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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MF GLOBAL HOLDINGS, LTD., *et. al.*, Debtors.	Case No. 11-15059 (MG) Chapter 11 Jointly Administered
In re: MF GLOBAL INC., Debtor.	Case No. 11-2790 (MG) SIPA

THE CUSTOMER REPRESENTATIVES' OPPOSITION TO THE MOTION OF THE INDIVIDUAL INSUREDS FOR RECONSIDERATION OF THE SEPTEMBER 20, 2013 ORDER DECLINING TO INCREASE THE "SOFT CAP" TO PERMIT THE PAYMENT OF ADDITIONAL DEFENSE COSTS

The Customer Representatives in the class action on behalf of former commodity customers of MFGI (the "Customers") respectfully submit this opposition to the Motion of the Individual Insureds for Reconsideration of the September 20, 2012 Order Declining to Increase

the "Soft Cap" to Permit the Payment of Additional Defense Costs (the "Motion").[1]

The Court Correctly Decided to Await the Outcome of the Appeal

1. This Court did the right thing in declining to raise the "soft cap" to $40 million *at least* until the Second Circuit resolves Sapere's appeal. Oral argument on the appeal is scheduled for November 25, 2013. The Circuit's decision will presumably provide guidance to the Court and the interested parties concerning the issue – raised by, among others, the Customer Representatives in their objections to the insurers' original February 2012 applications to lift the automatic stay (MFGH ECF Nos. 416, 484, 573) – of the Customer-victims' priority to policy proceeds to cover the shortfall in funds available to satisfy their claims.[2]

2. The Individual Insureds correctly note (Motion ¶ 3) that the appeal relates only to the E&O Policies. However, given the changed landscape since the Court's decision in April 2012 and the remarkable burn rate of proceeds from both sets of policies, the Court was wise to await the appeal before allowing additional advances from the D&O Policies. The Customers' claims trigger coverage under both policies and, as often observed, the deficit which currently sits at $632 million dollars far exceeds the totality of the combined E&O and D&O Policy limits. Simply put, there is every reason for the Court to wait until the appeal is resolved to entertain a renewed application to raise the soft cap, and, if the Court grants such relief at that time, to evaluate by how much the cap should be raised and under what conditions the advance of defense costs will continue, if at all.

[1] All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

[2] *See, e.g.*, MFGH ECF No. 416, ¶ 4 ("the Representative Customer Group requests that any insurance policies be maintained in their entirety to, *inter alia*, satisfy customer claims of lawsuits arising from the shortfall at MFGI"); MFGH ECF No. 484, ¶ 29 ("Until such issues are resolved . . . payments to Senior Management that decrease the available proceeds to satisfy customer claims with potential priority is simply premature and unjust"); MFGH ECF No. 573, ¶ 28 (Under Section 3420(a)(1) of the New York Insurance Law "the MFG Assurance policies should be held in trust for the [Customers'] exclusive benefit").

The Individual Insureds Provide No Basis for the Court to Reconsider

3. The Individual Insureds attempt to re-litigate an issue the Court has already resolved, which quite clearly is not the function of a motion for reconsideration. *See, e.g.*, *Shiboleth v. Yerushalmi*, 412 B.R. 113, 119 (S.D.N.Y. Bankr. 2009) ("A motion for reconsideration is not an opportunity to relitigate issues already decided by the Court"); *In re Enron Corp.*, No. 01-16034, 2007 WL 130865, at *1 (S.D.N.Y. Bankr. Jan. 16, 2007) ("a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided"). The standard for reconsideration is strict, and the Individual Insureds have not identified controlling authority or matters the Court may have overlooked likely to alter the Court's decision. *See, e.g., Shrader v. CSX Transp., Inc.*, 70 F. 3d 255, 257 (2d Cir. 1995) ("The standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

4. In this regard, the Motion identifies two putative facts "of which the Court may not have been aware" in issuing the September 20 Order. (Motion ¶ 32). Although unlikely, even if this is true, the facts relied upon by the Individual Insureds should not alter the Court's reasoning.

5. *First*, it is wholly irrelevant that, eight days *prior to* the Court's September 20 Order, Judge Francis partially lifted the *DeAngelis* stay. (Motion ¶¶ 23, 33). If it is relevant, it actually militates *in favor of* the decision to be cautious about reopening the defense cost spigot at this time. As the Court noted during oral argument in June 2013, the remarkable burn rate in defense costs has occurred during a period when the stay is in place, and the lifting of the stay is

only likely to drastically escalate depletion of insurance proceeds:

> [T]he real bills start when discovery is going. But -- but the parties have been in mediation and they've spent $32 million and they haven't taken a deposition yet. Okay. And if the litigation goes forward, the burn rate -- if this much has been burned in what is essentially fairly preliminary, I could only fathom what's going to happen if the litigation really goes forward full bore.

(June 28, 2013 Tr. at 13).

6. Put another way, now that the stay is partially lifted and the potential for the burn rate to explode it is particularly appropriate for the Court to await resolution of the appeal so it can consider both sets of policies holistically to fashion a remedy, if any, that recognizes certain realities concerning entitlement to defense costs but protects the numerous competing interests to vastly insufficient proceeds. This approach is consistent with the Customer Representatives' suggestion in response to the May 2013 request that any remedy the Court grants increasing the soft cap beyond the $30 million originally designated should involve a "hard cap" subject only to exceptional circumstances. (MFGH ECF. No. 1474 ¶¶ 4-5).[3] Neither trustee – signatories to the stipulation as to the increase – objects to the hard cap. (MFGH ECF Nos. 1479 ¶ 14; 1515 ¶ 5).

7. The Individual Insureds' *second* argument – that the Court was unaware or did not consider that Sapere's appeal (Motion ¶ 34) addresses only the E&O Policies – is equally unavailing given that the Motion concedes (Motion ¶¶ 3, 20, 35) Sapere focused only on the E&O policies during the June oral argument.[4] Indeed, during the argument Sapere expressly told

[3] Notably, the Individual Insureds' reliance on Judge Francis' order lifting the stay as grounds for reconsideration fails under its own logic. The Motion concedes that the actions by the CFTC and Litigation Trustee were never subject to the *DeAngelis* stay. (Motion ¶ 18). And the stay in the Customer class action remains in place as to discovery (Motion ¶ 23), which the Court acknowledges is the stage when the bulk of fees will accrue. (June 28, 2013 Tr. at 13).

[4] In this regard, the Individual Insureds' reliance on *Henderson v. Metropolitan Bank & Trust Co.*, 502 F. Supp. 2d 372, 379 (S.D.N.Y. 2007) is misplaced because, unlike here, in that case the fact prompting the court to grant reconsideration "was not before the Court when the motion . . . was decided."

the Court it is primarily interested in the E&O policies. (June 28, 2013 Tr. at 56).

8. It is worth noting that the Individual Insureds are in essence seeking a third bite at the apple. In their September 27, 2013 letter, the defendants made virtually the same arguments they make here to urge that Judge Francis reinstitute the *DeAngelis* stay.[5] Judge Francis rejected the defendants' request. The Individual Insureds now come back to this Court to again reargue the issue, even though this Court has already stated that they may renew their application following the appeal.

9. In this regard, the Motion is the embodiment of why the Court should *not* reconsider and raise the "soft cap" at this time to allow defense expenditures to continue unabated. Sixteen separate Defendants' counsel signed the Motion for reconsideration of what amounts to a settled issue until November 25, 2013, all of whom presumably discussed, reviewed and commented on every draft, each billing multiple-hundreds of dollars per hour.

10. Finally, the Individual Insureds' claim of "manifest injustice" (Motion ¶¶ 36, 37) from the Court's decision to await the appeal is vastly overstated. The Individual Insureds point to potential fees due to ongoing investigations by Congress, governmental entities, the trustees and self-regulatory organizations. (Motion ¶ 9). But these investigations are over. Congress issued its report in November 2012,[6] the SIPA Trustee and Chapter 11 Trustee released their reports in June 2012 and April 2013, respectively,[7] and the CFTC has filed its action based on its investigation naming only two of the Individual Insureds (13-cv-4463 (S.D.N.Y.) ECF No. 1).

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[5] *See DeAngelis v. Corzine, et. al.*, No. 11-cv-7866 (VM), ECF No. 543, *e.g.*, at 1 ("In light of the Bankruptcy Court's decision and the fact that insurance proceeds are now not available, the partial lifting of the stay in the *DeAngelis* actions is working a grave hardship on the Individual Defendants"); at 2 ("the Individual Defendants will not have insurance proceeds available to them for months longer").

[6] http://financialservices.house.gov/news/documentsingle.aspx?DocumentID=311647.

[7] *See* MFGI ECF No. 1865 and MFGH ECF No. 1279.

11. The current consequences of the "five sprawling lawsuits" cited by the Individual Insureds (Motion ¶ 37) are similarly overstated. Defendants' motions to dismiss in the securities class action were long ago fully briefed and the mandatory PSLRA discovery stay remains in place. The customer class action will be fully briefed by November 27, 2013, and the discovery stay in that action remains in place. The Chapter 11 Trustee Action names only Jon Corzine, Brad Abelow and Henri Steenkamp, who are among the individuals most likely to be able to fund their own defenses. And the CFTC Action names only Corzine and Edith O'Brien.

12. At bottom, the Individual Insureds do not identify a single specific defense they have been or will be able to raise or any specific hardship caused by the Court's September 20 Order.[8] Respectfully, the Motion sets forth only a potential hardship to counsel, who have already been paid $30 million.

Changed Circumstances Do Not Support Unabated Defense Costs at this Time

13. Understandably, the Individual Insureds rely heavily on the Court's April 2012 Order concluding they are entitled to an advance of defense costs. (Motion ¶ 12). However, the respective proceedings have progressed considerably since April 2012, and the changed circumstances (not including the remarkable burn rate since then) do not favor raising the soft cap at this time.

14. The previously unresolved questions of whether the policies provide entity coverage and are property of the estate have been resolved. As the Court noted during the June oral argument:

[8] For this reason also, their reliance on *Henderson* is misplaced. In *Henderson*, the Court granted reconsideration when it was presented with a new fact assuring that the plaintiffs would totally lack access to the court system in the Philippines. *Henderson*, 502 F. Supp. 2d at 379.

> But I thought that at the time of the initial motions the -- a claim on the entity coverage hadn't yet been triggered. It was anticipated, but had not yet been triggered, and that since then it has.

(June 28, 2013 Tr. at 11). The Court also noted:

> I think given the changed circumstances since the initial decision, proceeds are -- are property of the estate. That isn't to say that the insureds don't have -- the individual insureds don't have a claim against it as -- against the policies as well. ***But at this point it becomes a competition between two or more claimants against the insurance***.

(June 28, 2013 Tr. at 11) (emphasis added).

15. The SIPA Trustee is now able accurately to quantify the deficit in customer funds. In his recent allocation motion, the SIPA Trustee revealed the current deficit is $632 million, and even after the anticipated return of additional customer funds in connection with the settlement with MF Global UK Ltd. the deficit is expected to be $437 million to $457 million – all far in excess of the combined policy limits. (MFGI ECF No. 7103 ¶ 64).

16. The liability of MFGI, MFGH and certain of the Individual Insureds is no longer in serious doubt. Both the SIPA Trustee and Chapter 11 Trustee have issued investigative reports that identify wrongdoing by MFGI, MFGH and the Individual Insureds, the Customer Representatives have filed class claims against both estates, and both trustees have instituted lawsuits (the SIPA Trustee through his assignment to the Customer Representatives) against certain of the Individual Insureds. The liability to Customers and creditors is virtually assured. Moreover, the Court's reasoning that "the estates will actually benefit from a vigorous defense by the Individual Insureds" (April 10, 2012 Memorandum Opinion at 26) is simply not the case where, as now, both trustees are suing certain of the individuals to marshal assets to pay Customers and creditors.

17. In April 2012 the Customer Representatives argued that Customers should have priority to the policy proceeds (a variation of the point Sapere is arguing on appeal),[9] and the evolution of the proceedings since that time – some of which remove doubt as to liability – only bolster this position. This Court has the authority to fashion appropriate relief to protect the interests of all potential claimants, and nothing in the Motion suggests the Court should reconsider its decision to await the outcome of the appeal to do so.

18. Finally, as the Court is aware, the SIPA Trustee has filed a motion seeking authorization to advance funds from MFGI's general estate to satisfy the balance of the Customers' net equity claims in exchange for an assignment of those claims to the general estate. (MFGI ECF No. 7103). Because the policies will continue to respond to those claims, depletion of the policies' proceeds through the payment of ever-escalating defense costs will have a direct and adverse impact on the MFGI estate. For this additional reason, the Motion to reconsider the Court's decision to delay any modification of the soft cap should be denied.

[9] Although it is not a subject for this opposition to the Motion to reconsider, the Customer Representatives have and will continue to argue they have priority under, among other things, New York Insurance Law. (*See, e.g.*, MFGH ECF No. 573, ¶¶ 22-31).

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