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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

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6 MF GLOBAL HOLDINGS LTD., Case No. 11-15059(MG)

7

8 Debtor.

9 - - - - - x

10 THIELMANN, ET AL.,

11 Plaintiffs,

12 v. Adv. Case No. 11-02880(MG)

13 MF GLOBAL FINANCE USA,

14 INC., ET AL.,

15 Defendants.

16 - - - - - x

17

18 U.S. Bankruptcy Court

19 One Bowling Green

20 New York, New York

21

22 August 20, 2015

23 2:04 PM

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Page 2

1 B E F O R E :

2 HON MARTIN GLENN

3 U.S. BANKRUPTCY JUDGE

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7 Hearing re: Telephone Status Conference on the Record.

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25 Transcribed by: Dawn South and Tracey Williams

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1 P R O C E E D I N G S

2 THE COURT: All right. This is Judge Glenn.

3 We're on the record in Thielmann versus MG Global Holdings
4 Ltd., et al. It's adversary proceeding 11-02880. Can I
5 have the appearances for the plaintiff, first?

6 MR. RAISNER: Jack Raisner, Outtmen & Golden, Your
7 Honor. Good afternoon.

8 MS. MOYLAN: Lee Moylan, Klehr Harrison. Good
9 morning -- or good afternoon.

10 MR. ERCOLE: Charles Ercole as well, Your Honor,
11 from Klehr Harrison.

12 THE COURT: Thank, Mr. -- thank you, Mr. Ercole.
13 Anybody else for plaintiffs?

14 MS. OLSEN: Mary Olsen -- yes, Your Honor, Mary
15 Olsen of The Gardner Firm.

16 THE COURT: Thank you. Anybody else?

17 Okay. For defendant -- defendants?

18 MS. HAGER: Good afternoon, Your Honor, Melissa
19 Hager from Morrison & Foerster, and my colleague, James
20 Beha, is with me as well.

21 THE COURT: Thank you. Anybody else on the phone?
22 No.

23 Okay. All right. Ms. Hager, I think you
24 requested the conference?

25 MS. HAGER: Yes, Your Honor. I'm going to turn it

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1 over to my colleague, James Beha, who had the conversations
2 directly with the plaintiffs' --

3 THE COURT: Sure.

4 MS. HAGER: -- counsel that led to the request.

5 THE COURT: Okay.

6 MR. BEHA: Yeah, good afternoon, Your Honor, this
7 is Jim Beha. So we initially asked -- requested this
8 conference, because following our last conference we took
9 our deposition of Ms. Corrigan (ph) yesterday, and
10 determined that we would like to call her as a direct
11 witness in our case in chief, and so we wanted to amend the
12 -- our witness list in the joint pretrial order or do
13 whatever procedure, you know, the Court would like us to do
14 in order to do that.

15 We also had four additional exhibits that we
16 wanted to add in connection with adding Ms. Corrigan to our
17 witness list.

18 Now, I would say that the exhibits, we used in her
19 deposition, the plaintiffs have those, and I do think they
20 are all fair game as cross-examination exhibits, but we're
21 also happy to put them in -- amend our exhibit list now and
22 add them and provide copies to the Court now. Whatever Your
23 Honor would prefer.

24 THE COURT: Okay. Does somebody for the
25 plaintiffs want to respond?

1 MR. RAISNER: Thank you, Your Honor. This is Jack
2 Raisner.

3 We will not object to Mr. Beha's request with
4 respect to adding Ms. Corrigan to its witness list. I
5 assume that the procedures for handling her testimony will
6 be the same as for those witnesses we had designated who are
7 under the control of the defendants that we, the plaintiffs,
8 designated her as our witness first, we'll be able to submit
9 her narrative, Mr. Beha or his team can then cross, and in
10 doing so do whatever direct testimony they'd like to deduce
11 at the same time.

12 THE COURT: Okay. What about the four exhibits,
13 Mr. Raisner?

14 MR. RAISNER: We are not going to object to their
15 use.

16 THE COURT: All right. So, you know, I think in
17 the prior -- I think -- sometimes I get confused, I've had a
18 whole bunch of pretrials lately -- but I think I told you
19 this, that when one side calls a witness, you know, I expect
20 the full examination.

21 So, Mr. Beha, you know, they're going to sponsor
22 Ms. Corrigan's testimony -- written testimony as part of
23 their case, you'll get to cross-examine her. Since you've
24 indicated that you would call her as part of your case I'm
25 not going to -- you know, I won't entertain objections that

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1 it's beyond the scope of the direct. You can do your entire
2 examination then. Do you have any problem with that,
3 Mr. Beha?

4 MR. BEHA: No, not at all, Your Honor. And that
5 was definitely our understanding, and I think that that's
6 been all the parties' understanding --

7 THE COURT: Okay.

8 MR. BEHA: -- as we've been, you know, preparing.

9 THE COURT: Okay. So since Mr. Raisner has
10 indicated no objection to adding Ms. Corrigan, and since
11 they're intending to call her any way, I -- it seems to me
12 that you don't have to formally amend the case management
13 order to do that. I think it was the fact that they listed
14 her as a witness that led to your wanting to take her
15 deposition, and you've done that.

16 So with respect to the four exhibits I think what
17 you should do is -- and you can do this on Monday since
18 there's no objection to it -- give me -- you know, add --
19 you'll have to mark the exhibits -- premark the exhibits and
20 you'll give me that as part of a supplemental list. So
21 there's no objection to that then.

22 MR. BEHA: All right. Thank you very much, Your
23 Honor. And --

24 THE COURT: I understood there were some other
25 issues people wanted to talk about today before the trial?

1 MR. RAISNER: Yes, Your Honor, this is -- yeah, if
2 I may, Your Honor --

3 THE COURT: Sure.

4 MR. RAISNER: -- Jack Raisner.

5 THE COURT: Go ahead, Mr. Raisner.

6 MR. RAISNER: One more emendation with respect to
7 Ms. Corrigan.

8 In the course of her deposition she made an
9 emendation to a line in her narrative, and I bring it up to
10 the Court because Your Honor said that you would be reading
11 narratives before the trial, and I did not want there to be
12 any surprise in that this took place when of course reading
13 (indiscernible) is relying on it before coming for the
14 trial.

15 So if there is some procedure, protocol you'd like
16 followed with respect to that I'm fine. If there isn't
17 that's fine with us too. I did not vet this with Mr. Beha,
18 so he should feel free to raise any points.

19 THE COURT: What is the additional point you want
20 to raise in her testimony?

21 MR. RAISNER: She agreed to an emendation, to a
22 change in wording --

23 THE COURT: Okay.

24 MR. RAISNER: -- in one of the clauses -- phrases
25 in her narrative testimony -- her direct testimony.

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1 THE COURT: Okay. Why don't you file an amended
2 statement, okay, so that everybody has got it in front of
3 them.

4 MR. RAISNER: Okay.

5 THE COURT: And if they want -- you know, if they
6 want to cross-examine her about the change she made they can
7 do that just the way you would if somebody changes the
8 deposition.

9 MR. RAISNER: Okay, Your Honor. Thank you.

10 THE COURT: Mr. Beha, are you okay with that
11 approach?

12 MR. BEHA: Yes.

13 THE COURT: Okay.

14 MR. BEHA: Absolutely, Your Honor.

15 THE COURT: All right.

16 MR. BEHA: And, you know, if they could file it as
17 a redline or file a redline with it that would be helpful.
18 But we don't have any objection to their amending.

19 THE COURT: That would be helpful. If you can do
20 it as a redline that would be helpful, Mr. Raisner.

21 MR. RAISNER: Yes, we will.

22 THE COURT: Okay.

23 MR. RAISNER: The other issue was one that came up
24 regard the designated deposition transcripts, the protocol
25 for it, submitting those or entering those into the record.

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1 We did not know whether the Court has a preference
2 as to whether we should present that -- those requests up
3 front at the start of the trial and go through any
4 objections to their being part of the record or is there
5 another approach that we should take?

6 THE COURT: Hang on, Mr. Raisner, just a second.

7 So ordinarily -- I mean and you've given the other
8 side your designations from the deposition transcripts?

9 MR. RAISNER: Yes.

10 MR. BEHA: Yes, Your Honor, we've exchanged them,
11 and we've exchanged our respective objections and counter-
12 designations and objections to counter-designations.

13 THE COURT: And do I have those designations --
14 you know, I looked --

15 MR. RAISNER: Yes.

16 THE COURT: -- I read the pretrial order carefully
17 -- I got a lot of paper piled on my desk, as you probably
18 understand, and I've worked my way through a fair amount of
19 it, not all of it. I've read the briefs, I've read most of
20 the witness statements, not all yet. I spent a lot of time
21 going through the pretrial order.

22 And so with respect -- I guess I've done it two
23 ways in past trials. Frequently I get the parties to agree
24 that the deposition designations and counter-designations
25 are offered subject to the objections that have been stated

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1 in -- I will not -- we won't take the trial time for me to
2 rule on them, you know, I'll rule on them as necessary after
3 the trial. So that's usually been agreeable. I don't want
4 to put you on the spot now, you can let me know about that,
5 okay? I like to give people a fair chance to be able to
6 think about it and respond. But that's what's usually been
7 done.

8 Every once in a while somebody insists, no, we
9 want to know right then whether the objection is sustained
10 or overruled, and if parties insist on it we'll do that.

11 So why don't you -- offline why don't the two of
12 you talk about it and see whether you can work out an
13 agreement, okay?

14 MR. RAISNER: Okay.

15 MR. BEHA: Yes.

16 THE COURT: And if you do work out an agreement
17 let my chambers know, okay?

18 MR. BEHA: All right. I mean I can just say now
19 that we have just one concern with that, which is that, you
20 know, we've designated some testimony, and they may have
21 this issue as well, we designated some testimony for the
22 plaintiffs, and you know, how that testimony is going in
23 might affect what we do on cross. You know, if we're
24 getting things in through the transcript that we're
25 confident that it will --

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1 THE COURT: Sure.

2 MR. BEHA: -- become part of the record then we
3 won't have to spend time on it in the courtroom, but just --
4 we can follow your instructions obviously --

5 THE COURT: No, I'm not giving you an instruction,
6 I'm -- you know, if you want -- you're not going to get the
7 rulings on it before the start of the hearing on Monday,
8 I'll just tell you that, so if you want to -- we'll take the
9 time -- you know, if the defendants are going to -- if --
10 excuse me -- if the plaintiffs are going stand on their
11 objections to the deposition testimony we'll either go
12 through it during the hearing, if you want to go through, or
13 you'll just go ahead and cross-examine on it.

14 Okay. I'm not -- I've got too much to do to get
15 ready for the hearing to be able to rule in advance on the
16 objections to the deposition designations. Okay.

17 MR. BEHA: We understand, Your Honor.

18 MR. RAISNER: Understood.

19 THE COURT: Go ahead.

20 MR. BEHA: Oh, I'm sorry. There was one somewhat
21 related question I think we both had, which was introduction
22 of exhibits and also ruling on objections to exhibits,
23 whether you want to have them go in with the sponsor, you
24 know, at the time that the sponsor is testifying when the
25 sponsor's direct the offered, or since you have all of the

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1 sponsoring testimony already whether it's easier to just do
2 it up front.

3 THE COURT: I think it would be -- so there are no
4 objections as to a lot of the exhibits. There are more
5 objections than I expected there were going to be. But as
6 to the exhibits as to which there's no objection I think
7 they're reasonable in number. Sometimes, you know, I've had
8 trials here where the room has been lined with boxes and
9 somebody tries to dump in everything in advance, and I say,
10 no. But while there's still -- while there are a lot of
11 exhibits it is not an inordinate number of exhibits.

12 So, I'm -- I think it would speed it up if at the
13 start of the trial one or both of you can just say you're
14 offering, you know, all exhibits as to which no objection
15 has been stated, they're listed on the exhibit lists, the
16 exhibit lists are attached as Exhibits D and E to the
17 pretrial order, and I'll introduce them in evidence and we
18 won't have to do anything more.

19 So -- but let me take now -- I want to address the
20 defendants' objections to the plaintiffs' exhibits. It
21 seemed to me -- I was surprised by the number of exhibits as
22 to which you've asserted hearsay objections, authentication
23 objections. You know, if you're going to stand on them
24 you'll stand on them and I'll rule on them at the time. You
25 can go ahead and offer and state -- you know, plaintiffs can

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1 offer them, you'll make your objection, and I'll rule. But
2 I was just quite surprised.

3 You know, these are documents, for the most part,
4 that the defendants produced, and you know, without hearing
5 more I don't understand what your authentication objections
6 are. You can go ahead and do it. If I think that it is
7 resulting in unnecessary time being taken during the trial
8 for plaintiffs to authenticate documents that you produced I
9 will consider what, if any, appropriate course of action I
10 should take about that, but you know, I'm not prejudging it.

11 I just -- I was surprised when I saw the
12 plaintiffs' exhibit list with the number of exhibits that
13 the defendants are objecting to. But you'll decide, you
14 know.

15 The only thing I would urge you, and I'm not
16 trying to browbeat you into doing anything, but I urge
17 defendants' counsel to look at the list closely before
18 Monday and see whether you're going to stand on all the
19 objections that you're asserting.

20 So with respect to the hearsay objections -- so
21 you have hearsay objections to declarations, but you don't
22 indicate what portion of the declaration. You know, these
23 are of the putative class representatives. You -- the list
24 just shows, you know, 801 hearsay, and it's Savova (ph)
25 declaration in support of motion for class certification.

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1 You better come prepared.

2 I would suggest if there are specific sentences or
3 lines in the declarations that you're objecting to at the
4 time they're offered hand up a copy showing highlighted in,
5 you know, some color, the sentences, the portions that
6 you're objecting to, because you're certainly not going to
7 get the whole declaration excluded.

8 MR. BEHA: Yes, Your Honor, we will. We'll take a
9 closer look at those things.

10 THE COURT: Let me see whether I had some other
11 observations I wanted to make about it.

12 (Pause)

13 THE COURT: You know, the only other comment I
14 would make is, I know what hearsay is and I can give it the
15 weight that it's entitled to, but if you want to object to
16 it -- you know, if you want to -- you know, if you have
17 objections to specific sentences or portions of sentences on
18 hearsay you're going to give me something showing exactly
19 the portion. I'm not -- just the same way I don't go
20 through depositions that, you know, that get thrown in, I'm
21 not going to go through in advance because you say
22 objection, hearsay and simply exclude an entire declaration.
23 Okay? But you'll decide on Monday what you're -- if you
24 change your mind please let the plaintiffs know so that they
25 may tailor what they're going to do, okay?

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1 MR. BEHA: We certainly will, Your Honor.

2 THE COURT: Okay. I wanted to raise this issue
3 with both sides, and that is that the defendant --
4 defendants appear to agree that Kisch can be certified as a
5 class representative for a subclass of the -- for present
6 purposes I'll talk the non-MFGI employees, a class that I
7 gather would be around 200 people. And I'm not sure that
8 the precise definition that the plaintiffs posit is
9 sufficient or workable, although close.

10 Is it necessary to go forward during the hearing
11 for me to hear evidence about the 200 non-MFGI employees?
12 And I'm using -- I'm putting quotes around the non-MFGI,
13 because I know the plaintiffs dispute whether there are
14 truly any MFGI employees, but I think since the briefs have
15 used that term -- do we have to go forward as to the 200?
16 Let me ask you first, Mr. Beha.

17 MR. BEHA: Well, Your Honor, I would say that we
18 -- you're right that we in principal don't object, we think
19 that there are significant problems with the proposed
20 definition of that class, so I think that that would be our
21 concern.

22 But no, I mean I think that we do not oppose
23 certification of an appropriately defined subclass of former
24 employees of the Chapter 11 debtors.

25 THE COURT: Do both sides agree who those 200

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1 people are?

2 MR. BEHA: I don't think that we've ever had a
3 discussion about that, Your Honor, and I can say that I am
4 relatively confident that we do not agree.

5 MR. RAISNER: Your Honor, Jack Raisner.

6 Mr. Beha is right, we haven't had the
7 conversation, but Your Honor, it's been our practice in
8 certifying classes that these definitions are something that
9 we work out very assiduously and carefully with the other
10 side and try to come to an agreement. I've never been in a
11 position of having to do it in open court.

12 It would -- we can anticipate that they're going
13 to be exceptions that defendants will want, and we can
14 figure out a way to agree upon that or not or a procedure by
15 which we can come to an agreement, and then if we ultimately
16 can't maybe we can come to Your Honor and try to work --
17 bridge any gaps.

18 THE COURT: Let me say first that I will obviously
19 listen to -- look, I've already denied leave to amend the
20 complaint to name as named plaintiffs individuals who signed
21 releases, because I think in my view it clearly raises
22 individual issues.

23 So just focusing on the non-MFGI individuals. It
24 sounds like you're both working off of the 10/27 oracle
25 list, and I gather there are 200 or thereabouts people who

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1 are listed there coded for an entity other than MFGI. Am I
2 right about that?

3 MR. BEHA: Yes, roughly speaking.

4 MR. RAISNER: We agree.

5 MR. BEHA: I don't want to be precise, but roughly
6 speaking --

7 THE COURT: Okay.

8 MR. BEHA: -- that's true. And then as far as the
9 class, that number would be, you know, fairly significantly
10 reduced by some people who were not laid off, and I think
11 who have settled their claims.

12 THE COURT: Right.

13 MR. BEHA: And then I would also just note that
14 there are also debtor entities that were non-MFGI entities
15 that are not defendants in this suit.

16 THE COURT: And you're saying they're coded as
17 employed -- being employed by those other non-defendant
18 entities?

19 MR. BEHA: Yes. So, for instance, MX Clear, so --
20 but, you know, I don't have all of the information at my
21 fingertips, but yes, there is --

22 MR. RAISNER: There's --

23 MR. BEHA: -- you know, Your Honor, there are
24 other debtors in these cases and only three of the debtors
25 are named as defendants, and one of those debtors, their

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1 finance company, did not have any employees. So only two of
2 those other entities that actually had employees are named
3 defendants in this case.

4 You know, but I don't -- so, I expect that there
5 are disagreements, but I also don't disagree with
6 Mr. Raisner that I think it's likely that we can figure
7 something out and, you know, if it's amenable to Your Honor
8 that's probably the right way to do it in the first instance
9 so we don't take up, you know, your time and resources if we
10 don't have to.

11 THE COURT: Okay. I would like you to do that.

12 MR. BEHA: We can certainly do that, Your Honor.

13 THE COURT: Mr. Raisner, did you want to say
14 something else about that?

15 MR. RAISNER: No, thank you, Your Honor.

16 Again, we don't necessarily agree with Mr. Beha's
17 exceptions to the class as a kind of a gating issue that
18 we're agreeing to by going through the process.

19 I think we should start out and see where our
20 disagreements lie and try to narrow them until we can't
21 narrow them to closer and see where we are at and then move
22 from there and do whatever's practicable from there.

23 THE COURT: Let me just say --

24 MR. ERCOLE: Your Honor, Charles Ercole --

25 THE COURT: Yeah, go ahead.

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1 MR. ERCOLE: -- if I could just say one thing?

2 THE COURT: Sure.

3 MR. ERCOLE: Yeah. To this point that Mr. Beha
4 just raised about that there are several other entities, MF
5 Global Clear, MF Global Capital, and I can't remember,
6 there's another one, but I mean the other dozens of
7 employees -- not hundreds -- dozens of other employees that
8 we've discovered on the payrolls on that were included in a
9 list of people and entities that Mr. Conley (ph) signed on
10 behalf of when he filed a WARN notice way back when, and I
11 suspect that our position is -- in fact I know our position
12 is that if we're going to settle the non-MFGI folks we
13 should settle all of them, subject to points like you've
14 made around whether the -- they signed releases or whether
15 they were part of a wind-down theme.

16 If there are other people hidden at other entities
17 that we were aware of or learned later in the game -- first
18 of all, we're well within the statute of limitations for a
19 WARN Act claim, so that's not an issue.

20 So again, I think if we're going to talk about a
21 settlement of non-MFGI folks it should include all the other
22 entities.

23 MR. BEHA: Just to be clear at this point we're
24 talking about certification of a class. I don't think
25 anybody is talking about a settlement.

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1 MR. ERCOLE: No, I understand, but I was talking
2 about settling -- certifying a class as well. And again, if
3 he wants to amend the complaint to add Clear and Capital and
4 the like that's fine.

5 But my point is, is that part of our theory is
6 that they're all being operated together at least even if
7 you go into these subclasses certainly you have Inc. and
8 then you have all the non-Inc. entities.

9 THE COURT: Well let me just say this. I'm not
10 granting a motion to amend the complaint, because I don't
11 have a motion to amend the complaint, we're going forward
12 with the class certification hearing on Monday. I just
13 allowed the complaint to be amended to add one new
14 plaintiff.

15 It doesn't seem to me from what I've reviewed that
16 I'm going to be -- if we went forward with evidence about
17 the non-MFGI employees then I'm really going to be hearing
18 evidence about it. You know, I saw the footnote in the
19 defendants' brief and the reply brief that the plaintiffs
20 filed picked up on it and said, well they basically agree as
21 to a class for non-MFGI. Let's not take the time next week
22 to deal with -- see where you get to, okay? Okay.
23 That's --

24 MR. BEHA: Yes, Your Honor.

25 MR. ERCOLE: That's fine with plaintiffs, Your

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1 Honor.

2 MR. BEHA: And then we have one last sort of very
3 minor thing which --

4 THE COURT: Go ahead, Mr. Beha.

5 MR. BEHA: Well, I hope you will be happy to hear,
6 given the volume of papers that you are inundated with, so I
7 know the last time we spoke you said that if the parties
8 wanted to do post-hearing briefing you would permit that or
9 you would hear summations. And we've agreed that we think
10 given amount that we have already given you that a short
11 summation would be most helpful, you know, we hope, and that
12 right now we expect to complete all the testimony on Monday
13 and Tuesday, and I know you scheduled us for Monday and
14 Tuesday and Wednesday, and if we're able to stick with that
15 expected plan we would ask to give whatever closing argument
16 or summation Your Honor wanted to hear on Wednesday morning.

17 THE COURT: Mr. Raisner or Mr. Ercole, do you want
18 to address that?

19 MR. RAISNER: That's what Mr. Beha talked about --
20 what we talked about with him yesterday as being a possible
21 scenario that hopefully can -- we can meet and be done by
22 Tuesday. And if it's earlier then, you know, we'll see
23 where we are as far as summations.

24 THE COURT: Okay.

25 MR. ERCOLE: Yeah, I think that -- this is Charles

1 Ercole again.

2 Your Honor, you know, I think our only question is
3 if we get done early enough on Tuesday why wouldn't we just
4 do the summations late, late Tuesday afternoon?

5 THE COURT: Sure.

6 MR. ERCOLE: We don't view them as any grandiose
7 presentations.

8 THE COURT: Well let's proceed in that way.

9 I should alert both sides, there's a possibility
10 that I may be asking for additional briefing on an issue
11 that I don't think has been sufficiently addressed, I'll
12 even describe what that is it for you, okay? But that's not
13 inconsistent with -- and that would be -- I'm not asking for
14 trial briefs on -- or post-trial briefs on all issues, but
15 there may be one or two issues as to which I do want some
16 briefing. And, you know, I try not to let any of this be a
17 mystery, so let me -- again, I've decided nothing, but I
18 want to tell you based on all of what I've reviewed so far
19 questions that I have.

20 And so, you know, reviewing the briefs and
21 reviewing witness statements and many of the exhibits I
22 think has focused my thinking on, you know, the issues
23 surrounding the case. One of the issues that we've --
24 certainly the plaintiffs raised -- I guess it was the
25 defendants who raised it and the plaintiffs stated their

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1 view on this, this is about the Court -- what's -- can the
2 Court decide a merits issue as part of class certification.
3 And in reviewing Second Circuit case law, I mean, I think
4 that I can decide merits issues that are required to be
5 decided to determine class certification, but I'm not
6 setting out to reach issues that don't need to be decided as
7 part of class certification.

8 So looking specifically at the written offer
9 letters from MF Global Holdings, USA -- I'll just refer to
10 it as USA -- countersigned by -- I guess not every one of
11 these named plaintiffs has it -- it says that the people are
12 employed by USA and then, you know, it says "MF Global
13 Holdings, USA, Inc.," paren, quote, "('MF Global' or the
14 'Company')," close quote, close paren. And so -- and I
15 guess the plaintiffs' reply brief sort of focuses in on this
16 issue, but doesn't have -- doesn't cite any authority on
17 this point.

18 So this case, as I've continued to study it, seems
19 different than any of the other cases that are cited in
20 either side's brief. Here's what I mean by that. You know,
21 you both addressed issues of single employer under the WARN
22 Act. I've read state court cases, federal cases dealing
23 with New York State law. In some ways the New York State
24 doctrine of joint employer is similar to what you're really
25 arguing about single employer. But it fundamentally appears

1 to be a theory of vicarious liability to extend liability
2 from the direct employer, sometimes referred to as the
3 nominal employer, to subsidiaries, affiliates, parents.

4 And, you know, there's the, what, four or five-
5 factor test that's applied and they focus those tests -- you
6 know, control is a big factor, but none of -- at least I
7 haven't seen, maybe I'm missing something and you'll tell me
8 about it during your closings, I haven't seen any of the
9 cases that deal with trying to avoid WARN liability by a
10 direct employer. Direct employer meaning, okay, X has a
11 written employment contract with Y company, that seems to
12 create a contractual direct-employment relationship.
13 Whether the parent or a sister corporation is liable raises
14 the issue about single employer under the WARN Act, under
15 the New York State cases the joint employer doctrine.

16 But none of those cases address the issue -- and I
17 know that the defendants refer to USA as, you know,
18 administratively responsible for HR, payroll, et cetera, but
19 there are actual, at least as -- I guess one person it's an
20 old-man contract, God only knows what that means here, but
21 as to at least three of them that I've seen and maybe it's
22 more, there are actual written contracts signed by Connnelly
23 on behalf of USA and countersigned by the employee, sets
24 forth the terms of compensation, says that they're employed
25 by USA, why isn't that the direct employer? Is there any

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1 case law -- and this is what I might want post-trial briefs
2 -- is there any case law that would say in that -- you know,
3 in the circumstance of where the written contract is with
4 one entity, that's not really the employer.

5 So that's something that's bothering me, okay?

6 And I went back and read quite a few of the WARN cases and,
7 as I said, I read a bunch of the cases involving joint
8 employer theory under New York law and they all -- it's all
9 the vicarious liability to extend liability from a direct
10 employer to some subsidiary or affiliate or sister company.
11 So that's -- you know, that's something that's clearly on my
12 mind and I wanted you to know about it now.

13 MR. BEHA: Your Honor?

14 THE COURT: Yeah, go ahead.

15 MR. BEHA: I just -- we will certainly look into
16 this, obviously, further and we appreciate hearing what's on
17 your mind, because that's where we want to direct our
18 attentions. There is one I think -- I don't know if it's a
19 clarification or a nuance, but I think it should inform the
20 way one thinks about this, is that WARN Act liability does
21 not just attach to an employer, it attaches to an employer
22 who conducts a layoff. So, you know, the question would not
23 be just, as far as the question of direct liability, whether
24 Holdings had an employment relationship as a result of these
25 offer letters, although we understand that that's an issue

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1 that Your Honor is interested in and we will address it.

2 But even if that were true, that employer would still have
3 to have conducted a layoff without notice --

4 THE COURT: Let me ask you this --

5 MR. BEHA: -- to be direct --

6 THE COURT: -- Mr. Beha, because you're absolutely
7 right about it, and I think I read in the papers that with
8 perhaps the exception of one employee in Chicago it may be
9 that Hughes Hubbard drafted the letters, but they seem to
10 have gone out on USA stationery. So I would assume that the
11 plaintiffs are going to argue that the terminations were
12 done by USA and not by the SIPA Trustee. I just -- you
13 know, I'm not deciding anything --

14 MR. BEHA: I think that they --

15 THE COURT: -- but I've been thinking about all
16 this stuff.

17 MR. BEHA: And I assume they would argue that too,
18 but I think that we are extraordinarily confident that the
19 evidence we will put on will show that that's not in fact
20 the case, but everybody understood that individual layoffs
21 would be conducted by the SIPA Trustee, that the SIPA
22 Trustee drafted the notice, that the SIPA Trustee directed
23 when, where and how it would be done, and that it was a --
24 you know, and unfortunately, obviously from our perspective,
25 but simply an accident of the paper that was in the printer

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1 when somebody printed these things off.

2 THE COURT: Oh, I don't think it was an accident,
3 I don't think it was an accident at all.

4 MR. BEHA: No, I don't think anybody focused on
5 what the letterhead was that the --

6 THE COURT: All right, we'll see.

7 MR. BEHA: -- letter was printed, but anyway.

8 THE COURT: We'll see.

9 MR. RAISNER: Your Honor, if I may?

10 MR. BEHA: Sure.

11 THE COURT: Go ahead, Mr. Raisner.

12 MR. RAISNER: Thank you. I appreciate the
13 question the Court has raised and in our reply I think that
14 we had tried to express our -- the result of our experience
15 and research on this and that --

16 THE COURT: Well, you didn't have any research --

17 MR. RAISNER: -- we don't --

18 THE COURT: -- you didn't have any cases.

19 MR. RAISNER: -- we do not find that there --
20 sorry?

21 THE COURT: You didn't have any cases. You had
22 the argument there, but you didn't have any cases.

23 MR. RAISNER: Because there has been no case ever
24 brought in which the direct employer was ever thought to not
25 have been a participant in a layoff for the purposes of WARN

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1 liability no matter to what degree a parent or other party
2 determined or decided or also participated in the layoff.
3 The mere fact that the employees no longer continue their
4 employment with Holdings USA is sufficient for WARN purposes
5 to make the direct employer liable, again, without it having
6 to have outdone some other party in the decision-making
7 process.

8 THE COURT: Well, the other thing that separates
9 this case that is probably unique, it's certainly unique
10 from my knowledge of these cases, this is the only case I'm
11 aware of where the liquidating fiduciary principle applies
12 as a matter of law -- I determined that, it wasn't appealed
13 -- applies as a matter of law as to MFGI and, you know,
14 assuming the testimony is as the defendants suggest it will
15 be, that it was the SIPA Trustee who directed that these
16 layoffs take place and directed no WARN Act notices be
17 given.

18 So none of -- you know, this is a unique case
19 because the one subsidiary, because it's a registered
20 broker-dealer, the SIPA proceeding was started, the trustee
21 was appointed, he had to liquidate. He ordered that -- I'm
22 assuming the evidence is going to show that he directed that
23 these people be laid off.

24 So I understand your point, Mr. Raisner, but I'm
25 not aware of any other case that involves a situation such

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1 as this. We'll see where that takes us, but --

2 MR. RAISNER: Well, I would -- I think we should
3 see where it takes us, Your Honor, but you made the proviso
4 in the beginning to look at these issues that maybe this is
5 not the appropriate time for the merits of that defense and
6 some of these issues to be decided.

7 THE COURT: And that is exactly the last point I
8 wanted to raise. Ms. Hager and Mr. Beha, that may well be a
9 common quest -- there may well be common questions of fact
10 and of law with respect to a class comprised of -- and it
11 couldn't be defined this way, because nobody could figure
12 out whether they were in it, but you know who the 1100
13 people who were -- or thereabouts who were coded as MFGI,
14 are they a subclass with common issues of fact as to -- and
15 this may not be disputed at the end -- how their
16 terminations occurred, and then the common issues of law,
17 what's the legal import of that?

18 So, you know, Mr. Raisner is probably aware of --
19 he probably should be, he argued the case before me, I
20 think, the Dewey case -- one of the things I said in the
21 Dewey case is that because this is an equitable remedy the
22 Court retains the authority to reduce the amount of any
23 award, I think I cited -- I think it was a Sixth Circuit
24 case, I don't have my decision in front of me now -- if
25 there was good faith.

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1 So if -- you know, hypothetically, it wouldn't be
2 an issue to be decided on class certification, but if -- you
3 know, if the defendants say, look, the SIPA Trustee directed
4 us to let these people go, they were working at MFGI, they
5 may have been direct employees of USA, although we dispute
6 that, but we in good faith went and laid them off, and we
7 didn't send notices because the trustee said don't send them
8 notices, and that could well be good faith and that could
9 affect -- it's not, you know, Monday, Tuesday, Wednesday's
10 issue, but you all ought to be aware that that's an issue.

11 But I think that -- I'm mindful of what the Second
12 Circuit has said about what a judge is supposed to -- what
13 merits issues a judge decides -- can decide on class
14 certification, but it could well be that there is a class,
15 these MFGI-coded employees whose alleged direct-employment
16 relationship is with USA who were laid off at the direction
17 of the SIPA Trustee, that that group would have common
18 issues of law and fact.

19 MR. BEHA: Your Honor, may I? I know --

20 THE COURT: Yeah, go ahead.

21 MR. BEHA: -- you don't want to turn this into an
22 oral argument, but we certainly have anticipated some of the
23 issues that you were thinking about. As we were preparing
24 over the months, this was clearly a different hearing and
25 different issues before Mr. Kisch was added and before there

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1 was a plaintiff who would represent the group of Holdings
2 employees. Now, we still do not believe, at least with --
3 that with respect to the MFGI employees that class
4 certification would be appropriate for all the reasons that
5 we'll discuss over the coming days, but one thing I did want
6 to sort of highlight in advance, because I'm quite certain
7 this is what we will be asking for, which is if Your Honor
8 does decide that there are common issues of law and fact
9 among this group warranting class certification, you know,
10 we're now wrapping up on almost, you know, a year by the
11 time we're done of intensive discovery into these issues and
12 if there are common issues then, you know, we would like to
13 expeditiously move and resolve those issues

14 So I certainly understand that unless it's
15 necessary for class certification the Court is not going to
16 make ultimate merits determinations next week, but as I
17 said, if Your Honor decides class certification is
18 appropriate, you know, we are still very confident in our --

19 THE COURT: Well, let's just -- we won't --

20 MR. BEHA: -- (indiscernible) position that we'd
21 like to propose --

22 THE COURT: -- even talk about the MFGI group,
23 let's just talk about the non-MFGI, let's just talk to you
24 about -- let me just talk to you about those.

25 So I don't know what if any discovery the

1 plaintiffs are going to wish to take that they haven't
2 already taken. I want to make clear to -- since subject to
3 agreeing on a class definition I think -- let me just assume
4 for now that the parties will come to an agreement on a
5 class definition for the non-MFGI-classified employees, I'm
6 going to press both sides very hard to complete whatever
7 discovery they want to do very quickly, so we can get on and
8 get this decided. If a class gets certified of the MFGI-
9 classified employees -- when I say MFGI-classified,
10 classified as MFGI employees in that Oracle database, the
11 same is going to be true.

12 I don't know whether -- and I don't think we'll
13 get to it Monday, Tuesday or Wednesday, but very soon you're
14 going to have to tell me -- I mean, because I could easily
15 conceive of bifurcating and having a trial on the merits
16 with respect to the MFGI-classified employees, you know, I
17 assume that -- maybe I shouldn't assume -- you'll tell me at
18 some point, Mr. Beha, what defenses you're asserting as to
19 the non-MFGI employees. In the first opinion, I think I
20 alluded to, you know, there are three categories of express
21 defenses, I think two of them I said might be applicable
22 here, and it goes beyond that. So --

23 MR. BEHA: Yeah, and as we read it and in our
24 view, although we're definitely differently situated than
25 the SIPA Trustee, that the liquidating fiduciary as a matter

1 of law and could be determined to be such on a motion to
2 dismiss. We think there is a -- certainly a strong
3 potential on the facts once discovery is completed
4 (indiscernible).

5 THE COURT: I'm only making this comment because
6 it's a statement of fact, Mr. Raisner has been pretty good
7 about settling these cases, because I have approved some of
8 his WARN Act settlements, so --

9 MR. BEHA: Without getting into too much, Your
10 Honor, I think at this point there is a fundamental
11 disagreement about what we would be settling and certainly
12 it involves some of the issues that we've talked about. And
13 I think that it got to a point where people could agree on
14 what this case was ultimately about and (indiscernible) the
15 case is ultimately about, I think it's exceedingly unlikely
16 that they're going to have two new merits trials in this
17 case, let's put it that way.

18 THE COURT: And it -- well, we'll see where we get
19 to next week. But I would -- just to alert you both, I
20 mean, if it wound up that two classes were certified, they
21 seem sufficiently different that I would be inclined to
22 bifurcate and it seems much more likely that the defendants
23 would go to trial with respect to the MFGI, first off,
24 numerically, the numbers are much greater, and we'd move
25 forward very quickly to do that. I would -- well, let's

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1 leave it at that.

2 I will see you all Monday morning.

3 (A chorus of thank you)

4 (Whereupon these proceedings were concluded at 2:56 PM)

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

2

3 I, Dawn South and Tracey Williams, certify that the
4 foregoing transcript is a true and accurate record of the
5 proceedings.

6

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