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-and-

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UNITED STATES BANKRUPTCY COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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MF GLOBAL HOLDINGS LTD, *et al.*,

Debtors.

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: Chapter 11
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: Case No. 11-15059 (MG)
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**OBJECTION OF DOMINION TO THE MOTION OF THE DEBTORS FOR
INTERIM AND FINAL ORDERS UNDER 11 U.S.C. §§ 105, 361, 362, 363(c) AND
363(e) ANDBANKRUPTCY RULES 2002, 4001, 6003, 6004
AND 9014 (I) AUTHORIZING DEBTORS TO USE CASH COLLATERAL,
(II) GRANTING ADEQUATE PROTECTION TO
THE LIQUIDITYFACILITY LENDERS, AND (III) SCHEDULING A
FINAL HEARING PURSUANT TO BANKRUPTCY RULES 4001(b) AND (c)**

Virginia Power Energy Marketing Inc., Dominion Energy Marketing Inc., and Virginia Electric and Power Company (collectively, "Dominion")¹, by and through their undersigned counsel, hereby file their Objection to the motion (the "Motion")² of the Debtors for Interim and Final Orders Under 11 U.S.C. §§ 105, 361, 362, 363(c), and 363(e) and Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (I) Authorizing the Debtors to Use Cash Collateral, (II) Granting Adequate Protection to the Liquidity Facility Lenders, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c) [Docket No. 8]. In support of its Objection³, Dominion states as follows:

Preliminary Statement

1. Dominion hereby files its objection to the Motion due to Dominion's grave concerns regarding the reported shortfall in customer property in the MFGI estate and the prospect that the Motion, if granted, could impair the rights of MFGI's customers and the SIPA Trustee of MFGI (the "MFGI Trustee"), to obtain such customer property from the Debtors if held by the Debtors.⁴

2. Specifically, Dominion believes that the approval of the Motion could elevate the claims of the Liquidity Facility Lenders on customer property improperly converted by the Debtors above those claims of the MFGI estate and MFGI's customers. This Court should not permit such injustice to occur to the customers of MFGI and should deny the further use of cash collateral⁵ by the Debtors.

¹ Each of the entities that comprise Dominion was a customer of MF Global Inc. ("MFGI") on the Petition Date that traded commodities through MFGI, and each has a substantial customer claim against MFGI.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

³ Dominion also joins and hereby incorporates the legal bases (but not the factual assertions therein) of the Objection to the Motion raised by the Commodity Customer Coalition [Docket No. 83].

⁴ Customer property is defined to include, *inter alia*, property that is "unlawfully converted from and that is the lawful property of the estate." 11 U.S.C. § 761(10)(A)(viii).

⁵ The use of the term cash collateral used herein has the meaning set forth in section 363(a) of the Bankruptcy Code.

3. To the extent the Debtors hold cash that constitutes customer property, the Debtors should not be permitted to use such cash as they hold only legal title and, therefore, have no ability to use such cash for their own devices as such cash is held in a constructive trust for the MFGI estate and its customers. If the Debtors hold any greater interest than legal title to such cash or that cash is not held in a constructive trust, that cash is, at a minimum, cash collateral of the MFGI estate and its customers. Despite this interest, the Debtors have not proposed to adequately protect the interests of the MFGI estate and its customers. Accordingly, the Motion should be denied or, alternatively, the Debtors must be required to provide adequate protection to the MFGI estate and its customers for the use of their cash collateral.

4. Even if this Court permits the Debtors' use of cash collateral, such use should be strictly monitored. The Debtors seek to use up to \$26 million in cash collateral, but the Debtors have submitted only a superficial cash collateral budget that shows the expenditure of only \$4.9 million in cash collateral in the 10-week period that the Debtors' budget covers. Until such time as the Debtors can show a need to use amounts close to \$26 million, such a request should be denied or tempered to only permit usage of actual amounts needed to operate the business.

5. Likewise, a good faith finding for the Liquidity Facility Lenders is premature and should not be made until such time as this Court can hear evidence and determine whether the Liquidity Facility Lenders and their agents did, indeed, act in good faith. At a minimum, such a finding should not be granted until the various government agencies investigating the collapse of the Debtors and MFGI have completed such investigations and made their findings public.

Argument

The Use of Cash Collateral should Be Denied

6. By the Motion, the Debtors seek authorization to use up to \$26 million of cash held in accounts on which the Liquidity Facility Lenders assert a security interest (derived from what appears to be an asserted setoff right as a depository bank) and to provide adequate protection to the Liquidity Facility Lenders on account of any diminution in value from the use of this cash in the form of super-priority claims against the Debtors (including claims higher in priority than any other super-priority claims), first priority liens on all unencumbered property in which the Debtors have an interest, and junior liens on all previously encumbered property in which the Debtors have an interest.

7. However, as has been described in the media and disclosed by the MFGI Trustee, there appears to be a massive shortfall of customer property—approximately \$1.2 billion at the time of the filing of this objection—in the MFGI estate.⁶ This customer property should have been segregated by MFGI for the benefit of its customers and should be returned to these customers of MFGI before any other entity receives any portion of this property. 11 U.S.C. § 766(h) and 17 C.F.R. § 190.08. To date, there remain many unanswered questions regarding the whereabouts of this customer property and the circumstances of the apparent illegal failure of MFGI and its affiliates to segregate properly the customer property in the possession of MFGI.

8. Due to the lack of clarity regarding the whereabouts of the customer property that should have been held by the Debtors' wholly owned subsidiary, MFGI, there is a distinct lack of information regarding the ownership of all of the property held

⁶ James W. Giddens, Trustee for the liquidation of MF Global Inc. (Nov. 22, 2011) Statement from the Office of the Trustee for the Liquidation of MF Global Inc. [Press Release]. Retrieved November 28, 2011 from <http://dm.epiq11.com/MFG/document/GetDocument.aspx?DocumentId=1452116>.

by the Debtors, including the cash which the Debtors seek to use and the property they seek to encumber. The Debtors' use of the cash collateral and the potential encumbrance of the property held by the Debtors may cause further a dissipation of customer property that should have been segregated at the MFGI estate. Because the ownership of the assets of the Debtors is unclear, the granting of the Motion will, potentially, provide the Liquidity Facility Lenders with an interest in this customer property that will impair the rights of the MFGI estate and its customers.

9. No authorization to use such cash should be allowed until there has been a finding by this Court, on a complete evidentiary record, that the cash held by the Debtors and the Debtors' property that the Debtors seek to saddle with super-priority claims and adequate protection liens are not customer property or derived from its proceeds.

10. The plain meaning of section 363(a) of the Bankruptcy Code requires that the Debtors show that they have an interest in the cash held by the Liquidity Facility Lenders in order to use that cash. In a case which involves approximately \$1.2 billion in missing customer property, the Debtors should be required to make a greater showing as to ownership of these funds beyond the ownership of the account in which the funds are held in order to use such cash. No such proof has been offered by the Debtors at this time.

11. To the extent the cash collateral that the Debtors seek to use or the property they seek to encumber is or was converted from customer property, it remains customer property pursuant to section 761(10)(A)(viii) of the Bankruptcy Code. To the extent these funds are customer property, the Debtors only hold legal title to said funds as the equitable ownership of these funds is held by the MFGI estate and its customers. The

Debtors should not be permitted to benefit through the use of customer property to which they only hold legal title and that should have been segregated for customers of an affiliate it controlled.

12. Moreover, to the extent the Debtors hold converted customer property, such customer property should be held in a constructive trust by the Debtors for the benefit of the MFGI estate and its customers. Constructive trust is the "formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee." Cassirer v. Sterling Nat'l Bank & Trust Co. (In re Schick), 246 B.R. 41, 45 (Bankr. S.D.N.Y. 2000). The creation of a constructive trust is governed by state law. Id. Under New York law, this requires proof of (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance on that promise, and (4) unjust enrichment. Id. at 46. New York law does not require strict compliance with these four factors, provided the constructive trustee "acquired and holds property under unconscionable and inequitable circumstances, and is unjustly enriched." Id. In the current case, if the Debtors hold converted customer property, they are doing so under unconscionable and inequitable circumstances, and have been unjustly enriched to the detriment of the MFGI estate and its customers.

13. This Court should not countenance the manifest injustice that would be caused by a further dissipation of customer property for the benefit of the Debtors who may have converted customer property in the first place.

14. Even if this Court were inclined to permit the Debtors to use customer property that they hold, the customers of the MFGI estate and the MFGI estate have an

interest in such cash, making this customer property cash collateral of the MFGI estate and the MFGI estate. See 11 U.S.C. § 363(a). Because this customer property constitutes cash collateral of the MFGI estate and its customers, the Debtors must either obtain consent to use this cash collateral or show that they are adequately protecting the interests of the MFGI's estate and its customers in accordance with section 363 of the Bankruptcy Code. See 11 U.S.C. § 363(c). The Debtors have failed to obtain such consents and have not proposed the provision of any such adequate protection.

Alternatively, to the extent the Debtors require the use of this cash collateral to operate, the Debtors should be required to adequately protect the MFGI Trustee and customers of the MFGI estate with liens and super-priority claims of a greater priority than the adequate protection package granted the Liquidity Facility Lenders. To the extent the Court determines that the cash in the possession of the Debtors which has been used under any Interim Cash Collateral Order (as extended) or which is used in the future is customer property, the customer property interest of the customers of the MFGI estate must be adequately protected. Absent such adequate protection, the use of any cash of the Debtors should not be permitted.

The Debtors' Budget is Insufficient

15. Regardless of whether this Court determines whether to permit the Debtors' use of Cash Collateral, the Court should require the Debtors to provide a detailed budget for its use of cash collateral. It should also require the Debtors to provide justification for its request for use of \$26 million in cash collateral. The only budget provided by the Debtors only shows projected usage of \$4.9 million in the ten week period ending January 6, 2012. Second Stipulated Order Between the Debtors and

JPMorgan Chase Bank, N.A. Extending (I) the Specified Period in which the Debtors may use Cash Collateral and (II) the Objection Deadline Set Forth in the Amended Cash Collateral Order. [Docket No. 119]. There is, therefore, no basis to authorize the Debtors to use \$26 million in cash collateral if there is, as projected, only \$4.9 million in total cash collateral usage in the projection period.

16. This budget should also disclose the cash collateral that the Debtors propose to provide to non-Debtors for use by these non-Debtors in this period. These funds will be leaving the estates of the Debtors and may not provide a corresponding benefit to creditors of the Debtors' estates. While these outflows may be minimal, the Debtors should be required to disclose all such outflows so that the creditors of the Debtors may determine whether to object to such outflows and to determine whether the use of cash collateral will benefit the estate.

The Good Faith Finding is Premature and May Not Be Warranted

17. The Liquidity Facility Lenders or its agents should not at this stage be found to have acted in good faith pursuant to section 363(m) of the Bankruptcy Code. There has been no evidentiary hearing held that established that the Liquidity Facility Lenders or its agents have acted or negotiated in good faith regarding the Debtors' use of cash collateral. It is widely reported in the media that there are various law enforcement agencies investigating the Debtors and the transactions they undertook in the weeks leading up to the Debtors bankruptcy filings. Until such investigations are complete and an evidentiary hearing is held by this Court, there should be no good faith finding made in regard to the conduct of the Liquidity Facility Lenders or their agents.⁷

⁷ For instance, upon information and belief, JPM, the agent for the Liquidity Facility Lenders, was MFGI's depository bank for customer property accounts prior to the filing of the MFGI's SIPA proceeding.

Conclusion

WHEREFORE, for the reasons set forth herein, Dominion respectfully requests that this Court enter an order (a) either (i) denying the relief requested in the Motion or (ii) granting the Motion, but requiring the Debtors to provide the MFGI estate and its customers adequate protection of their interest in this cash collateral or customer property to be encumbered through use of cash collateral; and (b) providing such further relief as this Court deems just and proper.

Pursuant to 17 CFR § 1.20, JPM was required to acknowledge that it was informed that the customer funds deposited with JPM were those of a customer and were being held in accordance with the provisions of the Commodity Exchange Act. To extent that any of the cash collateral used is or was customer property, JPM would have knowledge that such cash collateral was customer property, and the good faith of JPM and the other Liquidity Facility Lenders in receiving and holding such customer property would be called into question.

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