY: I'm not prepared to -- to say one
22 way or the other on that, Your Honor.

23 THE COURT: Okay. And so where is the line drawn?
24 You don't have any precedent that -- I take it, that says
25 that the individuals have the right to have their defense

1 costs paid even if it completely exhausts all the policies?

2 Do you have authority for that?

3 MS. DOHERTY: One way or the other. And I --

4 THE COURT: Okay. So don't you -- you say it
5 would be unprecedented. Well, you're telling me it's
6 unprecedented what you're arguing as well. I think that
7 that's a hypothetical that we don't need to get to.

8 THE COURT: I hope we don't. Okay.

9 Anybody else want to argue?

10 MS. DOHERTY: Thank you, Your Honor.

11 MR. DOODY: Your Honor, if I may, I'm Stephen
12 Doody on behalf of MFG Assurance. I'm the E&O policy
13 carrier, so I thought it might be proper in sequence to come
14 up for a moment?

15 THE COURT: Please.

16 MR. DOODY: Does that work for you?

17 THE COURT: Yeah.

18 MR. DOODY: Thank you.

19 THE COURT: Come on.

20 MR. DOODY: Thank you, Your Honor. Again, Stephen
21 Doody on behalf of MFG Assurance, and I'm from Allen &
22 Overy.

23 I don't think I need to rehash what two prior
24 counsel have gone through. I think they've done a very good
25 job of it and I appreciate the questions Your -- Your Honor

1 has.

2 I just wanted to try to touch on some of the
3 points that you raised. One is that with respect to the
4 vetting of defense costs, we have professional firms. I
5 just wanted to make mention that we have a firm called LVL
6 which does that specifically for the E&O policies. So what
7 we really have is a doubling up by having LVL look at it and
8 Troutman, and then on top of that, because MFG Assurance is
9 under enhanced regulatory scrutiny, we also have the BMA,
10 the Bermuda Monetary Authority that is looking at the
11 expenses of -- of the MFG Assurance, generally.

12 THE COURT: Are they getting copies of all of the
13 bills that are being submitted?

14 MR. DOODY: Your Honor, I know that they were
15 getting copies of bills for a long time. I'm not sure if
16 that's still the current practice because I think the BMA
17 has effectively said that the Willis -- which is a
18 professional broker -- they're relying on Willis to look at
19 it. And so we have Willis, LVL, and Troutman. So it's
20 several layers.

21 THE COURT: Who is getting copies of all of the
22 statement -- the detailed statements from professional
23 services?

24 MR. DOODY: For professional services, those go to
25 Willis, to LVL, and to Troutman. And, again, previously I

1 know that they had been going through at a certain rate to
2 -- to BMA, but I can't tell you that they are currently
3 going through there. The BMA got satisfied that the process
4 was appropriate.

5 THE COURT: Is there entity coverage under the E&O
6 policies?

7 MR. DOODY: I'm sorry. Is there entity coverage?

8 THE COURT: Is there entity coverage, yes.

9 MR. DOODY: Yes, there is, Your Honor. In fact,
10 you've addressed that in the -- in your memorandum is that
11 there is, and that brings me on to another point, which is
12 clearly a contentious point with respect to where do you
13 draw the line.

14 And I think that the case that we might want to
15 look at -- and maybe Your Honor is correct that we'll have
16 to do more briefing on this. But the First Century case
17 draws the line by saying that you look at present costs, you
18 look at present claims as opposed to future potential
19 claims.

20 And so what we have is defense costs that are
21 coming in now that are immediate. We don't estimate defense
22 costs going forward. We haven't said that defense costs are
23 going to be X millions of dollars going forward and,
24 therefore, we pay them all. But that's essentially -- oh,
25 excuse me.

1 THE COURT: It's okay.

2 MR. DOODY: Sorry about that.

3 THE COURT: It's all right.

4 MR. DOODY: But that's essentially what -- what is
5 being juxtaposed here is the potential claim, if realized,
6 valued, et cetera, that's not yet crystallized.

7 What First Century says is you don't preserve
8 policy proceeds for the purpose of future potential claims.
9 What you do instead is you -- you have to recognize that the
10 more immediate -- the immediate claims do get paid.

11 So we -- I appreciate, Your Honor, this is
12 somewhat ad hoc in terms of going back and forth on it and,
13 of course, we're happy to spend more time and give you more
14 briefing, if you wish. But I wanted to address that --

15 THE COURT: Okay.

16 MR. DOODY: -- to you.

17 THE COURT: Thank you, Mr. Doody.

18 MR. DOODY: I -- again, I think that prior counsel
19 has really covered a lot of this in terms of the costs being
20 pushed. We do also have this problem. I don't -- I don't
21 want to lose track of the fact, and I appreciate that Your
22 -- Your Honor is very focused on the regulatory actions.
23 But what we also have is a number of plaintiffs, and there's
24 an overlap among the plaintiffs as to who actually owns the
25 claims. So what we have is defense counsel spending time

1 and effort on that as well.

2 And so we have a multitude of complaints that have
3 come through. We have motions to -- excuse me -- motions to
4 dismiss with respect to those various claims. We haven't
5 gotten to the worst of it yet.

6 THE COURT: Motions of dismiss, have they been
7 filed?

8 MR. DOODY: I believe they are filed, but they're
9 now stayed by virtue of the -- of the stay that -- on the
10 MDL stay. And, again, counsel is correct in saying there's
11 an MDL stay. That's pre-vicarious. You -- you may have
12 seen that Sapere had asked for that to be disabled. The
13 stay is now in place for another month or so, but Sapere
14 does ask for that to be disabled. That's all there is a
15 month.

16 But, again, the --

17 THE COURT: A month now and it could be extended
18 or maybe shortened. I don't know.

19 MR. DOODY: Absolutely, Your Honor. That's
20 absolutely correct. It could be -- it could be -- it could
21 be extended.

22 But what we don't have is a stay with respect to
23 the ongoing regulatory matters and we don't have a stay with
24 respect to the CFTC, the Chapter 11, which has now morphed
25 into the plan administrator. There's still stuff going

1 forward and people still have costs and expenses. I don't
2 need to go again through the numbers. You've -- you've
3 heard that.

4 With respect to the claims themselves, that's
5 another issue that's an open issue. Sapere is probably a
6 good example of it. And maybe this is not fair just to
7 focus on them, but initially they said we are missing X
8 amount of dollars. The X keeps diminishing. As of right
9 now --

10 THE COURT: Fortunately.

11 MR. DOODY: Fortunately, and I think everybody
12 should be happy about that. There should -- that should be
13 the one thing we can all agree on. We're now at a point
14 where the SIPA trustee is saying that we're at 96 percent
15 and --

16 THE COURT: I think it was 94. Is it up to 96
17 now?

18 MR. DOODY: Well, I'll defer to Mr. Kobak, but I
19 think -- you said --

20 MR. KOBAK: Ninety-four.

21 MR. DOODY: Ninety-four. Oh, I'm sorry. I
22 misread that.

23 THE COURT: That's okay.

24 MR. DOODY: But we're -- we're definitely getting
25 up there and there's -- there are -- there's a debate as to

1 whether that number is still too conservative. So that
2 itself is another question about when Your Honor had said
3 these claims are enormous. They are enormous, but they are
4 the melting ice cube in a very positive way. As -- as more
5 good work is done by the trustee and -- and monies are
6 brought in, and they're allocated and -- and, you know, the
7 work is done, this is getting better and better.

8 So we, the insurers, don't yet know how bad this
9 is or, you know, how -- whether there is actually a claim.
10 Well, there will always be a claim, I guess, but there -- we
11 don't know -- we don't know the extent of it at this point.
12 I just wanted to make sure we -- we addressed that for one
13 second.

14 THE COURT: What's the cite to First Century?

15 MR. DOODY: I'm sorry, Your Honor. I don't have
16 it off my -- I know it's in your memorandum decision.

17 THE COURT: Okay. Mr. -- yeah. I -- which I have
18 here, so I --

19 MR. DOODY: If I get my book I can get it for you.

20 THE COURT: That's okay. I'll -- I'll find it.

21 MR. DOODY: It's -- it's on page 30, I think, of
22 your memorandum decision, if that's helpful.

23 THE COURT: Well, I got the Westlaw -- the West
24 version of it, so --

25 MR. DOODY: Well, it's somewhere around 30.

1 THE COURT: That's all -- I'll find it.

2 MR. DOODY: Okay. But he -- he's got it. Thank
3 you.

4 THE COURT: It's okay.

5 MR. DOODY: Thank you.

6 THE COURT: Go ahead.

7 MR. DOODY: And I think, Your Honor, and I'm
8 working from recollection here to one of your earlier
9 questions, whether at the time that you wrote the memorandum
10 decision, whether there was a claim from the SIPA trustee.
11 My recollection is that the SIPA trustee had -- had put in a
12 claim, at least to the E&O tower at that point.

13 THE COURT: Okay.

14 MR. DOODY: And I'm working from recollection, but
15 that's my recollection --

16 THE COURT: Okay.

17 MR. DOODY: -- and I just wanted to try to answer
18 your question on that.

19 Again, I think that prior counsel has really
20 covered a lot of ground here and those are all my -- my
21 other comments.

22 THE COURT: Thank you very much, Mr. Doody.

23 MR. DOODY: Thank you.

24 MR. BINDER: Your Honor, Neil Binder with Binder &
25 Schwartz. I submitted -- I represent Henry Steenkamp and we

1 submitted the motion along with Ms. Doherty as part of that
2 group.

3 Just to -- very briefly, Your Honor, I just wanted
4 to highlight, because my client is involved in all of the
5 civil litigations, just to let you know what has been done
6 because a lot of these fees -- and loud and clear Your Honor
7 wants a breakdown and Your Honor is going to get the
8 breakdown, I'm sure. But liaison counsel has been working
9 very, very cooperatively.

10 We have, in the customer action, filed a motion to
11 dismiss and then it was stayed before the plaintiffs had to
12 respond, and also in the securities action all of the
13 defendants filed a joint motion and then there were
14 supplemental briefs as well, and then there were replies.

15 In addition, the mediation itself has been -- has
16 -- there were two not full weeks, but two week sessions of
17 mediation that have involved extensive briefing on all of --
18 from Chapter 11 trustee and all the various entities as well
19 as retaining experts, working with experts, putting on very
20 substantive presentations as well. So a lot of work has
21 been done.

22 I don't know how much has been -- what the
23 breakdown is, but I think what you're going to find when you
24 get the numbers is that on the civil side you will -- you
25 should see a lot of coordination by a smaller group of

1 counsel, and -- and you'll see, when you see those numbers,
2 that there is a significant amount of very real work that is
3 the result of the litigations that have been filed,
4 including the filing by the Chapter 11 trustee of a
5 complaint against three of the defendants during the
6 pendency of the stay.

7 So work continues. There's a lot to be done. But
8 I think --

9 THE COURT: You filed the action, but it's stayed,
10 isn't it?

11 MR. BINDER: There -- there is no stay in that
12 action. There was a letter down to Judge Frances suggesting
13 that -- that there was a stay, but, obviously, work has to
14 be done when a complaint comes in. It can't simply be set
15 aside. So, anyway, I just wanted to alert the Court to --
16 to the extent of the cooperation and the work that is being
17 done.

18 THE COURT: Thank you.

19 MR. BINDER: Thank you.

20 THE COURT: All right. Mr. Kobak.

21 I don't know. Are you a supporter or an opponent?
22 I --

23 MR. KOBAK: Well, we did not oppose raising, even
24 though we think the burn rate is excessive, we do concede
25 that there is a need for defense costs to some extent, and

1 so we supported going to 40, and we're not withdrawing that
2 today. When the objection came in from the plaintiffs'
3 counsel to whom we assigned our claims that perhaps it was
4 time for the soft cap to become a hard cap, we do not oppose
5 that. We think it may be time to do that.

6 We're very happy to have Your Honor vet the
7 expenses. We think -- I think we've -- from early on we've
8 taken the position that we thought there ought to be some
9 kind of oversight and we appreciate that while we might like
10 to have that oversight, that might not be the most
11 appropriate thing. But we think, given the circumstances
12 here, it would be appropriate to have the Court review that.
13 We have a hard time, despite everything that's been said,
14 understanding why the fees have been mounting the way they
15 have.

16 I would like to focus on the E&O policy. We did
17 submit a claim under that policy back in April of 2012.

18 THE COURT: Was that before or after my -- my
19 decision --

20 MR. KOBAK: It was roughly --

21 THE COURT: -- in April?

22 MR. KOBAK: -- simultaneously.

23 THE COURT: Okay.

24 MR. KOBAK: I think we did it while the motion was
25 pending, probably shortly before Your Honor's decision.

1 THE COURT: Because my -- and this may be faulty.
2 My recollection is that when it was argued, you hadn't
3 submitted the --

4 MR. KOBAK: I think we said --

5 THE COURT: -- request.

6 MR. KOBAK: -- we were going to and we
7 subsequently did. And since that time we've submitted to
8 them results of our own investigation and other materials.
9 So that was over a year ago. The insurer's taken no
10 position on that claim, but it's not correct that there's
11 not a claim against that policy.

12 As recently as a couple of weeks ago in the Second
13 Circuit on one of the Sapere motions, they indicated that
14 they weren't prepared to take a position either finally or
15 preliminarily. It seems to me that it's -- part of this
16 problem could be alleviated if they were to take a position.
17 It's hard for me to see how they can disclaim coverage when
18 we now have at least four investigations, including the
19 CFTC's complaint, which seem to suggest that at the very
20 least there are serious errors and omissions that would be
21 covered by this policy.

22 I also want to dispel the idea that estate assets
23 are being used in the class action. That's really not true
24 to any significant extent. Part of the reason that we
25 assigned our claims to the class action plaintiffs was so

1 they would take the laboring ore in pursuing those actions.
2 We are cooperating with them, but that in itself is not a
3 terrible drain on the estates' resources. And, likewise, I
4 don't believe the class action plaintiffs have named
5 anything like 26 people.

6 I'm a little surprised to hear about the expenses
7 of the investigations. I know there's been a lot of
8 investigative activity. I'm not aware that any of those
9 investigations has been terribly active other than the
10 CFTC's, and the CFTC now seems to have named only two
11 people. So I don't really see why we're talking about 26 or
12 50 people in the future.

13 The statement was made that there might be a
14 defense because we consented to relief by the CFTC. Of
15 course that order is subject to Your Honor's approval. It
16 may be that parties haven't seen it. But it's very clear
17 that what we consented to was only for the purposes of that
18 enforcement action and was not to have any effect outside of
19 that context. So we haven't admitted those allegations for
20 any other purpose.

21 And in short, Your Honor, I think I'll -- the
22 plaintiffs -- you really ought to hear from the plaintiffs
23 because in a sense it's really their objection, but we would
24 -- we do think it's high time that there be some real
25 scrutiny of these expenses (a), and (b) that there be some

1 cap put on it for certain so that we don't keep coming back
2 and little by little exhausting the policies.

3 In the E&O case, the policy is \$125 million.
4 According to the latest figures I saw, I think we're up to
5 about eight or \$9 million of expenses, so there's still over
6 \$100 million left. It's clear that the shortfall, however
7 you calculate it, is going to be much greater than that
8 amount and that money is going to be desperately needed at
9 some point.

10 THE COURT: Thank you, Mr. Kobak.

11 MR. KOBAK: Thank you, Your Honor.

12 THE COURT: Mr. Bennett.

13 MR. BENNETT: Thank you, Your Honor.

14 I -- I would find myself echoing an awful lot of
15 what Mr. Kobak said, and so I'm not going to do that. I
16 just want to cover a couple of additional points from our
17 perspective.

18 Number one, the trustee before the effective date
19 did consent to the movement from 30 to 40, and so I'm not
20 going to revisit that even though I might have come out
21 differently had I been in control of -- or my clients been
22 in control of the debtors at that time.

23 And -- and I will say that two points relative to
24 a dialogue that's been going on between Your Honor and
25 counsel for the insurance companies and for the defendants.

1 Number one, it does seem to me, from what I have
2 seen, that this Court might have very different views of
3 what is levels of appropriate duplication and what is
4 reasonably necessary than apparently the insurance companies
5 do.

6 And I would secondly say it's entirely possible
7 that with all these procedures they may be going through all
8 these procedures, but they may not be working. And I -- I
9 have the same -- for all of the same reasons Mr. Kobak told
10 Your Honor, so I won't repeat them.

11 I will say this. There was a suggestion that this
12 was self-effectuating and, Your Honor, therefore, didn't
13 have a role in it. We disagree with that. But I will say
14 that unless something dramatically changes, that there won't
15 be another agreement by -- by at least the reorganized
16 debtors to an -- to an increase. So we will not be dealing
17 with the prospects that it can't come to you. It will come
18 to you if there is another round and another request for an
19 increase.

20 With that, I also wanted to advise the Court that
21 if I leave in the middle of the argument it's because I have
22 another appointment with the judge who has the appeal of the
23 confirmation order. Judge Torres has a -- has a pre-motion
24 conference at 4:00, so I've got to get to -- so I may leave
25 a little early.

1 THE COURT: Thank you.

2 All right. Let me hear from the objectors.

3 MR. MOIRANO: Your Honor, Michael Moirano on
4 behalf of the class representatives.

5 Your Honor, just so you know, we had filed a class
6 claims in both estates at -- prior to your prior ruling.
7 Those are essentially tort claims based on breach of
8 fiduciary duty, conversion of funds. So those claims are
9 out there and clearly trigger on behalf of the entities the
10 coverage under the E&O policy.

11 And we believe that -- that in light of the
12 development since your opinion, most significantly the
13 extensive reports that have been filed by both the SIPA
14 trustee and the Holdings' trustee, that there is really
15 little question of liability clearly on the entities' part
16 and that, therefore, there's coverage. There's liability.
17 And as Mr. Kobak explained, there's no question that the
18 amount of damages are going to far exceed the remaining
19 limits of those policies.

20 So we think at least with respect to the E&O
21 coverage, it should be clear that -- that the estates and
22 the customers have a vested interest in those at this point,
23 and that if there is going to be additional defense costs
24 paid, it should be limited to the other policy.

25 Now with respect to that policy, Your Honor, I'm

1 sympathetic with the individual defendants' position as I
2 think you are. And, you know, there are certainly contract
3 rights there. But we're now in a position at this point
4 where we -- we know what the facts are. As has been
5 explained, there's been numerous government investigations.
6 There's been reports. Everyone kind of knows what the facts
7 are.

8 THE COURT: You'll -- you'll forgive me if I say
9 that the government doesn't get to decide what the facts
10 are.

11 MR. MOIRANO: Well, the facts are laid out in --
12 in the reports of the trustees and we --

13 THE COURT: I understand that. But, you know,
14 where there are lawsuits, the defendants do get to put on a
15 defense.

16 MR. MOIRANO: Oh, absolute -- no -- no question
17 about it, Judge. But the other point is is that --

18 THE COURT: I don't accept as true what's in the
19 CFTC complaint or --

20 MR. MOIRANO: No.

21 THE COURT: -- or the trustees' reports or, you
22 know --

23 MR. MOIRANO: Understood, Your Honor.

24 But what we do know is that the liability that
25 these individuals face is going to far exceed, I'm sure, any

1 personal assets they have, and that what they should be
2 striving for is getting the claims against them settled
3 within the policy limits. And that's -- that's our goal
4 here, Your Honor. We think that -- that -- what the focus
5 of everyone should be at this point is trying to get the
6 claims settled within the policy limits that eliminates
7 liability for most of these individual defendants, but for
8 two it looks like, and -- and they can go on with their
9 lives.

10 And so our suggestion is, Your Honor, that -- that
11 there is an ongoing effort and we're -- we're still hopeful
12 that there will be a settlement that involves the insurance
13 companies that will -- that will involve a global settlement
14 with all the individual defendants.

15 Our suggestion is is that, you know, you get the
16 information about the -- where this money is being spent,
17 because we're as shocked as you were about the amount that's
18 been spent. But that we -- we defer this particular matter
19 until you've had an opportunity to review that and we've had
20 an opportunity to try to get this case settled within the
21 policy limits to minimize the impact on the estate and to
22 minimize the impact on the individual defendants.

23 THE COURT: Are there additional sessions
24 scheduled with Judge Weinstein?

25 MR. MOIRANO: I -- I don't believe there's --

1 we're waiting for a -- some communication from the insurers
2 at this point is my understanding of where it stands, Your
3 Honor, and depending on what that is, you know, hopefully we
4 can move forward.

5 But we -- we've continued the stay for 30 days to
6 allow that process to work its way out. We're hopeful we
7 can get this done. We're hopeful it can get done within
8 policy limits, get the customers out of the estates, and the
9 estates will be better off without us there as you've -- as
10 you've clearly indicated.

11 And -- but if we can't resolve that, Judge, then
12 we think, particular with the E&O coverage, there should be
13 a limitation, if not a bar placed on any further defense
14 fees coming out of that policy. And then a limitation --
15 some limitation on the defense costs coming out of the other
16 coverage, particularly for individuals that have the
17 financial wherewithal to pay for their defense, and -- and
18 maybe, you know, we get down to a situation where it's an as
19 need basis, you know, for -- for individual defendants that
20 don't -- can't defend themselves. But we are as concerned
21 with -- as you are, Your Honor, with the eroding nature of
22 these policies.

23 And we would request, also, this information that
24 you're requesting the defendants to provide, which is just a
25 summary, we would like to see that as well.

1 THE COURT: No. It's going to be in camera. You
2 know, the plaintiff --

3 MR. MOIRANO: All right.

4 THE COURT: -- doesn't get to see what the
5 defendants are spending.

6 MR. MOIRANO: Well, we know -- we know it's 32
7 million.

8 THE COURT: Well, you do, but you don't know how
9 it's divided up.

10 MR. MOIRANO: No. And --

11 THE COURT: And the plaintiffs are not getting to
12 see what the defendants are --

13 MR. MOIRANO: Okay. Thank you, Your Honor.

14 THE COURT: -- have spent.

15 MR. MOIRANO: Thank you.

16 THE COURT: All right. Let me hear from the
17 objectors.

18 Is Sapere -- somebody from Sapere going to argue?

19 MR. WALSH: Good afternoon, Your Honor. Ken Walsh
20 on behalf of Sapere.

21 I'll be brief, but we objected to the dual
22 presentment to maintain our initial objection to lifting the
23 stay and the imposition of the \$30 million soft cap. As
24 Your Honor --

25 THE COURT: You --

1 MR. WALSH: I'm sorry.

2 THE COURT: My original decision, you sought a
3 stay from me. I denied it. The District Court denied it.
4 You've not sought a stay from the Court of Appeal. My
5 original opinion is the operative governing document,
6 correct?

7 MR. WALSH: Well, yes, Your Honor.

8 THE COURT: You appealed it, but it -- it remains
9 in full force and effect.

10 MR. WALSH: Correct. But in order to increase
11 this \$30 million soft cap another \$10 million -- and I think
12 Your Honor was sort of getting at this earlier, this Court
13 should have some oversight as to how these funds are being
14 spent --

15 THE COURT: That's a different issue.

16 Go ahead. I interrupted you. What -- what's your
17 argument?

18 MR. WALSH: Sure. No. But as Your Honor noted
19 previously, the circumstances have progressed and in the --

20 THE COURT: Sapere more than any other plaintiff
21 customer has done more to increase the costs on the defense
22 side than anybody else.

23 MR. WALSH: We have sought our --

24 THE COURT: You've -- you've -- no. You've -- no.
25 I mean, your position has always been -- you've objected to

1 virtually everything that's happened in the bankruptcy case.
2 You've appealed most of it. You -- you've decided to sue a
3 lot more people than anybody else have. That's fine. You
4 -- you have certain rights. But then -- then when you do
5 that, you come in and argue that nobody's entitled to a
6 defense with insurance. I mean, you know, you're -- you've
7 been consistent throughout. I have to say that.

8 (Laughter)

9 MR. WALSH: Well, we have maintained that they do
10 have access to a defense under the D&O policies. Our
11 interest lies primarily in the E&O policies.

12 And as Your Honor discussed previously, if they --
13 if the insurers and -- are able to decide amongst themselves
14 -- they've spent -- they've gone through, at this point, \$32
15 million. To raise it another \$8 million, we'll be back here
16 very -- very, very soon.

17 THE COURT: I don't know. We'll see. I don't
18 know if I'm going to raise it, and if I do raise it, people
19 come back they're -- you know, pay your money and take your
20 chances. I don't know. It's --

21 MR. WALSH: Well, as we've argued --

22 THE COURT: That's it.

23 MR. WALSH: -- before Your Honor previously,
24 commodities' customers, including Sapere, we do have a very
25 strong interest in these policy proceeds, the E&O policy

1 proceeds. We have an allowed claim --

2 THE COURT: That doesn't mean that because you
3 assert a claim you get to tie everybody's hands behind their
4 backs so that they can't afford a defense. You know --

5 MR. WALSH: We do have an allowed claim at this
6 point in the MFGI civil liquidation.

7 THE COURT: And you've collected a majority of
8 that.

9 MR. WALSH: Well, as Mr. Kobak noted, there still
10 will be a significant shortfall --

11 THE COURT: Well, I -- I don't --

12 MR. WALSH: -- created by --

13 THE COURT: -- I don't underestimate that.

14 Okay. Anything else you want to say?

15 MR. WALSH: No. That's all, Your Honor.

16 THE COURT: All right. Anybody else wish to be
17 heard?

18 All right. Ms. Ahari, we've got the 4th of July
19 holiday coming up. What's a reasonable time for you to
20 submit the chart, July 15th or -- we can get an earlier
21 time, but I don't know what -- you've got -- do you have all
22 the information that you --

23 MS. AHARI: We'll need to do some -- I mean, we've
24 got the -- we've got the basic information, but we don't
25 have it in a form that would be -- that would assist the

1 Court at this point. So I probably need --

2 THE COURT: What do you need?

3 MS. AHARI: July 15th.

4 THE COURT: That's a Monday. Is that -- is that
5 enough? Do you want more time? Tell me.

6 MS. AHARI: Why don't we do the end of that week?

7 THE COURT: The end of that week is July 19th.

8 MS. AHARI: Let's do July 19th. July 19th. Thank
9 you.

10 Do you want anything else at that time? Do you
11 want additional briefing at that time or do you just want
12 the --

13 THE COURT: No. I think --

14 MS. AHARI: -- bill information first?

15 THE COURT: I want to see the information first.

16 MS. AHARI: Okay.

17 THE COURT: And I may be satisfied -- satisfied
18 may be the wrong term. Look, I'm not happy. That I've made
19 clear. When I see that information, I'll decide. It may be
20 that I will decide to go ahead and approve the increase in
21 the cap to \$40 million. Without more briefing -- I'll just
22 tell you all, without more briefing, I'm not going to make a
23 soft cap a hard cap. It seems to me that to take that step,
24 I'm going to require more briefing from the parties.

25 So since the only thing that's being -- that at

1 least was asked of me was to increase the soft cap by \$10
2 million to \$40 million, I think that's the decision I've
3 got. It may be when I see the additional information I will
4 do that. It may be I'll have more questions and we'll
5 schedule another hearing. I don't think I need more
6 briefing at -- at this point. I don't want -- okay.

7 All right. But let me make clear. If I go ahead
8 and approve the increase to \$40 million, no one should
9 assume that I'm going to increase it beyond that. No one.
10 You may think it's unprecedented. Well, there will be
11 precedent then. Okay. So don't assume -- I mean, I -- I
12 look at -- it may have taken 15 months or so to get to the
13 \$32 million, but the litigation is barely going at this
14 point. And if it really does move forward, the burn rate I
15 -- I sort of aghast at what it's likely to be.

16 So whoever is on the defense side, you better
17 think twice before you -- before you incur fees and think
18 that they're going to be reimbursed with this Court's
19 approval. If I get reversed, so be it.

20 Okay. Thank you.

21 MS. AHARI: Thank you, Your Honor.

22 THE COURT: All right. We're adjourned.

23 (Whereupon, these proceedings were concluded at 3:10
24 p.m.)
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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

**Sherri L
Breach**

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