

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
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4 In re:) Chapter 11
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5 MF GLOBAL INC.) Case No. 11-02790(MG)
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In re:))
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MF GLOBAL HOLDINGS LTD.) Case No. 11-15059(MG)
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9))
MF Global Holdings Ltd., as) Adv. Pro. No. 13-01663(MG)
10 Plan Administrator v. JCF MFG)
Holdco LLC, et al.)
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- - - - - x

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13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York

16
17 June 19, 2014
18 10:00 AM

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20 B E F O R E :
21 HON MARTIN GLENN
22 U.S. BANKRUPTCY JUDGE
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1 Hearing re: Adv. 11-02790 - Doc# 7818 Motion for Objection
2 to Claim(s) Number: 300000720/Trustees Objection to the
3 General Creditor claim of Todd Thielmann, et al. (Claim No.
4 300000720)
5
6 Hearing re: Adv. 13-01663 - (CC: Doc. no. 1) Adj. Pre-trial
7 Conference
8
9 Hearing re: Adv. 13-01663 - (CC: Doc. nos. 16, 17, 26, 27)
10 Motion to Dismiss Filed by Debevoise & Plimpton
11
12 Hearing re: (CC: Doc# 1503) Adj. Hrg. RE: Twenty-Fourth
13 Omnibus Objection of Plan Administrator Seeking to Disallow
14 Certain Duplicate MFGI Customer Claims
15
16 Hearing re: (CC: Doc# 1159) Adj. Hearing RE: Ninth Omnibus
17 Objection of Plan Proponents Seeking to Disallow Certain
18 Duplicate MFGI Customer Claims
19
20 Hearing re: Doc# 1889, 1890 Motion for Omnibus Objection to
21 Claim(s)/Fifty-Second Omnibus Objection of Plan
22 Administrator Seeking To, in Part, (1) Subordinate and
23 Reclassify and (2) Disallow and Expunge Certain Non-Debtor
24 Employee Claims
25

1 Hearing re: (CC: Doc# 1847) Adj. Hrg. RE: Motion for
2 Objection to Claim(s) Number: 1793/Objection of Plan
3 Administrator to the Claim of Plaintiffs in Adversary 11-
4 02880 (MG)(Claim No. 1793)

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P R O C E E D I N G S

THE COURT: All right, please be seated. All right, we're here in MF Global Inc., 11-02790 and MF Global Holdings. Ltd., 11-15059, and several adversary proceedings that we'll come to.

Mr. Hildbold?

MR. HILDBOLD: Good morning, Your Honor. Billy Hildbold on behalf of the plan administrator.

We -- if it's okay with Your Honor I'd like to go out of order of the agenda. We have a couple of uncontested matters.

THE COURT: Sure.

MR. HILDBOLD: The ninth and twenty-fourth omnibus objections, which we submitted a declaration of no objection. I'm not sure if Your Honor has any questions or just wants to enter those orders, but I'm available if you have any questions.

THE COURT: No, I don't have any questions.

The ninth omnibus objection, which is at ECF docket number 1159, no response was filed. It seeks to disallow certain duplicate MFGI customer claims, and it's proceeding as indicated as uncontested. Other than as to Occidental Energy, what has happened as to Occidental Energy?

MR. HILDBOLD: They have actually withdrawn their

1 claim, Your Honor.

2 THE COURT: Okay. According to the plan
3 proponents the claimants assert claims based upon the same
4 substantive liability as the unliquidated portion of the
5 respective claim filed against Holdings by the SIPA Trustee.

6 The debtors reviewed their books and records and
7 believe the appropriate party to bring such claims, if any,
8 is the SIPA Trustee, whose claim is listed under the heading
9 surviving claim on Exhibit A.

10 The objection is sustained.

11 MR. HILDBOLD: Thank you, Your Honor.

12 The next is the twenty-fourth omnibus objection,
13 which is also subject to the same declaration of no
14 objections.

15 THE COURT: All right. Anybody wish to be heard
16 on the twenty-fourth?

17 The twenty-fourth omnibus objection seeks to
18 disallow certain duplicate MFGI customer claims. It's at
19 ECF 1503. It's proceeding as to all uncontested and
20 unresolved claims. And the plan proponents seek to -- an
21 order disallowing and expunging the claims, which is similar
22 to the ninth omnibus objection, were based upon the same
23 substantive liability as the surviving claim.

24 The objection is supported by the declaration of
25 Scott Rinaldi. And it's based on -- the claims are based on

1 the same substantive liability as the unliquidated portion
2 of the respective claim filed by -- filed against Holdings
3 by the SIPA Trustee.

4 The objection is sustained.

5 MR. HILDBOLD: Thank you, Your Honor.

6 Next is the fifty-second omnibus objection, which
7 is at docket 1889. It seeks to subordinate and reclassify
8 in part and disallow and expunge in part certain non-debtor
9 employee claims.

10 We received no responses. The declaration of
11 Scott Rinaldi is attached as Exhibit C, and Mr. Rinaldi is
12 on the phone if Your Honor has any questions. The SIPA
13 Trustee filed a statement at docket 1892.

14 If Your Honor doesn't have any questions -- I will
15 let Your Honor know that part of these claims contained a
16 either 401(k) or employee stock purchase plan amount which
17 was previously returned.

18 THE COURT: Does anybody wish to be heard with
19 respect to the fifty-second omnibus objection?

20 All right. As Mr. Hildbold indicated it's at ECF
21 1889, it's proceeding as to five claims listed in Exhibit A.
22 Those are claims 634, 923, 1210, 1252, and 1253.

23 The plan administrator objects to the claims as no
24 liability non-debtor employee claims, and seeks an order
25 subordinating and reclassifying the equity portion of the no

1 liability non-debtor employee claims and disallowing and
2 expunging the compensation-based portion of the no liability
3 non-debtor employee claims.

4 The objection is supported by the declaration of
5 Scott Rinaldi. No responses were filed.

6 The portion of the no liability non-debtor
7 employee claims that the plan administrator objects to is
8 the portion that asserts the claim based on ownership of
9 common stock of Holdings Ltd. or alleged losses of such
10 common stock. The plan administrator asserts two grounds
11 for its objection.

12 One, holders of common stock are not creditors of
13 Holdings, Ltd., but instead interest holders and only
14 creditors may file proofs of claim.

15 And two, to the extent that the no liability non-
16 debtor employee claims assert damages arising from the
17 purchase or sale of common stock such claims must be
18 subordinated and reclassified as equity interest pursuant to
19 Section 510(b) of the Bankruptcy Code.

20 And the plan administrator requests that the Court
21 subordinate and/or reclassify the equity portion of the no
22 liability non-debtor employee claims as Class VI(a) common
23 interests under the second amended and restated plan.

24 Additionally the debtors reviewed their books and
25 records which reflect that the claimants, subject to the

1 objection, were employees of MFGI and not any of the Chapter
2 11 debtors.

3 Thus to the extent that they assert a claim for
4 compensation related obligations of MFGI, including
5 severance, vacation, contributions to the 40(k) plan or
6 employee stock purchase plan the debtors are not liable and
7 the portions of the claims relating to MFGI's compensation-
8 related obligations should be disallowed and expunged.

9 The Court has reviewed the objection, the
10 supporting declaration, again no responses were filed.

11 The objection is sustained.

12 MR. HILDBOLD: Thank you, Your Honor.

13 Next up is the objection of the plan administrator
14 and the objection of the SIPA Trustee to the claims filed by
15 the plaintiffs in the WARN adversary proceeding.

16 THE COURT: Okay.

17 MR. HILDBOLD: How would you like us to proceed?

18 THE COURT: You're up there, you can argue.

19 MR. HILDBOLD: Sure, yes.

20 THE COURT: Go ahead.

21 MR. HILDBOLD: Okay. We filed our -- the plan
22 administrator filed --

23 THE COURT: Why don't you wait for -- Mr. Raisner
24 is coming up.

25 MR. HILDBOLD: Okay.

1 THE COURT: And why don't you make your
2 appearance, Mr. Raisner.

3 MR. RAISNER: Mr. Irkel (ph) is going to --

4 THE COURT: Okay. Can make your appearance?

5 MR. IRKEL: Yes. Yes, Your Honor. Charles Irkel
6 (ph), along with my co-counsel, Jack Raisner, on behalf of
7 plaintiff.

8 THE COURT: Thanks very much.

9 MR. IRKEL: Thank you.

10 THE COURT: Please have a seat. Go ahead.

11 MR. HILDBOLD: Your Honor, Dustin Smith I believe
12 will be arguing for the SIPA Trustee.

13 THE COURT: Okay.

14 MR. HILDBOLD: I don't know if you wanted his
15 appearance as well.

16 THE COURT: Thank you.

17 MR. HILDBOLD: The plan administrator filed his --
18 its objection at docket number 1847, it was filed on
19 April 17th. We received a response from the WARN
20 plaintiffs' counsel at docket number 1880, which was filed
21 on May 15th, and we -- and the plan administrator filed a
22 reply at docket number 1922 on June 17th.

23 The basis for our objection is -- was two-fold.

24 First that the WARN dismissal -- the dismissal of the WARN
25 adversary as to the plan administrator or the Chapter 11

1 debtors is now res judicata and the claim should be
2 dismissed on that -- that ground.

3 THE COURT: So if a claim was filed and if the
4 claim alleged I was employed by MF Global Holdings, would
5 res judicata apply? I mean I dismissed several opinions,
6 right?

7 MR. HILDBOLD: Uh-huh.

8 THE COURT: And in the second of them, as to
9 Holdings, I said they -- basically they failed to do what I
10 said in the first opinion, which is they had to allege who
11 they were employed by and they didn't do that. They argued
12 joint employer theory.

13 But if somebody filed a proof of claim and said I
14 was employed by MF Global Holdings Inc. or MF Global USA
15 would res judicata apply?

16 I mean I didn't -- it was the absence of the
17 factual allegations in the complaint that led to the
18 dismissal with prejudice.

19 MR. HILDBOLD: No, to the extent that employees of
20 MF Global Holdings USA have filed claims against us not
21 involved in the WARN action, to the extent there's been
22 vacation aspects or --

23 THE COURT: Well let's put the vacation -- I want
24 to deal with the vacation separately.

25 MR. HILDBOLD: Sure. To the extent that they had

1 a claim against us we have resolved those claims largely or
2 we have --

3 THE COURT: What about class proof of claim?

4 MR. HILDBOLD: In what terms, Your Honor?

5 THE COURT: No, look, if the issue before me is
6 they file a proof of claim and they didn't do any better
7 with the proof of claim than what they did the second time
8 when I dismissed the amended claimant --

9 MR. HILDBOLD: Uh-huh.

10 THE COURT: -- it would be one thing to argue that
11 res judicata applies. Whether it's res judicata, some
12 preclusion principal. I already decided --

13 MR. HILDBOLD: Right.

14 THE COURT: -- that the complaint that failed to
15 allege that the plaintiffs were employed by one of the
16 Chapter 11 debtors that's what led to the dismissal with
17 prejudice.

18 MR. HILDBOLD: Correct.

19 THE COURT: Okay. So what's in the proof of claim
20 that you're trying to expunge? Is there anything different?
21 I mean maybe I'm missing something.

22 MR. HILDBOLD: I believe what we're -- what we're
23 expunging is they asserted a claim on behalf of the
24 plaintiffs in the adversary proceeding.

25 THE COURT: Without any further allegations.

1 MR. HILDBOLD: To the extent that they had further
2 allegations they were -- they were tied to the adversary
3 proceeding. Right?

4 THE COURT: Uh-huh.

5 MR. HILDBOLD: They attached a statement which
6 said this claim is being filed in conjunction with the
7 adversary proceeding, they said that it is both for WARN Act
8 damages and vacation pay as alleged in the adversary
9 proceeding.

10 THE COURT: Without any additional allegations of
11 by whom they were employed.

12 MR. HILDBOLD: Right, with nothing more.

13 THE COURT: So if they -- if they filed an amended
14 claim now and said I was employed by MF Global Holdings Inc.
15 or MF Global USA --

16 MR. HILDBOLD: I don't believe they -- I believe
17 the plan prevents them from filing an amended claim now.

18 THE COURT: Why is that?

19 MR. HILDBOLD: Because I believe -- and I don't
20 have it with me -- this is strictly from memory -- that
21 there's a provision in the plan that cuts off the right to
22 amend claims, but I'm not sure.

23 THE COURT: Okay.

24 MR. HILDBOLD: But more importantly to amend the
25 claim to suggest that they are now representing someone

1 other than -- than the plaintiffs in that adversary
2 proceeding would be a fundamental change in facts that would
3 prevent the amendment of that claim.

4 THE COURT: Well, I think the law -- I think I
5 cited this -- I didn't go back to read my opinion today --
6 but I think there's good law that says you have to be a
7 member of the class you're seeking to represent. Okay. You
8 can't -- if you're not a member of the class you can't
9 assert rights of other people.

10 So I guess the issue for me is whether the
11 individuals who filed proofs of claim, class or individual,
12 are -- and if it's a class thing are they a member of the
13 class they're seeking to represent? If they haven't alleged
14 anything to demonstrate that they were an employee of one of
15 the Chapter 11 debtors the answer may be one thing.

16 MR. HILDBOLD: Well and I think that's the
17 fundamental issue that you faced in the adversary
18 proceeding.

19 THE COURT: Well but in the adversary -- yeah, so
20 you know, I -- the first -- the first opinion dismissed the
21 adversary with prejudice as to MFGI, the SIPA case, and
22 dismissed it without prejudice as to Holdings with leave to
23 amend. They amended. I told them what they had to do, they
24 didn't do it, I dismissed it with prejudice. But I don't
25 know -- well, I think the issue -- I'll hear whether they

1 think they could allege in good faith that the named
2 claimants were in fact employees of the Chapter 11 debtor,
3 not the stuff that I kicked out the first time. If they
4 have nothing more than that --

5 MR. HILDBOLD: Well more importantly, Your Honor,
6 they admit that res judicata applies. So I don't know that
7 that's even an issue --

8 THE COURT: Okay.

9 MR. HILDBOLD: -- for you to decide because
10 they've admitted that res judicata applies. Certainly they
11 limit it to the WARN Act damages, but we look at it as the
12 underlying basis of the same claim.

13 THE COURT: Well, I didn't -- I certainly -- one
14 of those opinions has a footnote that basically says I'm not
15 deciding vacation pay because I think I said an adversary
16 proceeding is the wrong way to assert that claim, you've got
17 to do it through a proof of claim.

18 So there's nothing in my -- in either of the two
19 opinions that resolves any issues with respect to vacation
20 pay. You agree with that?

21 MR. HILDBOLD: I actually disagree, Your Honor --

22 THE COURT: Tell me why.

23 MR. HILDBOLD: -- and for this reason.

24 The underlying basis to have a claim for vacation
25 against the Chapter 11 debtors would be that you are a --

1 first an employee of the Chapter 11 debtors.

2 THE COURT: I'm not disagreeing with that.

3 MR. HILDBOLD: Right. So --

4 THE COURT: But if it didn't -- I did not -- are
5 you telling me that I ruled on vacation pay? I didn't. I
6 mean --

7 MR. HILDBOLD: No, no.

8 THE COURT: -- I expressly didn't.

9 MR. HILDBOLD: No, you ruled that they were not
10 employees of the Chapter 11 debtors.

11 THE COURT: I ruled that -- well, no, I didn't
12 rule that they were not employees of the Chapter 11 debtor.
13 I ruled that for purposes of the WARN Act claims they failed
14 to allege that they were employees of the Chapter 11 debtors
15 and I don't -- you know, I didn't bring a copy of my opinion
16 out, but I'm pretty sure that's what I ruled.

17 MR. HILDBOLD: Right. I would -- I would say that
18 they failed to establish that they were employees of the
19 Chapter 11 debtors, and in --

20 THE COURT: For purposes of the WARN claim.

21 MR. HILDBOLD: Well --

22 THE COURT: Look, I specifically said vacation pay
23 had to be resolved with respect to proof of claim.

24 MR. HILDBOLD: Right, but I believe that was in
25 the SIPA case that vacation pay was to be --

1 THE COURT: You think I ruled on the vacation pay
2 for you but not for the SIPA Trustee?

3 MR. HILDBOLD: No, no, Your Honor. I believe that
4 you -- again, I don't believe that you specifically ruled on
5 the vacation pay claim. Whether or not they had a vacation
6 pay claim.

7 What I think you ruled on was that the single
8 employer theory did not apply in these cases because MFGI
9 was a liquidating fiduciary and therefore you couldn't
10 bootstrap the Chapter 11 debtors if there was a liquidating
11 fiduciary at the first place -- in the first place.

12 But I think you also established that their
13 purported class did not establish that they were Chapter 11
14 debtor employees.

15 THE COURT: No, I think I said you couldn't -- the
16 named plaintiffs have to be a member of a class to seek to
17 represent. Since the named plaintiffs didn't establish that
18 they were employed by any of the Chapter 11 debtors they
19 couldn't purport to represent people who were.

20 MR. HILDBOLD: Okay.

21 THE COURT: Did I do more? Where -- tell me --
22 read me from my opinion and --

23 MR. HILDBOLD: No.

24 THE COURT: -- tell me where I decided more than
25 what I just said.

1 MR. HILDBOLD: I don't believe that you did, Your
2 Honor. The problem is in the proof of claim. The proof of
3 claim states that it is for the plaintiffs in the adversary
4 proceeding.

5 THE COURT: Okay.

6 MR. HILDBOLD: So they are the plaintiffs in the
7 adversary proceeding.

8 THE COURT: You may get to the same position,
9 but --

10 MR. HILDBOLD: Right.

11 THE COURT: Go ahead.

12 MR. HILDBOLD: In -- if we're discussing the
13 plaintiffs in the adversary proceeding as the -- as the
14 claimants then certainly you're -- I believe Your Honor
15 decided that they were not employees of the Chapter 11
16 debtors.

17 THE COURT: I just want (indiscernible -
18 00:18:39).

19 MR. HILDBOLD: Sure.

20 (Pause)

21 THE COURT: Did any employees of any of the
22 chapter 11 debtors file either WARN or vacation act claims?
23 Because if it did there were -- I mean I've already -- with
24 respect to MFGI I've already entered two orders approving
25 the vacation portions of 169 employee claims. That's as to

1 the SIPA.

2 Did any employees -- I don't think I've had this
3 issue come up with respect to Holdings or the other Chapter
4 11 debtor employees with respect to vacation claims. So my
5 question is did any employees of Holdings or the other
6 Chapter 11 debtors file vacation pay claims?

7 MR. HILDBOLD: There are employees that have filed
8 claims that include a vacation portion. I don't know that
9 they have been fully reconciled yet, but there certainly are
10 those claims, and I -- I can't say with certainty but I can
11 -- I can certainly submit something to Your Honor afterwards
12 of the reconciliation of those claims.

13 THE COURT: I take it that the Chapter 11 debtors
14 -- well let me ask this -- let me ask a question. Did the
15 Chapter 11 debtors schedule any employee vacation pay
16 claims?

17 MR. HILDBOLD: I don't believe that we did, Your
18 Honor.

19 THE COURT: Go ahead.

20 MR. HILDBOLD: Turning to the claim itself and
21 it's assertion of a separate vacation pay claim, it's clear
22 regardless of the various errors on the claim the vacation
23 pay portion is clearly and inextricably tied to the
24 adversary proceeding.

25 THE COURT: I disagree. I refused to consider

1 vacation pay as part of the adversary proceeding.

2 MR. HILDBOLD: I mean in the way that the claim
3 was presented.

4 THE COURT: Look, do you agree I refused to
5 consider vacation pay claims when ruling on the motions to
6 dismiss the adversary proceeding? I think I said that
7 vacation pay claims had to be asserted by way of proof of
8 claim.

9 MR. HILDBOLD: Correct, Your Honor.

10 THE COURT: Okay.

11 MR. HILDBOLD: But what I am asserting is that the
12 claim that was filed and the evidence and proof attached to
13 that claim as establishing that they have a claim states
14 that it is tied to the adversary proceeding. It says the
15 claim is being filed in conjunction with and that it asserts
16 both WARN Act damages and vacation pay --

17 THE COURT: I understand that.

18 MR. HILDBOLD: -- as alleged in the adversary
19 proceeding.

20 THE COURT: Are any -- were any of the named
21 plaintiffs -- and I think you did put something in about
22 this at the time of the adversary -- were any of the named
23 plaintiffs employed by any of the Chapter 11 debtors?

24 MR. HILDBOLD: I don't believe they were, Your
25 Honor.

1 THE COURT: That's a little wishy-washy.

2 MR. HILDBOLD: I don't have that information, I'm
3 trying to recall that from memory, but my understanding
4 is --

5 THE COURT: Okay. And I think at the time of the
6 amended complaint there was something in writing on behalf
7 of the Chapter 11 debtors that these were all -- these
8 people were all employed by MFGI, the broker/dealer. I
9 didn't go back and look at that.

10 Go ahead.

11 MR. HILDBOLD: With that, Your Honor, we rebutted
12 the evidence they provided in their claim in our objection.
13 They failed -- which shifted the burden to them. They
14 failed to meet their burden that they have employees of the
15 Chapter 11 debtors, and the case law is clear, if they
16 failed to rebut then they do not have a valid claim.

17 THE COURT: Okay. I understand your argument.

18 MR. HILDBOLD: Would you like me to turn the
19 podium over --

20 THE COURT: Yeah.

21 MR. HILDBOLD: -- to Mr. Smith?

22 THE COURT: Sure.

23 MR. SMITH: Good morning, Your Honor. Dustin
24 Smith from Hughes Hubbard & Reed appearing on behalf of the
25 SIPA Trustee.

1 The only contested matter on the MFGI agenda for
2 today is the trustee's objection to general creditor claim
3 of Todd Thielmann, which is ECF number 7818.

4 The filing claim asserted three basis for
5 recovery. A claim for a violation of the WARN Act,
6 attorneys' damages arising from the alleged violation of the
7 WARN Act, and a third component for the recovery of unused
8 vacation days on behalf of the punitive -- or purported
9 class of MFGI employees.

10 THE COURT: Thielmann was employed by MFGI,
11 correct?

12 MR. SMITH: Thielmann was -- Thielmann and the
13 other individuals named in their complaint were all employed
14 by MFGI.

15 Thielmann concedes that the two WARN components of
16 the claim are barred by the Court's October 23rd, 2012 order
17 dismissing with prejudice the WARN Act claims on the
18 liquidating fiduciary principal, so I'll only focus on the
19 vacation claim component.

20 The purported class vacation claim is unnecessary
21 and duplicative and does not meet the Court's requirement
22 for the assertion of the class claim in a liquidation
23 proceeding, and on that basis should be disallowed and
24 expunged.

25 THE COURT: You agree that -- well let me ask you.

1 Do they have accrued unpaid vacation?

2 MR. SMITH: Yes, and in fact as Your Honor pointed
3 out you have issued orders for 169 -- the allowance of 169
4 claims for vacation days.

5 THE COURT: Thielmann was not among the 169
6 however.

7 MR. SMITH: No, but in our papers we state that we
8 would allow the Thielmann claim on an individual basis.

9 THE COURT: So why aren't you objecting to his
10 vacation pay claim? He's asserted a vacation pay claim, you
11 agree you owe him a vacation pay claim, why am I supposed to
12 expunge the claim?

13 MR. SMITH: We object to it on the basis that he's
14 asserting it on the entire class, and we feel that --

15 THE COURT: You're objection to the class claim.

16 MR. SMITH: The class claim, not --

17 THE COURT: You're not objecting to his individual
18 claim.

19 MR. SMITH: Yes. I thought we'd clarify that in
20 our papers but clarify here --

21 THE COURT: Okay.

22 MR. SMITH: -- we are -- will allow Thielmann's
23 individual claim and the other -- I believe there's four
24 other ones.

25 THE COURT: How many employees of MFGI filed

1 vacation pay claims?

2 MR. SMITH: We received 500 employee claims and
3 200 -- well over 500 employee claims and 275 of those
4 contained a portion for vacation days, and it's the
5 trustee's position that as long as they're consistent with
6 the policies and procedures of MF Global we will allow the
7 vacation pay claims.

8 THE COURT: Did -- did MFGI schedule unpaid
9 employee vacation in their -- were those -- was anything --
10 is there anything in the schedules that reflects unpaid
11 vacation pay?

12 MR. SMITH: Well, I think our case is procedurally
13 slightly different --

14 THE COURT: Right.

15 MR. SMITH: -- as being a SIPA proceeding so we
16 don't have the same scheduling.

17 THE COURT: You don't have the scheduling.

18 MR. SMITH: So.

19 THE COURT: Okay. So I'm not saying that this is
20 the way I'm going to rule, but I hope you can understand
21 that when you very forthrightly in your papers acknowledge
22 that, you know, any employees who filed unpaid vacation
23 claims will have allowed claims, you have to reconcile the
24 amounts, but that's a fair statement of what you've agreed,
25 right?

1 MR. SMITH: Yes, that's correct.

2 THE COURT: Okay. So Thielmann filed a class
3 proof of claim. And how many employees did MFGI have?

4 MR. SMITH: I believe approximately 900.

5 THE COURT: Okay. So do you -- can you tell me
6 from MFGI's books and records how many employees had accrued
7 unpaid vacation when MFGI closed its doors?

8 MR. SMITH: Unfortunately the books and records
9 did not just have a column next to each employee saying
10 that, so it's a highly individualistic determination
11 which --

12 THE COURT: Can you give me an estimate from it?
13 I suspect it's more than 200 or some odd number.

14 So I hope you understand from my standpoint you're
15 objecting to class proof of claim, I'm not ruling -- I'm
16 taking it under submission today, okay, I got hear the other
17 side about it, but it's not all that -- you know, you agree
18 as a matter of law that any employees who had unpaid
19 vacation at the time the doors shut it would have a valid
20 proof of claim if they filed it. You'd have to reconcile --
21 determine the amount for the books and records, right?

22 MR. SMITH: Yes, that's correct.

23 THE COURT: Okay. And you're essentially arguing
24 I shouldn't permit a class proof of claim so that all
25 employees who had accrued unpaid vacation at the time the

1 door shut would have a valid claim to collect. That's
2 basically what you're telling me.

3 MR. SMITH: Well, Your Honor, I think that's
4 consistent with this Court's precedent. I think there's a
5 number of reasons for that.

6 THE COURT: I'm not -- look, I'm taking under
7 submission, but when you get down -- and you know, I'll
8 analyze yes the circumstances for applying 7023 with respect
9 to proof of claim is different than in an adversary
10 proceeding. I understand that. It's not categorical that
11 class proofs of claim are not permitted. So it's a question
12 of applying facts and circumstances and the legal principals
13 that apply for class proofs of claims and I'm not ruling on
14 it.

15 You know, if -- yes, the amount of each employee's
16 accrued unpaid vacation is individual, but I dare say it's
17 never going to get litigated, okay? If you're going to do
18 -- if I were to certify a class proof of claim for all
19 employees who had accrued unpaid vacation you'd figure it
20 out. You'd say here are the employees, this is amount that
21 was owed, we agree we owe the money, it's just a question of
22 computing the amount. Okay.

23 MR. SMITH: I believe our concern is that that
24 raises a number of other practical and legal issues.

25 THE COURT: What's the practical?

1 MR. SMITH: So on the practical side the trustee
2 -- the SIPA Trustee provided actual notice to all former
3 employees of MFGI, so they had been notified of the
4 bankruptcy and the bar date. They had an opportunity to
5 file a claim and they -- the large majority -- or the
6 majority of the employees chose to file a claim on the basis
7 that they had a claim too.

8 THE COURT: Well, I don't know what -- since you
9 can't tell me how many employees of MFGI had accrued unpaid
10 vacation you can't tell me that a majority of them filed
11 proofs of claim can you?

12 MR. SMITH: I can tell you the majority of the
13 employees filed a claim in the case, MFGI's former
14 employees. I can't tell you whether the majority of those
15 who may have had unused vacation days filed a claim.

16 THE COURT: I thought you said there were like 900
17 employees and 200 and some odd -- how many filed proofs of
18 claim?

19 MR. SMITH: We received 560?

20 THE COURT: Five hundred and sixty.

21 MR. SMITH: Five hundred and sixty employee
22 claims.

23 THE COURT: Okay.

24 MR. SMITH: And it's consistent with what the
25 approach would think if MFGI went bankrupt in October 31st,

1 the large majority of -- or I shouldn't say large majority
2 -- a number of employees may have used all their vacation
3 days before that point of the year which is why they
4 wouldn't file a claim.

5 THE COURT: Right.

6 MR. SMITH: That being said the allowance of the
7 class claim will impose on top of the already preexisting
8 claim structure yet another claim structure which will come
9 with the added administrative burden. The cost and the
10 delay is obviously foremost in the trustee's mind that
11 sending out class notice, which I believe requires 90 days
12 and then a determination of those claims that comes in, the
13 objections to duplicative claims, and the other practical
14 considerations that it raises, it's a serious concern for
15 the estate on a practical level.

16 On a legal issue the Court -- or this Court
17 (indiscernible - 00:32:31) raised the issue whether there'd
18 be a due process violation of allowing what is effectively
19 the bootstrapping of late-filed claims onto the otherwise
20 claims proceedings.

21 THE COURT: I am very concerned about that, I am.

22 MR. SMITH: And that's the consideration we have.
23 Effectively those employees who effectively followed through
24 on their rights filed timely claims will be forced to pay
25 for the administrative procedure and the legal expenses that

1 will come from this auxiliary claims procedure, which we do
2 feel is duplicative.

3 THE COURT: You call it auxiliary claims
4 procedure, there is -- there are circumstances in which a
5 class proof of claim is appropriate, correct?

6 MR. SMITH: I would agree.

7 THE COURT: Okay.

8 MR. SMITH: I would argue that those circumstances
9 are in which the claimants may not have received actual
10 notice of the bankruptcy, and I think that our view of the
11 case law is looking at it is in a case where hypothetically
12 you'd have a group of unknown creditors who did not receive
13 actual notice --

14 THE COURT: Does --

15 MR. SMITH: -- or relied on the class proof of
16 claim.

17 THE COURT: Does the SIPA estate have any records
18 of what the total accrued unpaid vacation pay was at the
19 time that it filed the SIPA proceeding? Not just for those
20 who filed proofs of claim, I just --

21 MR. SMITH: Unfortunately from my understanding MF
22 Global did not calculate unaccrued vacation pay on an
23 ongoing basis, and due to the administrative cost of
24 employing accountants to go through and just calculate that
25 number alone we have not undertaken that exercise.

1 THE COURT: Okay. All right. Anything else you
2 want to add?

3 MR. SMITH: No, that's it, Your Honor.

4 THE COURT: Okay. All right.

5 MR. IRKEL: Which order would you like me to go
6 in, Your Honor?

7 THE COURT: Whatever order you wish.

8 MR. IRKEL: Well let me -- let me focus on the --

9 THE COURT: You have to identify -- every time you
10 speak --

11 MR. IRKEL: I'm sorry. Charles Ircel on behalf of
12 plaintiff, Todd Thielmann.

13 Your Honor, I think you pointed out the key issue
14 in this case which is that there's no schedules required of
15 a SIPA Trustee.

16 I've done dozens of bankruptcy cases over the
17 years, not just WARN Act cases, for creditors debtors alike,
18 and in cases that are brought in jurisdictions like this
19 where there's a very strong -- New York and Illinois have
20 very strong wage payment statutes -- the issue of vacation
21 pay it's regularly -- it's regularly scheduled and then
22 routinely allowed.

23 And I think in this case the SIPA Trustee has
24 agreed that if there was a schedule they would put it on
25 because they say there is no question of law to dispute.

1 They have no -- in paragraph --

2 THE COURT: You agree that all employees received
3 notice of the bankruptcy filing and the bar date -- notice
4 of the bar date?

5 MR. IRKEL: That is --

6 THE COURT: Is the answer yes?

7 MR. IRKEL: Yes, Your Honor. Yes. I would also
8 remind the Court --

9 THE COURT: And a substantial number of filed
10 proofs of claim.

11 MR. IRKEL: Yes, although I think it's interesting
12 that out of 560 they're saying only 275 are vacation claims.
13 I'm saying that the other ones might well be for a lot more
14 money, they might be for commissions, things that people are
15 focused on.

16 THE COURT: I've dealt with commission claims
17 already, but maybe they also didn't have accrued vacation --
18 unpaid vacation.

19 MR. IRKEL: Understood. Understood.

20 But again, I would -- as the Court mentioned
21 earlier in the first oral argument when it dismissed the
22 claims against MFGI the Court specifically did ask what was
23 going to happen to the vacation pay claims. Would they
24 survive as part of the adversary or if you dismissed the
25 adversary what would happen? And the comment was they would

1 become part of the claims process.

2 Over the next year or so as assets were being
3 brought into the estate -- and at that time when you
4 dismissed the -- our first complaint there were not enough
5 money in the estate even to pay customers at that point, so
6 it wasn't clear where we were going to be.

7 We kept monitoring it, we talked with the
8 trustee's counsel various times, as recently as January when
9 we resolved the fifty-first omnibus objection where we
10 agreed WARN was no longer part of the claim. We raised the
11 issue again, what's the position on the class proof of
12 claim?

13 Three months -- they said it would get back to us
14 within a week or a month or so. Several months later we
15 received this objection now saying that a class proof of
16 claim should not be allowed, and we just find it, you know,
17 incredible that now that there's money in the MFGI estate --

18 THE COURT: I don't find it incredible. I don't
19 find it incredible.

20 MR. IRKEL: Well, okay. Let me make a secondary
21 point.

22 I think at most what the Court should do is if
23 it's going to deny the class proof of claim, which again I
24 don't think is setting great precedent if you granted it.
25 If you granted a class proof of claim because of this unique

1 situation without the schedules the class proof of claim
2 there will be not be extensive litigation, if we do a 90-day
3 notice period we do it that way.

4 I mean if they would say here today that they
5 could just allow all the claims I'm not sure that we need to
6 go through the whole class notice process. We would
7 certainly be happy with that. We just want some assurance
8 that the people are going to get their vacation pay that
9 they earned.

10 THE COURT: You know, I went through a lot of
11 fencing at the time of the first and second motions to
12 dismiss. Do you agree now that all of the named plaintiffs
13 were employees of MFGI?

14 MR. IRKEL: Well, Your Honor, I would say this,
15 and as regards Holdings, I mean it's on appeal. Our theory
16 has always --

17 THE COURT: I'm asking you a question.

18 MR. IRKEL: No, we would not concede. I mean our
19 theory has always been that they -- this entity operated as
20 a single employer to --

21 THE COURT: Do you agree that each of the named
22 plaintiffs showed up for work every day for MF Global Inc.?

23 MR. IRKEL: They did, and they received paychecks
24 from MF Global USA Holdings.

25 THE COURT: Well so did every other employee of

1 the enterprise. But named plaintiffs showed up to work,
2 carried out their responsibilities working for MF Global
3 Inc., correct?

4 MR. IRKEL: Yes, Your Honor.

5 THE COURT: Okay. So --

6 MR. IRKEL: You know, as -- and as to the Holdings
7 arguments, I mean I don't think it is res judicata, we have
8 this up on appeal, if it comes back down and the Court sends
9 it back down with instructions to re-examine the single
10 employer test we think it gets to examine --

11 THE COURT: Just please focus on vacation pay.

12 MR. IRKEL: On the -- no, but on the vacation pay
13 it's a joint employer idea, the concept that these were run
14 as one entity, that the vacation policy came from the top of
15 the organization down, the policy under which the employees
16 accrued the vacation pay came down through the organization,
17 including Holdings, the payments were made through -- from
18 different entity, and again, I think they could be jointly
19 liable. And obviously they're only jointly liable for the
20 deficiency, whatever -- you know, if vacation is paid in
21 full by MFGI then there's no claim for vacation pay against
22 Holdings. It's only to the extent that it can't be
23 satisfied.

24 THE COURT: You're agreeing -- I know you've got
25 your single employer theory, but you're agreeing now finally

1 that all of these named plaintiffs were employed by -- you
2 know, worked for MFGI, right?

3 MR. IRKEL: They -- we believe they worked for all
4 of them. But yes, I would, you know, concede for the point
5 of oral argument, not as some legal conclusion or for
6 internal inconsistency in argument, but --

7 THE COURT: So let's focus on the class proof of
8 claim.

9 MR. IRKEL: Yes.

10 THE COURT: It seems to me that the requirement
11 that you founder on perhaps is Rule 23(b)(3), class action
12 is superior to other available methods for fairly and
13 efficiently adjudicating the controversy. That's where the
14 law seems to me to be quite strongly against you. That in
15 the bankruptcy context the proof of claim is a much more
16 efficient way of adjudicating the rights of the claimants.
17 Yes, it requires them to file the piece of paper, it's quite
18 a simple thing to do. There's no dispute I take it, you
19 agree that all of the employees received notice of the
20 bankruptcy filing and of the bar date, correct?

21 MR. IRKEL: I presume that they did, yes.

22 THE COURT: All right. So why isn't the claims
23 allowance process a superior method -- it may -- your
24 argument is well, they acknowledge these people were
25 entitled to vacation pay but they -- you know, they didn't

1 file -- who -- where was the reliance, how did anybody rely
2 -- so cases have looked at the issue of whether -- in the
3 class claim context whether employees relied upon the class
4 proof of claim. I don't see that here.

5 MR. IRKEL: Well, I mean I would say this, Your
6 Honor, I think under American Pipe where the United States
7 Supreme Court said that the filing of a class action tolls
8 the statute of limitations and then there are cases, and I
9 think they're cited -- there's a Fourth Circuit decision
10 cited in Judge Bernstein's decision in Konnot (ph) where he
11 says that it's similar in a bankruptcy that if a class is
12 not certified they -- a new bar date should be issued for
13 the employees and that they do not have to show that there
14 was individual reliance upon the --

15 THE COURT: Are you saying Judge Bernstein held it
16 should be --

17 MR. IRKEL: No, I mean he cites to --

18 THE COURT: -- that there should be a new bar date
19 established now?

20 MR. IRKEL: On page -- this is in In re: The
21 Konnot Group, 491 B.R. 88, 2013 at -- what page is this at
22 -- it looks like it's at 97, and when it talks about -- it
23 first talks about in American Pipe:

24 "The commencement of a class action suspends the
25 applicable statute of limitations as to all asserted members

1 of the class who would have been parties" --

2 THE COURT: A little slower. Just read it again
3 but a little more slowly.

4 MR. IRKEL: Okay. "The commencement of a class
5 action suspends the applicable statute" --

6 THE COURT: Slow down.

7 MR. FISCHER: -- "of limitations as to all
8 asserted members of the class who would have been parties
9 had the suit been permitted to continue as a class action."

10 And that's citing to American Pipe & Construction
11 Company v. Utah, 414 U.S. 538, 1974.

12 He then goes down and he says in his text citing
13 again to that:

14 "Furthermore the class members do not have to
15 demonstrate that they refrained from taking individual
16 action prior to the expiration of the statute of limitations
17 in reliance on the pendency of the class action."

18 American Pipe 414 U.S. at 552.

19 And then Judge Bernstein cites the same tolling
20 rule applies in bankruptcy.

21 "If the representative files a timely adversary
22 proceeding or class proof of claim and the Court denies a
23 motion to certify the class it should set a reasonable bar
24 date to allow members of the punitive class to file
25 individual claims."

1 And then he cites to -- he had two circuit
2 opinions. I'm trying -- TWL, that's all capitals, 712 F.3d
3 at 899, and then he also citings to Gentry v. Siegel (ph),
4 668 F.3d 83, and that's a Fourth Circuit decision, 2012
5 specifically addressing a class proof of claim.

6 So again, to the extent --

7 THE COURT: So I would have the -- if I followed
8 the rationale of Judge Bernstein -- and I want to go back
9 and read it again -- is that I could simply set a new bar
10 date for employees of MFGI to file individual proofs of
11 claim for vacation pay, right?

12 MR. IRKEL: Yeah, you could. I mean I think -- we
13 think that's --

14 THE COURT: But you don't like that because you
15 wouldn't get any fees --

16 MR. IRKEL: No, we don't want any fees, Your
17 Honor.

18 THE COURT: -- if I did that.

19 MR. IRKEL: We don't want -- we don't want any
20 fees in this one. Standing here today if they say they'll
21 allow the claims we're not making the fee app for this
22 vacation pay.

23 THE COURT: Have you told them that before?

24 MR. IRKEL. No. They didn't ask.

25 You know, the point is again routinely in other

1 litigations where we -- on the WARN Act cases we -- there's
2 often vacation or an unpaid wages portion, and we tell the
3 people up front that, you know, that you're owed that money,
4 you're owed that money under the estate policy, you're owed
5 that money as a priority under the Bankruptcy Code, you're
6 going get that money, we don't ask for a percentage of that.
7 So that's -- so again, we think it should be a class proof
8 of claim. We think it should just be allowed and the people
9 should get their vacation pay.

10 THE COURT: So talk about the WARN Act, talk about
11 Holdings now. You --

12 MR. IRKEL: Well Holdings I think is the same. I
13 mean to Holdings -- again, our position is it's up on
14 appeal, we told them this, we would concede that there's res
15 judicata at least at this point versus WARN and arguably the
16 vacation pay. I mean they argue about the deficiencies in
17 our proof of claim. I think saying that it includes
18 vacation pay when they have all the records and they've
19 conceded there's no defense to liability for the vacation
20 pay. I think that's a sufficient enough allegation just to
21 state it in the proof of claim, but --

22 THE COURT: You've -- your argument is you put
23 them on notice that the claimants are also seeking vacation
24 pay.

25 MR. IRKEL: Yes. Yeah, and again, they concede

1 liability to it, they have the books and records, it's a
2 matter of running the payroll and saying this is what each
3 person is owed, and we concede that.

4 And in fact if the Court went the other way with
5 the notice I would propose that they run the records and
6 they tell the people, you know, there is a record that says
7 you're owed \$2,000 in vacation pay, you need to fill out
8 this form. I don't think they should have to.

9 Anything else, Your Honor?

10 THE COURT: No. Either of the moving parties want
11 to speak?

12 Mr. Hildbold, do the Chapter 11 debtors have books
13 and records showing how much accrued and unpaid vacation
14 there was at the time of the bankruptcy filing?

15 MR. HILDBOLD: Can I --

16 THE COURT: Please.

17 (Pause)

18 MR. HILDBOLD: Generally not, Your Honor.

19 THE COURT: I don't know what that means, but --

20 MR. HILDBOLD: Across the enterprise they were
21 generally not kept. It was, you know, depending on the
22 department or the entity it was -- it may have been kept
23 there.

24 THE COURT: How many employees did Holdings have?
25 It didn't have -- can you -- look, I don't want to get into

1 cross-examination, I'm trying -- I'm really trying to get a
2 sense -- look, you don't dispute that if people had -- if
3 people were employed by -- let's put aside the single
4 employer, joint employer --

5 MR. HILDBOLD: Sure.

6 THE COURT: -- issue, okay? But if somebody
7 really worked for Holdings or really worked for MF Global
8 USA Inc. and had accrued but unpaid vacation you're not
9 disputing if they had filed a proof of claim they'd be
10 entitled to receive it.

11 MR. HILDBOLD: Yeah, in fact I verified that to
12 the extent people have filed proof of claims that they were
13 an employee of Holdings USA and it had a vacation component
14 that yes, we've been reconciling those and paying those
15 claims. So we --

16 THE COURT: How many employees did the Chapter 11
17 debtors have at the time of the bankruptcy? Approximately.

18 MR. HILDBOLD: Two or 300, Your Honor.

19 Your Honor, you mentioned that we were put on
20 notice of a vacation pay claim, and I would argue that the
21 notice that we were given was not of an independent vacation
22 claim --

23 THE COURT: Yeah, they combined WARN Act and they
24 mention vacation as well.

25 MR. HILDBOLD: Right, all tied to the adversary

1 proceeding.

2 THE COURT: Well, and you --

3 MR. HILDBOLD: So --

4 THE COURT: -- won on the WARN Act, we'll see what
5 an appellate court says about it, but you know, you've won
6 on it so far.

7 MR. HILDBOLD: But --

8 THE COURT: I don't know what I'm going to do yet,
9 I'm just telling you the vacation pay stands on different
10 footing.

11 I mean this is not the usual case where somebody
12 has some tort theory or some, you know, complicated theory
13 of why they're owed money. If people had accrued and unpaid
14 vacation they were owed the money, you agree they were owed
15 the money.

16 MR. HILDBOLD: Sure. And to the extent that they
17 filed a claim --

18 THE COURT: Okay.

19 MR. HILDBOLD: -- against our estates then we have
20 -- we have been paying those claims.

21 THE COURT: And the issue is in that circumstance
22 if there was a timely and -- if there was a timely proof of
23 claim -- timely class proof of claim filed by -- you know,
24 they also have the problem that they have not -- they did
25 not allege, in my view, we'll see whether a different court

1 thinks differently about it, they did not sufficiently
2 allege that any of the named plaintiffs were employees of
3 the Chapter 11 debtors. Okay. And the proof of claim may
4 fail for that reason -- and you know, because you have to be
5 a member of the class you seek to represent the class proof
6 of claim may fail for that reason.

7 MR. HILDBOLD: Correct, Your Honor.

8 THE COURT: Do you have any idea what the accrued
9 -- what the total amount of accrued and unpaid vacation was
10 at the time the Chapter 11 cases were filed?

11 MR. HILDBOLD: I don't, Your Honor.

12 THE COURT: Let's just put it this way, you don't
13 stand there with the most appealing argument trying to take
14 the vacation pay out of the hides of your former employees,
15 okay? It may be that legally that's the result, okay? But
16 -- let me leave it at that.

17 I'll take -- I'm taking this under submission.

18 MR. HILDBOLD: Thank you, Your Honor.

19 THE COURT: Thank you very much.

20 MR. HILDBOLD: Did you --

21 THE COURT: I don't think I need to hear anymore.
22 If you want. Is there something you wanted to add? Go
23 ahead, I don't want to cut you off, but --

24 MR. SMITH: Just --

25 THE COURT: Just identify yourself for the record

1 again.

2 MR. SMITH: Dustin Smith, Hughes Hubbard & Reed.

3 Just one point of quick clarification on the
4 notice and the claims procedure to give Your Honor a little
5 more background on this.

6 You know, we've been very flexible on allowing
7 individual claimants who just put in, for example, you know
8 claimed \$10,000 with no basis of claim. I think as Your
9 Honor knows from our previous objections to reach out to
10 them through phone calls and letter campaign to allow them
11 the opportunity for anybody who filed any type of place
12 holder claim before the bar date.

13 So I think we would disagree with the assertion
14 that, you know, we're trying to take this out of anybody's
15 hide. We're happy to allow it if they filed a timely claim,
16 it's just the procedures of the case.

17 Thank you, Your Honor.

18 THE COURT: Thank you very much. All right, I'm
19 going take this under submission.

20 All right, so now let's go onto the next one.

21 Mr. Hildbold?

22 MR. HILDBOLD: Your Honor, that leaves us with the
23 adversary proceeding, and I will turn it over to those
24 counsel.

25 THE COURT: Okay.

1 (Pause)

2 THE COURT: I tell you what let's take a ten-
3 minute recess while people shift around, okay?

4 (Recess at 10:53 a.m.).

5 THE COURT: All right, please be seated.

6 All right, we're here in connection with the
7 adversary proceeding MF Global Holdings Ltd. versus JCF MFG
8 Holdco LLC, it's adversary proceeding number 13-01663.

9 MR. HILDBOLD: Your Honor, before you begin I just
10 wanted to make sure it was okay that I was dismissed from
11 the courtroom. You had no further questions for me?

12 THE COURT: Have a nice day.

13 MR. HILDBOLD: Thank you.

14 MS. SELDEN: Good morning, Your Honor. Shannon
15 Selden, Debevoise & Plimpton for JCF MFG Holdco, and with me
16 are Mike Wiles and Megan Bannigan.

17 Your Honor --

18 THE COURT: Thank you. Let me get all the
19 appearances for the --

20 MS. SELDEN: Sure.

21 THE COURT: Okay.

22 MR. HARWOOD: Your Honor, Michael Harwood from
23 Kasowitz, Benson, Torres & Friedman for the plaintiff, and
24 with me is David Mark.

25 THE COURT: Okay.

1 MR. CAWOOD: Your Honor, Fred Stevens, Klestadt &
2 Winters for the following joining movant defendants,
3 Palisade Capital Management, Palisade Strategic Master Fund,
4 Chrysler Group, Rampart Convertible Arbitrage, Pension Plans
5 of Nextera, Pontigus (ph) Investment Management, James
6 Brooks, Nanette Schoolfield (ph), Mark Newman (ph), and
7 Mary, John, and Kathleen Boil (ph). Thank you.

8 THE COURT: Okay. Thank you very much. Go ahead.
9 Go ahead, I'm sorry.

10 MS. SELDEN: Your Honor, in this adversary
11 proceeding the plan administrator seeks to recover four
12 preferred stock dividends paid by debtor MFG Global Holdings
13 to my client JCF, among others between November 2010 and
14 August 2011 on a theory that Holdings had unreasonably small
15 capital when it made those payments.

16 Your Honor, that claim and the related claim for
17 disallowance should be dismissed with prejudice, because
18 even as amended and even will access to the record of
19 exhaustive investigations of MFG conducted by its trustees
20 and regulators the complaint still does not allege any facts
21 to show that Holdings itself had unreasonably small capital
22 at the time of each of the transfers.

23 Instead the amended complaint collapses the MFG
24 corporate structure, lumps Holdings in with its
25 subsidiaries, and contends that because those businesses

1 collectively engaged in a roughly year-long trading strategy
2 that ultimately failed the dividends paid by one entity,
3 Holdings, at various points earlier in that year should be
4 avoided. Those allegations are not sufficient to state a
5 viable claim for relief under Iqbal.

6 Under Iqbal a complaint must allege sufficient
7 facts to state a claim for relief that is plausible on its
8 face where plausible does not mean possible.

9 The facts alleged must, if true, be sufficient to
10 prove the elements of the cause of action, and in assessing
11 the adequacy of the facts alleged courts begin, as the
12 Supreme Court itself did both in Iqbal and in Trombly, by
13 first identifying those elements.

14 Here where there's a claim for avoidance based on
15 unreasonably small capital under Section 548(a)(1)(b) of the
16 Bankruptcy Code it's not a general right to recoup payments
17 when a business fails and it doesn't permit one debtor to
18 avoid payments based on the actions or more importantly the
19 financial condition of separate legal entities.

20 The statute provides only that a transfer may be
21 avoided if the debtor, here Holdings Ltd., was engaged in or
22 about to engage in business or a transaction for which any
23 property remaining with the debtor -- that same debtor --
24 was an unreasonably small capital.

25 So the financial condition of the debtor at the

1 time of the transfer is the very core of the claim and
2 that's what's missing from this complaint.

3 Courts have recognized that to state a viable
4 claim on this theory a plaintiff must allege facts that if
5 true would be sufficient to prove that at the time of each
6 transfer the transferee's financial position was so
7 precarious that it was technically solvent but doomed to
8 fail.

9 So what does that mean and what do courts look
10 like? In assessing whether those elements can be or have
11 been established they look to the --

12 THE COURT: Just slow down a little bit.

13 MS. SELDEN: Sure.

14 THE COURT: Okay.

15 MS. SELDEN: In looking at whether those elements
16 can be established or have been alleged in a complaint court
17 looks -- courts look to the indicia of the debtor's own
18 financial condition at or around the time of the transfer,
19 and that requires more than the conclusory allegation that
20 the company was taking on debt or post-emergent or that it
21 ultimately failed.

22 The indicia of the financial condition are the
23 kinds of things you'd expect to see. They're things like
24 the debt to equity ratio, the existence of working capital
25 needs, the capital cushion that's historically required in

1 its industry, and in particular any financial predictions
2 made by that company and whether they were reasonable and
3 prudent when made.

4 It's not enough to just allege the conclusion, the
5 element of the claim that there was unreasonably small
6 capital. To allege the facts that would prove that element
7 if those facts were true plaintiffs in a complaint must
8 allege those kinds of underlying facts about the financial
9 condition.

10 THE COURT: So if, for example, if MF Global's
11 exposure as a percentage of its equity at let's say
12 September 30th, 2011 was 460 percent and for Citigroup,
13 Goldman Sachs, Jefferies, JPMorgan, and Morgan Stanley it
14 ranged from 2.6 percent to 7.7 percent. Would that
15 disparity support an argument that it was operating with
16 unreasonably small capital?

17 MS. SELDEN: That allegation --

18 THE COURT: I didn't make those numbers up I'm
19 sure you know.

20 MS. SELDEN: I know. Those allegations are
21 allegations about MF Global, and MF Global is defined as --

22 THE COURT: Well, you know --

23 MS. SELDEN: -- a term of art in the complaints.

24 THE COURT: -- Louis Freeh wrote an
25 investigational report of MF Global Holdings Ltd., and the

1 report was issued on April 3rd, 2013, and it's 119 pages
2 long, and the numbers I gave you hypothetically appear on
3 page 98 of the report and it looks at other ratios as well,
4 but he basically, after an exhaustive investigation, reached
5 a lot of conclusions.

6 And I mean I would -- you know, my reaction is
7 that this complaint is pretty thin on facts supporting the
8 plausible claims that they -- it asserts, but unlike perhaps
9 the normal situation where a complaint just comes in over
10 the transom and there hasn't been the history that MF Global
11 has had since its collapse, and I'm just looking at former
12 Judge Freeh's report, there also obviously is Mr. Gidden's
13 report in the SIPA estate, I didn't focus on that, I focused
14 on MF Global Holdings because that's where these dividends
15 were paid out of.

16 You know, Judge Freeh at page -- starting at
17 page 94 of the report focuses on the liquidity problem of
18 the entire enterprise as of the summer of 2011.

19 So I guess the -- you know, that the -- the
20 dividend payments here that are being challenged go back to
21 November 15th, 2010. There are three in 2011; February
22 2011, May 2011, August 2011.

23 My quick review of Judge Freeh's report, you know,
24 paints a bleak picture, but mostly bleak when you get to the
25 summer of 2011, but with increasing concern, and he recites

1 all the emails that were exchanged within MF Global, at
2 least as reported by Judge Freeh, many people other than
3 Mr. Corzine shared the concern that they had insufficient
4 capital to conduct the business they were conducting.

5 You know, you're asking me to dismiss the
6 complaint with prejudice because you don't think they've
7 alleged a plausible claim that these dividends were paid
8 when MF Global Holdings was operating with too small
9 capital?

10 MS. SELDEN: If I may, Your Honor, let me --

11 THE COURT: Go ahead.

12 MS. SELDEN: -- let me address those point in
13 three ways.

14 First, you're absolutely right that the Freeh
15 report is extensive and includes detailed factual
16 descriptions of the investigation.

17 What's missing in the complaint are facts from the
18 Freeh report --

19 THE COURT: So if they attached --

20 MS. SELDEN: -- specific to Holdings' --

21 THE COURT: If they file an amended complaint --

22 MS. SELDEN: -- condition.

23 THE COURT: -- and say the same thing and see
24 Exhibit A, the Freeh report.

25 MS. SELDEN: If the detailed allegations of the

1 Freeh report were specific to the conditions of Holdings
2 Ltd. --

3 THE COURT: It is.

4 MS. SELDEN: -- that paid the dividends --

5 THE COURT: It is.

6 MS. SELDEN: -- at the time of the transfer that
7 would be one way to address the deficiency of these
8 allegations. But the plaintiffs here had the opportunity to
9 do that. This is an amended complaint. They had access to
10 the Freeh report. But when you look at the allegations
11 about the size of the Euro RTM positions, those are
12 allegations related to not just Holdings but Holdings and
13 its subsidiaries.

14 The complaint doesn't do what it needs to do to
15 state this kind of claim, which is break it down according
16 to the entity that paid the transfers.

17 THE COURT: Well Holdings wasn't an operating
18 company, it had to look to its subsidiaries and affiliates
19 for its cash flow and earnest didn't it?

20 MS. SELDEN: Holdings wasn't an operating company,
21 it was a holding company, but even as a holding company the
22 correct test under Section 548(a)(10)(b) of the Bankruptcy
23 Code is to look at that entity's financial condition at the
24 time that it made the transfer.

25 I think one fundamental problem with this

1 complaint is that it disregards that corporate forum and
2 asks this Court to treat the holding company debtor has
3 interchangeable with and basically collapsed into its
4 subsidiaries.

5 There are cases in which that may be appropriate
6 and some of them are cited in the briefing, but those are
7 cases in which the corporate structure itself was implicated
8 in the form of the transfer. That's not the case here.
9 This is just a straight dividend payment by one entity, and
10 it's the financial condition of that entity that's relevant.

11 THE COURT: The dividend from one entity, the top
12 level company that had to rely on cash flow generated from
13 its operating subsidiaries and affiliates, right?

14 MS. SELDEN: I believe so, Your Honor, yes.

15 But again, if -- if the cash flow that Holdings
16 was receiving from its subsidiaries was insufficient to
17 sustain this payment and left it with unreasonably small
18 capital --

19 THE COURT: As long as they keep borrowing money
20 they were able to sustain the cash flow to the parent.

21 MS. SELDEN: And --

22 THE COURT: It's when somebody turned off the
23 spigot and there were margin calls that they -- that, you
24 know, the music stopped.

25 MS. SELDEN: So in one sense what that's

1 describing is an issue at the subsidiary level. That is was
2 the subsidiary able to pay the funds up to the holding
3 company? But that's not the issue before Your Honor in this
4 complaint.

5 What's before Your Honor in this complaint is the
6 access of the --

7 THE COURT: In October? In October 2011 was the
8 holding company that filed the first case?

9 MS. SELDEN: In October of 2011 it was the holding
10 company that filed the first case, but the fact that the
11 holding company ultimately filed for Chapter 11 doesn't tell
12 you anything about its financial condition as of November
13 2010 when the first transfer was made or --

14 THE COURT: Well, I think --

15 MS. SELDEN: -- as of February 2011.

16 THE COURT: I think the plan administrator has
17 real problems about the November 2010 payments, and that's
18 almost \$5 million that they're seeking to recover. When you
19 get to February 2011, if you're May 2011, August 15th, 2011,
20 and you know, Judge Freeh's report focuses in on the
21 deteriorating financial condition of the whole global
22 enterprise and specifically over the summer of 2011.

23 MS. SELDEN: Again, Your Honor, to the extent that
24 the complaint draws on those allegations it too focuses on
25 the deteriorated and financial condition and looks at the

1 ultimate result for Holdings.

2 But if you look at paragraph 40 of the complaint,
3 which describes the increase in the sovereign debt trading,
4 again it doesn't break it down according to the time of the
5 transfers. It describes the trading strategy that began in
6 September 2010 and ultimately became very robust by the end
7 of the summer of 2011. But these are transfers that were
8 made in November 2010, in February 2011, in May of 2011.

9 As to each of those --

10 THE COURT: So let me ask you --

11 MS. SELDEN: -- three transfers --

12 THE COURT: -- if they simply stapled the Freeh
13 report as Exhibit A and the Gidden's report as Exhibit B
14 would the complaint sufficiently allege that the dividends
15 were paid at a time that MF Global Holdings was operating
16 insufficient capital?

17 MS. SELDEN: Your Honor, I don't --

18 THE COURT: Mr. Wiles thinks no.

19 MS. SELDEN: Your Honor, I don't think that would
20 do it. I think Mr. Wiles is right to shake his head.

21 THE COURT: I got very upset with Mr. Wiles about
22 a week ago when somebody sat right -- roughly where you were
23 and when somebody else was arguing they were violently
24 shaking their head, and I said, you really shouldn't be
25 doing that, you know. Okay.

1 MR. WILES: But here I was shaking my head at you.

2 THE COURT: No, I'm just --

3 (Laughter)

4 THE COURT: The second time they did it after I
5 gave the warning then I really got upset.

6 MS. SELDEN: If he starts throwing things at me I
7 know I'm in trouble.

8 THE COURT: Your colleague is doing just fine on
9 her own.

10 MS. SELDEN: No, Your Honor, I don't think that
11 would do it and I don't think that did it in this complaint.

12 I think here the plan administrator had access to
13 those facts. If those facts showed or were sufficient to
14 allege that Holdings itself had unreasonably small capital
15 at the time that it made each of these transfers, not at the
16 time that it filed for bankruptcy, but when it made the
17 transfers, then it could and should have alleged those
18 facts. They don't get a free pass just because someone else
19 did the work and put together the investigative report. It
20 is the obligation --

21 THE COURT: Is there --

22 MS. SELDEN: -- of the plaintiff to --

23 THE COURT: -- a presumption of insolvency at
24 least as the time of the August 15th, 2011 payment?

25 MS. SELDEN: Your Honor, I don't think the

1 complaint even goes that far.

2 THE COURT: No, I'm asking you a question. Is
3 there a presumption of insolvency? If this was a preference
4 case, which it's not pleaded that had way, if it was a
5 preference case there'd be a presumption that they were
6 insolvent at the time of that payment, right?

7 MS. SELDEN: I don't believe that this complaint
8 supports a presumption that Holdings Ltd. was insolvent as
9 of August 2011. Again --

10 THE COURT: They filed bankruptcy when?

11 MS. SELDEN: October 25th -- or 31st of 2011. So
12 a couple of months later. And if you look --

13 THE COURT: And there is a presumption on
14 preferences that 90 days before bankruptcy they were
15 insolvent.

16 So you don't think when this came cratering down
17 in October of 2011, you don't think they were insolvent
18 then?

19 MS. SELDEN: As of October 2011?

20 THE COURT: Yeah.

21 MS. SELDEN: Certainly if they filed for
22 Chapter 11 in October of 2011 --

23 THE COURT: Yes.

24 MS. SELDEN: -- but I think the complaint itself
25 rebuts a presumption that they were insolvent as a result of

1 the Euro RTM trading as of August 2011.

2 THE COURT: Well as long as the spigot remained
3 open for them to continue to borrow they could have kept
4 going. It's when the faucet got shut off that everything
5 came -- and margin calls and everything else that the house
6 came tumbling down.

7 MS. SELDEN: What the complaint itself alleges,
8 Your Honor, is not that it was the Euro RTM trading or the
9 pressure on liquidity or the margins that brought Holdings
10 down or rendered it with unreasonably small capital during
11 the course of the year of 2011, but that it was a run on the
12 bank late in October of 2011 that caused its financial
13 collapse, and that's in paragraph 45 of the complaint.

14 The complaint itself alleges that Holdings
15 collapsed after that run on the bank because of a capital
16 charge taken by its subsidiary. It doesn't allege that
17 Holdings lacked reasonable capital at any point prior to
18 that in the year.

19 If those facts were available they should be in
20 this complaint, and because they're not it should be
21 dismissed.

22 THE COURT: But the Freeh report sure says that.
23 I mean the Freeh report focuses on the capital that was --
24 should have been there to support the business they were
25 conducting.

1 You know, I may have -- I'm being unfair to you in
2 the sense that the complaint doesn't attach the Freeh
3 report, okay? I read your motion, I read their response, I
4 looked at the complaint. I should -- well, let me go back
5 and look at the Freeh report. You know, I didn't read it
6 over again cover to cover, but it tells a pretty horrible
7 story.

8 MS. SELDEN: Your Honor, the story in the Freeh
9 report is one thing, the story in the complaint is another,
10 and the story that's required to establish a claim on an
11 unreasonably small capital theory sufficient to survive a
12 motion to dismiss is yet a third thing.

13 Here the particular allegations of the complaint
14 allege that it was Holdings acting through its subsidiaries
15 that engaged in this trading, that it was the subsidiaries
16 that were putting the trades on, posting the margin,
17 experiencing the challenges, and ultimately the capital
18 charges taken by the subsidiaries that left to Holdings
19 collapse.

20 Without collapsing the corporate structure, as you
21 cannot and should not do based on the allegations of this
22 complaint, Your Honor should focus only on the financial
23 condition of Holdings and at the times that are relevant to
24 these transfers.

25 Those -- you know, as previously mentioned and as

1 I know you know it started in November of 2010 and continued
2 in February, May, and August. Even if you think the
3 allegations are sufficient as to August that's a very
4 different claim than a claim that requires discovery going
5 all the way back to November of 2010 when you're looking at
6 the financial condition over the course of a year versus in
7 the final two months of the business.

8 And I think on this Iqbal itself is clear while
9 Rule 8 is generous it's not unlimited and it doesn't open
10 the keys to discovery based on nothing more than
11 conclusions, and you don't get to plead a complaint and get
12 to take discovery and continue with the burden and cost of
13 discovery where you're relying just on conclusions.

14 Even if you think there are facts elsewhere that
15 might support that claim it is the burden of the plaintiff
16 to put those facts in their complaint.

17 And here we ask for dismissal with prejudice
18 because of the ample opportunities that the plan
19 administrator has had to do that.

20 They've had a first amended complaint, we raised
21 the same challenges in essence that we raised here. They've
22 attempted to address those allegations, but if you look at
23 those paragraphs of the complaint, and not at the Freeh
24 report, but at paragraphs 39 to 45 of the complaint you'll
25 see that they collapse Holdings right into MFG Global and

1 its subsidiaries, that they allege actions by the
2 subsidiaries, that they allege it generally over the course
3 of the year, and that they don't do what they need to do to
4 state a claim.

5 For that reason, Your Honor, we ask that this
6 complaint be dismissed in its entirety with prejudice.

7 THE COURT: Okay, thank you.

8 MR. HARWOOD: Good morning, Your Honor, Michael
9 Harwood from Kasowitz, Benson for the plaintiffs.

10 Your Honor, we'll start with what the basis of the
11 claim is and what we allege as to MF Global Holdings,
12 because the basis of the claim is was the entity that made
13 the claim payment either inadequately capitalized or had
14 unreasonably small capital?

15 THE COURT: Well, I've got a conclusory allegation
16 that MF Global Holdings was at unreasonably small capital at
17 the time it made the payments. That's a conclusory
18 allegation.

19 MR. HARWOOD: That one sentence is, but we have
20 other facts in there that support that, Your Honor.

21 THE COURT: This is --

22 MR. HARWOOD: If I may.

23 THE COURT: Well --

24 MR. HARWOOD: What we allege is --

25 THE COURT: -- you can't. Stop. Point me to the

1 specific allegations in the complaint that established that
2 MF Global Holdings had unreasonably small capital in
3 November 2010.

4 MR. HARWOOD: Paragraph 39 what we allege at the
5 beginning, Your Honor, is that MF Global Holdings had three
6 years of losses and had no anticipated ability to generate
7 profits going forward, and it had been losing money for
8 three years and was in precarious financial conditions.

9 So what they did was they brought in Mr. Corzine
10 and said how are we going to turn this company around? And
11 his plan at that time was to create -- and we say this in
12 paragraph 39 -- was to create an investment bank operation
13 for which as we allege in 39 that they had inadequate
14 available liquidity to run an investment bank.

15 So what his plan was was to engage in the Euro RTM
16 trading, because he could do that as the Euro RTM works, you
17 could buy the asset by using other peoples' money. So he
18 didn't -- MF Global Holdings did not need its own liquidity
19 to buy these Euro bond, they would use the RTMs, use other
20 peoples' money to buy it, and this is the business in which
21 they were intending to engage, and that's what the statute
22 looked at, and they had inadequate capital at the time to do
23 that so they needed to use RTMs to get someone else to buy
24 these by sale and obligation to repurchase and they had
25 inadequate capital to do that so that was the way that they

1 did it.

2 So they structured this going forward and what
3 they said was we're going to buy these things, we're going
4 to engage in a full fledged plan to do that and they jumped
5 into this right away. I know Your Honor says that
6 November 1 is a tough road to hoe, but --

7 THE COURT: Yeah, show me facts --

8 MR. HARWOOD: Sure.

9 THE COURT: -- in the complaint.

10 MR. HARWOOD: Yes. What the complaint says --

11 THE COURT: No, stop. Show me allegations in the
12 complaint that state a plausible claim that the roughly
13 \$5 million in dividends paid on November 15th, 2010 were
14 paid at a time when MF Global Holdings was insolvent or had
15 unreasonably small capital to conduct its business. What
16 was the -- what was the RTM position in November 2010?

17 MR. HARWOOD: It was approximately \$2 billion.

18 THE COURT: \$2 billion.

19 MR. HARWOOD: Approximately \$2 billion.

20 THE COURT: All right. All right. And show me
21 non-conclusory allegations that they had unreasonably --
22 that they were insolvent or had unreasonably small capital
23 in November 2010.

24 MR. HARWOOD: The allegations in paragraph 39
25 through 42 say that as of November of 2010 they had just

1 reported a loss of \$90 million -- excuse me, let me just
2 look at the number I have here -- they had just reported a
3 loss of \$54 million for the quarter ending September 30th
4 and their projected loss for the quarter ending December 31,
5 2010 was another \$30 million.

6 THE COURT: And --

7 MR. HARWOOD: And they were investing in
8 \$2 billion worth of Euro RTMs --

9 THE COURT: Do you think that that -- that
10 established that they were insolvent at that time, would you
11 agree?

12 MR. HARWOOD: It doesn't establish that they were
13 insolvent, no, we're not alleging that they were insolvent
14 at that time.

15 THE COURT: And how does that -- those losses
16 establish that they were operating with insufficiently small
17 capital?

18 MR. HARWOOD: Because what it establishes is that
19 that they were required to place -- put a margin on those
20 bonds, they had no ability, if those bonds were unwound at
21 that time they had no capital available to make the payment
22 that was owed on the purchase. We say that they had
23 inadequate capital at that time. And they couldn't have
24 repurchased those \$2 billion worth of bonds at that point if
25 the -- if they were required to do that because the

1 obligator defaulted it or whatever.

2 So they had inadequate capital to invest in Euro
3 -- \$2 billion worth of Euro RTMs at that point. They had
4 just lost \$54 million and they were projecting a \$30 million
5 loss that quarter just on that beginning of this plan, and
6 they were -- and the law says that you look at what is
7 reasonably foreseeable for the business in which they were
8 about to engage, and their plan in November of 2010 was to
9 buy many more billions of dollars of these Euro RTMs that
10 they couldn't afford to buy.

11 THE COURT: Where do you support that? I mean the
12 Freeh report traces through the increases in authority which
13 to -- you know, to do the reverse repo transactions and
14 authority was increased gradually.

15 So where -- I mean other than you -- you're giving
16 me conclusions, you're not giving me -- look, this is an
17 unusual case because I got two reports, I've got an opinion
18 from Judge Marrero, among other things.

19 You know, you may be on stronger footing as to the
20 May and August 2011 dividends not because of what you put in
21 the complaint, because you had nothing there, but because of
22 the extensive investigations done and reported by two
23 trustees that traced the history.

24 Go ahead.

25 MR. HARWOOD: Thanks.

1 Well, I'll even start at the back and work my way
2 backwards. But in August we do allege that they had over
3 \$600 million in margin calls that they had already put up
4 that was completely illiquid and unavailable to them. They
5 had a \$255 million capital charge that they had to put up
6 based on FINRA coming in in August of 2011 that they --
7 therefore was another -- bringing it up to nearly a billion
8 dollars in funds that were unavailable to them and stuck in
9 an illiquid account.

10 What we have is throughout that time in each
11 quarterly reporting time, in each quarterly dividend payment
12 that their subsidiaries on whom they rely for income were
13 all in a loss position and none of them were passing money
14 up to MF Global Holdings. So MF Global Holdings had no
15 source of liquidity to make any of these payments on each of
16 the quarters.

17 As Your Honor pointed out their only available
18 capital was -- was revenues generated by the subsidiaries,
19 but the subsidiaries were reporting losses in the -- in the
20 10 to nearly -- in one quarter nearly a \$100 million loss.
21 So there was no money coming up. So Holdings had no money
22 to finance the business in which it was engaged and about to
23 become engaged.

24 So by definition without any funds available they
25 were in fact illiquid on each of those quarterly payments.

1 THE COURT: Just give me a second.

2 MR. HARWOOD: Sure.

3 (Pause)

4 THE COURT: Tell me again what's the paragraph --
5 what are the paragraphs of the complaint -- amended
6 complaint that you're relying on to support the allegation
7 that MF Global Holdings was operating with insufficiently
8 small capital in November of 2010.

9 MR. HARWOOD: It would be paragraphs 39, 40, 41,
10 and 42.

11 THE COURT: All right. Hang on.

12 MR. HARWOOD: And 43. Sorry, Your Honor.

13 (Pause)

14 THE COURT: So I've read over paragraphs 38
15 through 42 and I don't see any facts alleged that would
16 support that in -- on November 15th, 2010 at the time it
17 paid about \$5 million total in dividends and it had
18 insufficiently small capital.

19 MR. HARWOOD: Well, Your Honor, what we -- what's
20 alleged in there in paragraph 39 is that as of September of
21 2010 the company had three years of substantial losses, was
22 in a precarious financial condition, and had no reasonably
23 prospects to return to profitability. So it -- so it was in
24 a continuing loss position.

25 THE COURT: It says --

1 MR. HARWOOD: So --

2 THE COURT: -- had been unprofitable for more than
3 three years with few prospects of return to profitability
4 without a major transformation of its business plan.

5 MR. HARWOOD: Correct.

6 THE COURT: So it changed its business plan which
7 turned out to be a disaster.

8 MR. HARWOOD: Exactly. And so what you look at on
9 the payment date is what is reasonably foreseeable on the
10 payment date? And what we allege is it was reasonably
11 foreseeable by November 15th, 2010 that this Euro RTM plan
12 and program was not going return to company to
13 profitability, and it was only digging the hole deeper
14 because --

15 THE COURT: So, you know, in paragraph 40 you
16 allege that by the end of September 2010 they had an RTM
17 portfolio was close to \$2 billion, by the end of August 2011
18 it had groan to 11.7 billion for a net position of
19 8.2 billion after you take the hedges out.

20 MR. HARWOOD: Right.

21 THE COURT: So as to the August 2011 \$5 million in
22 dividends I would say, okay, I read it as a plausible claim,
23 they're operating with insufficient capital at that time,
24 too small capital to conduct its business, and this massive
25 net position in sovereign debt. But working back from there

1 I don't see where you've got the allegations that it was
2 operating with insufficiently small capital.

3 You -- go ahead.

4 MR. HARWOOD: Yeah. What I'm pointing to, Your
5 Honor, is that they have a business plan, and again the
6 statute and the law looks at what the business that you are
7 about to engage in, and the business plan was to continue --
8 and we allege this in there and the facts show it -- that
9 from quarter to quarter to increase exponentially the size
10 this Euro RTM portfolio, but in each quarter every time they
11 did that the losses were still being generated.

12 THE COURT: I want to focus on that first payment,
13 because -- the first payment on November 15th, 2010.

14 What your complaint alleges and what the Freeh
15 report would support is they've been unprofitable for three
16 years, they had to come up with a new business plan.

17 Well Corzine came up with a new business plan
18 which turned out to be an utter disaster, mostly because
19 they had inadequate -- and this isn't addressed in the
20 complaint -- they had inadequate risk controls, and you
21 know, the reason you're exposure is from 2 billion to
22 8.7 billion at that point they clearly were operating, you
23 know, from everything I've read. Not in your complaint, but
24 when I read the Freeh report. By the summer of 2011 they
25 were tottering. Everybody could see it but Corzine.

1 MR. HARWOOD: Well, again, Your Honor, what we
2 believe is, and we think we've alleged enough to create the
3 issue of fact, that the events that occurred in August of
4 2011 and July and June of 2011 were reasonably foreseeable
5 in November of 2010, because this was inevitable that margin
6 calls would be coming in --

7 THE COURT: Show me anything that supports the
8 argument that it was reasonably foreseeable in November 2010
9 that when there was about \$2 billion in RTM exposure that it
10 was inevitable that the business was going to fail.

11 MR. HARWOOD: What we allege in paragraph 43, Your
12 Honor, at the end, is that the financing of the European
13 sovereign debt through Euro RTMs at all times through the --
14 created significant and ultimately untenable liquidity
15 risks.

16 THE COURT: Yeah, at the end of the day --

17 MR. HARWOOD: Ultimately. I understand.

18 THE COURT: -- ultimately it was untenable, we all
19 know that.

20 MR. HARWOOD: And that the capital MF Global used
21 to finance the initial margin and margin calls under Euro
22 RTMs was trapped because MF Global could not unwind the
23 trades before maturity without sustaining significant
24 losses. So they didn't have the funds, MF Global Holdings
25 had no money to finance those losses, and so therefore they

1 had inadequate capital --

2 THE COURT: And when you get to \$8.7 billion net
3 position that's all true.

4 MR. HARWOOD: And we believe, Your Honor, that --
5 that it's also true as to two billion.

6 THE COURT: Do you think so?

7 MR. HARWOOD: Or in excess of two billion.

8 THE COURT: Where, show me something that supports
9 that. Other than your conclusion allegation, show me
10 anything that supports that.

11 MR. HARWOOD: Other than the allegation that they
12 did not have adequate capital to unwind their Euro RTM
13 portfolio at any given time. That's the -- that's the only
14 allegation. But that's a factual allegation that they did
15 not have adequate capital to unwind these -- the bonds in
16 their portfolio and that this investment scheme, this
17 investment plan was doomed to failure from the beginning,
18 you know, from as early as November of 2010 it was
19 reasonably foreseeable.

20 It's not what their actual projections were, but
21 what a reasonable viewer of their financials at the time of
22 the payment would have anticipated going forward. And from
23 November of 2010 it was clear that this company could not
24 finance of its own accord the investments that it was
25 making.

1 (Pause)

2 THE COURT: Anything else you want to say about
3 that?

4 MR. HARWOOD: As to that issue?

5 THE COURT: Yeah.

6 MR. HARWOOD: No, Your Honor.

7 THE COURT: I do want to hear about the -- the
8 declaration of the last dividend which was not paid.

9 MR. HARWOOD: Okay. Again just a little
10 procedural history on that.

11 If Your Honor recalls a proof of claim was filed
12 as to that unpaid dividend.

13 THE COURT: Right.

14 MR. HARWOOD: We filed an objection to it, and the
15 last time my colleague was here in front of Your Honor the
16 idea was --

17 THE COURT: We said we'll deal with it in the
18 adversary proceeding.

19 MR. HARWOOD: Let's deal with it in the adversary
20 proceeding.

21 THE COURT: All right.

22 MR. HARWOOD: So what we really look at is the
23 adequacy of the objection to it as an objection to a proof
24 of claim, and the law is clear and the procedure is clear
25 that in effect your objection is the equivalent of an

1 affirmative defense, and we objected to it on the ground
2 that it was improperly declared by the company at the time.

3 THE COURT: Humor me and tell me what was
4 procedurally incorrect about the way the dividend -- the
5 last dividend was handled.

6 MR. HARWOOD: I missed the beginning of your
7 question.

8 THE COURT: Humor me by --

9 MR. HARWOOD: Humor.

10 THE COURT: -- explaining to me --

11 MR. HARWOOD: Sure.

12 THE COURT: -- what the procedural irregularities
13 were with respect to the declaration of the last dividend.

14 MR. HARWOOD: Sure. As to the procedural
15 irregularity, although the board voted for it, it was never
16 entered into the books and records, it was never -- the
17 resolution was never formally approved and adopted, and
18 that's necessary under their bylaws and under Delaware law
19 in order for it to then be properly declared.

20 In addition to legally, as we pointed out, if you
21 find that the company was inadequately capitalized at the
22 time it was granted then it's prohibited under Delaware law
23 to grant a dividend under those conditions.

24 THE COURT: And when was the declaration of that
25 last dividend?

1 MR. HARWOOD: October 15th, I believe.

2 THE COURT: All right.

3 MR. HARWOOD: So two weeks before the bankruptcy

4 -- less than two weeks before the first bankruptcy.

5 THE COURT: Let me see if I've got any other
6 questions for you.

7 (Pause)

8 THE COURT: Has there been any discovery?

9 MR. HARWOOD: No, Your Honor. Today was also
10 listed as a scheduling conference, but I didn't want to get
11 ahead of myself.

12 THE COURT: Right. All right, let me hear from
13 the other side again.

14 MR. HARWOOD: Just the last thing I would just add
15 is Your Honor asked about the idea of attaching the Freeh
16 report as an exhibit.

17 The Freeh report, while lengthy, also has
18 substantial sections on customer accounts and other things
19 that are not at issue here and would go well beyond the
20 aspects of the complaint that are necessary for this claim.
21 But if Your Honor thinks that's a useful path to go we can
22 do that and just refer to certain sections.

23 THE COURT: It seems to me like an empty gesture
24 frankly.

25 Okay, anything else you want to add?

1 MR. HARWOOD: No, Your Honor.

2 THE COURT: Let me hear from the other side again.

3 MS. SELDEN: Your Honor, I'll be brief and address
4 just a couple of points in response.

5 First I would encourage Your Honor to do exactly
6 what you're doing, which is to focus on the specific
7 allegations of the complaint, and I think when you look at
8 those paragraphs you see that they are missing critical
9 information.

10 Paragraph 39 in particular, which is doing an
11 awful lot of work in this complaint is the place at which
12 the plan administrator is pointing the Court to see that
13 Holdings letted lacked capital. It doesn't actually say
14 anything about Holdings' assets. It doesn't say it was
15 engaged, it had no prospect to return into profitability.
16 It said it had few prospects. It said it had three years
17 that it had been unprofitable. None of that tells you the
18 kinds of things about working capital needs, about debt to
19 equity, about financial projections, none of that tells you
20 the kinds of facts that --

21 THE COURT: Well they do have --

22 MS. SELDEN: -- are indicative of unreasonably
23 small capital.

24 THE COURT: Again it's late in the day, but they
25 pick up the figure that I quoted earlier from the Freeh

1 report in this chart that exposure as a percentage of equity
2 was 460 percent. They didn't include the chart that's in
3 the Freeh report at page 98 which compares it to Citigroup,
4 Goldman, Jefferies, JPMorgan, and Morgan Stanley where the
5 percentage was between 2.6 percent and 7.7 percent. Four
6 hundred and sixty percent is a little bit higher.

7 MS. SELDEN: That is higher number, Your Honor,
8 but that's the number as of September 30th, 2011, and I
9 believe that the Freeh report is based on consolidated
10 financials as to that number --

11 THE COURT: Well look --

12 MS. SELDEN: -- and not as to Holdings.

13 THE COURT: -- the part of your argument where you
14 try to dissect the enterprise into each and argue that the
15 complaint is inadequate because it -- it focuses on a
16 consolidated -- consolidated numbers rather than Holdings
17 alone simply doesn't carry any weight.

18 This was a holding company that depended on its
19 operating subsidiaries for its financial resources and it's
20 ability to pay dividends, et cetera. So that part of the
21 argument I reject.

22 MS. SELDEN: In that case, Your Honor, perhaps I
23 should turn to a different part of the argument.

24 THE COURT: Well -- go ahead.

25 MS. SELDEN: Unless you had a further question

1 about that.

2 THE COURT: No, I -- look, I mean what's -- if I
3 didn't have -- and I recognize it's -- it seems to me almost
4 an empty gesture to tell the plaintiff to staple the Freeh
5 report or the Gidden's report to a second amended complaint
6 and point to the specific numerous sections of the report
7 that do cover precisely what's -- what's argued here.
8 You've read it I'm sure, there's a lot of history already in
9 this case.

10 Not to quote Judge Marrero, but when he denied
11 motions to dismiss the gist of -- this was not sort of the
12 collapse of MF Global didn't happen, you know, miraculously
13 overnight, it got -- it was a declining -- it was burying
14 itself deeper and deeper. And the question of whether the
15 November 2010 dividend was paid at a time when it was
16 operating with insufficiently small capital is far from
17 clear.

18 By the time you move to August 2011 and they paid
19 on August 15th, 2011 about \$5 million in dividends good luck
20 if you think you're going to show that that was -- those
21 dividends were not paid at a time when MF Global Holdings
22 was operating with insufficiently small capital.

23 I'm not making any decisions, but I mean, you
24 know, what about the dates, February 15th, 2011, May 15th,
25 2011, I don't know.

1 MS. SELDEN: Your Honor, and that point as to
2 timing, what the plan administrator is asking is to go
3 forward with discovery and with this adversary proceeding on
4 the basis of these allegations. The scope of that discovery
5 looks very different if you allow them to go all the way
6 back to November of 2010 and include that claim on the basis
7 of absolutely no factual allegations as to financial
8 conditions then. If we're looking at the difference
9 between --

10 THE COURT: No, there are some allegations.
11 Whether there are enough is a different issue.

12 MS. SELDEN: But on a claim for unreasonably small
13 capital to avoid a transfer I think the four transfers
14 should be broken up essentially as separate claims. There's
15 one claim for November, for February, for May, and for
16 August.

17 If you think the allegations are sufficient as to
18 August that doesn't necessarily mean that they're sufficient
19 as to the rest, and those claims should be dismissed.

20 I would also say that even if you have a business
21 plan that ultimately turns out poorly, even very poorly as
22 it clearly did here, that's not enough to state a claim for
23 unreasonably small capital. And I think the In re: Iridium
24 case, which we cite and discuss in our briefs, is
25 instructive here. Again, a case in which the commerciality

1 of the business plan seemed promising at the outset but
2 ultimately failed resulting in a Chapter 11 filing nine
3 months later. What the court looks at there in considering
4 the unreasonably small capital claim is the adequacy or the
5 reasonableness and prudence of the financial projections at
6 the time they were made, not as of August 2011, not as of
7 October 2011, not sitting here today in 2014, but when that
8 plan was made, when it was carried out were the financial
9 projections reasonable and prudent at the time?

10 Your Honor, if you look at this complaint at the
11 factual allegations there are no allegations about the
12 financial projections regarding the plan. There's a
13 description of the plan itself, but no allegations about a
14 contemporaneous understanding of its reasonableness or
15 prudence.

16 We infer it was imprudent because it didn't work
17 out well, but that's not enough to state a claim.

18 THE COURT: Yeah --

19 MS. SELDEN: That's the kind of hindsight
20 allegation that courts reject.

21 THE COURT: This is -- the claims are for
22 constructive (indiscernible - 01:42:38) not actual fraud,
23 correct?

24 MS. SELDEN: Right.

25 THE COURT: And so Rule 8(a) rather than Rule 9(b)

1 applies in determining the sufficiency of the complaint.

2 MS. SELDEN: Correct, Your Honor.

3 THE COURT: Okay. So I know what I was searching
4 for before, Judge Marrero in the MF Global Holdings Ltd.
5 Securities litigation, his opinion on November 12th, 2013
6 where he said:

7 "Defendant's contentions would suggest that the
8 fall of MF Global must have been the fateful work of
9 supernatural forces or else that explanation -- or that --
10 or else that the explanation for spectacular multi-billion
11 dollar crash of a global corporate giant is simply that
12 stuff happens instantaneously of its own accord."

13 And this complaint is clearly sufficient to allege
14 plausible claims for constructive fraudulent conveyance with
15 respect to dividend payments made in August 2011.

16 It gets more dicey moving backward. There were
17 dividend payments that they seek to challenge, each about
18 \$5 million, November 15th, 2010, February 15th, 2011,
19 May 15th, 2011, August 15th, 2011.

20 The motion to dismiss is denied.

21 While the allegations in the complaint are thin
22 the Court concludes that they're sufficient to state a
23 plausible claim for relief with respect to each of the four
24 dividend payments -- the payments made on the four dates
25 that I -- that I mentioned.

1 Whether -- there are obviously many other elements
2 of the fraudulent conveyance plan that will have to be
3 established, and whether there are defenses and whether they
4 can establish that the -- that the dividend payments in
5 November 2010 are recoverable, much harder time they have
6 with that.

7 There's obviously a lot of information known today
8 about MF Global Holdings and its subsidiaries and
9 affiliates.

10 As I've already mentioned the moving parties'
11 argument that the complaint must separately dissect the
12 financial condition on a stand-alone basis of MF Global
13 Holdings on each of the dates is simply wrong. It was a
14 holding company that depended on its operating subsidiaries
15 and affiliates for its cash flow and revenue.

16 While permitting the complaint to proceed seeking
17 to recover dividend payments made as far back as
18 November 15th, 2010 will result in expanding the scope of
19 discovery it will not inordinately do so.

20 Much of the documentary record has been preserved
21 because of the other pending litigation, much of it is
22 available electronically.

23 A stipulation -- I guess it was -- we saw --
24 received today between the SIPA Trustee and the -- and the
25 defendants, Corzine, with respect to maintaining the

1 computer systems and the availability of data. As I
2 understand it those systems were retained from some time in
3 2015. So there's plenty of information that's already been
4 collected, easily searchable.

5 I think the plan administrator has a much more
6 difficult time reaching back to November 2010, but I can't
7 say based on applying Rule 8 that the complaint is -- does
8 not state a plausible claim for relief with respect to the
9 dividends as far back as November 15th, 2010.

10 (Pause)

11 THE COURT: With respect to the objection to the
12 claim of JC Flowers that's been filed for the -- you know,
13 the last unpaid dividend it's a contested matter, it'll get
14 resolved, discovery -- I'll apply the usual discovery rules
15 with respect to that and we'll go forward. All of this is
16 going to get resolved together.

17 Let's talk about now. What period should the
18 Court allow for fact discovery and expert discovery?

19 MR. HARWOOD: We've had tentative discussions
20 between ourselves -- sorry, Michael Harwood for plaintiff.

21 We've had tentative discussions between ourselves,
22 we don't think based on the nature of the defenses that
23 plaintiff will really need very much discovery from the
24 defendants, assuming that it's acknowledged that the
25 payments were made on the particular dates to the particular

1 defendant entities --

2 THE COURT: Well the discovery they need from --

3 MR. HARWOOD: Exactly. And as Your Honor pointed
4 out and we've discussed the databases are available.

5 In terms of document production it shouldn't be
6 that difficult. We've talked about the idea of maybe six
7 months for fact discovery. The only question is to the
8 extent to which they may need fact witnesses to explain the
9 business plan and what's going on, and those people we don't
10 have control over.

11 So it may -- six to nine months for fact discovery
12 and then we think maybe three months after that, I think we
13 discussed, to for expert discovery on adequacy of capital.

14 If we controlled the fact witnesses I think we
15 could do fact in six months, but I don't want to make
16 promises I can't keep.

17 THE COURT: Yeah. Magistrate Judge Francis is
18 regulating the discovery in the matters pending in the
19 District Court. Obviously I will do that for here, but
20 where issues have come up and it could over scheduling
21 depositions, he and I have conferred -- not over scheduling
22 depositions per se -- but we -- it's been disclosed on the
23 record, and you know, over the case -- he and I have talked
24 about issues regarding discovery come up.

25 MR. HARWOOD: I know in that connection there's

1 been an effort made to not have witnesses appear multiple
2 times for different litigations, and I'm sure we can discuss
3 with counsel ways to coordinate as well, assuming that
4 they're not -- their track isn't too far ahead of ours, but
5 I don't think it will be.

6 THE COURT: All right. Let me hear from the
7 defendants' counsel.

8 What -- given nature of the case I will -- I'm
9 prepared to agree to a six-month period for fact discovery.
10 It's longer than I usually agree upon, but this is more
11 complicated by virtue of the pending District Court actions
12 that we need to coordinate. But have you -- have you spoken
13 about a discovery plan? What is that you're -- why don't
14 just come on up to the podium again. Tell me what your --

15 MS. SELDEN: No, Your Honor, we haven't spoken in
16 detail about a discovery plan except insofar as we agree
17 that most of the discovery in this case will be our request
18 to the --

19 THE COURT: Right.

20 MS. SELDEN: -- plan administrator and that those
21 documents are likely to be available.

22 We're prepared to move quickly to talk to them in
23 a cooperative way about how best to do that and how best to
24 streamline that in light of the other pending litigation.

25 THE COURT: Okay. How much time do you want to

1 answer the complaint?

2 MS. SELDEN: I would think four weeks would do it,
3 Your Honor.

4 (Pause)

5 THE COURT: Let me ask this then. My usual
6 template for case management and scheduling orders is on the
7 website under my chamber's rules. I would ask that the two
8 of you confer and fit in the dates on six months for fact
9 discovery and three months for expert discovery thereafter
10 is satisfactory to me, but you have to put -- put real dates
11 in.

12 My courtroom deputy is out today and will be out
13 tomorrow. Get a date from Deanna for a case management and
14 scheduling conference about three months from now. I want
15 to check in on where you are at that point.

16 (Pause)

17 THE COURT: What I think you should do, and I'm
18 sort of in the process of changing that template, I'm not
19 going do it for this, use the one that's on. The change
20 really has to do with whether you -- whether I require that
21 you file a discovery plan, and -- which the Federal Rules of
22 Civil Procedures require you to arrive at. I'm not going
23 put it in the order, but you ought to confer quickly, and
24 you know, think about how -- what your discovery plan is,
25 and it is mostly going to be defendants taking discovery

1 from the plaintiffs and others. How you're going to proceed
2 with discovery and see if you can come to a general
3 agreement about how that will go.

4 So if there are discovery disputes my -- you'll
5 see in the template that if you have any discovery disputes
6 I don't take any discovery motions. You contact -- you
7 know, you meet and confer, you try to resolve differences,
8 if you can't the party needing the assistance of the Court
9 arranges for a telephone conference at a date that's
10 mutually convenient, and here it's certainly conceivable
11 that the discovery disputes will be with third parties and
12 not with the plan administrator, but the same applies.

13 I -- generally you'll get a conference by
14 telephone mostly within a day of the request and I'm
15 generally able to resolve those disputes without the
16 necessity of either side filing briefs. Occasionally I'll
17 ask for letter briefs.

18 You'll see the template also requires -- and maybe
19 you've already done this -- but within 14 days of the date
20 of the order the parties have to meet to discuss settlement
21 or ADR.

22 Have there been any settlement discussions?

23 MR. HARWOOD: No, Your Honor.

24 THE COURT: Okay. So you're required to do that.

25 And I certainly encourage you to see if you can resolve

1 this.

2 I mean this is the unusual situation where a lot
3 of the facts are known. I mean I -- you know, I mean the
4 Freeh report or the Gidden's report are hearsay, but you
5 know, they're well-sourced and you've got a lot of
6 information and you've obviously read them both I'm sure --
7 both reports. So you've got a lot of information.

8 I think the hole here from the plan administrator
9 side is what was the situation in November 2010? That's
10 where the push is. I mean you can -- you're -- as you get
11 closer to the date of the -- of the bankruptcy obviously
12 your arguments get stronger, but I think for November, maybe
13 even for February you've got a tougher road. Take that into
14 account when you confer about settlement. Okay, I'm sure
15 you will. Sophisticated counsel, I'm sure you'll do that.

16 All right. What I'd ask is get me the case
17 management scheduling order by next week -- some time the
18 middle of next week. Deanna I think will be back in on
19 Monday and you'll get a date from her for a case management
20 scheduling conference.

21 Okay. And if there's at any point either side
22 believes there's something that requires a conference you
23 call and it'll get arranged.

24 Anything else either side wants to raise today?

25 MR. HARWOOD: Just one other --

1 THE COURT: Okay.

2 MR. HARWOOD: -- sort of housekeeping matter.

3 The Klestadt firm appeared and joined in on behalf
4 of 13 of the other defendants.

5 THE COURT: Yeah.

6 MR. HARWOOD: There are 14 defendants who have not
7 responded at all. We were waiting until today as to whether
8 to bring a default motion, because if Your Honor wasn't
9 going to allow the case to proceed there would be no point.

10 THE COURT: Right.

11 MR. HARWOOD: So we now would want to file default
12 motions as to those defendants that have not responded.

13 THE COURT: Okay. Are they represented -- do you
14 know whether they're represented by counsel?

15 MR. HARWOOD: We've served them all and we've
16 heard nothing from any of them.

17 THE COURT: Contact them again. I mean it's --

18 MR. HARWOOD: We'll send a letter before filing a
19 motion.

20 THE COURT: Needless to say I'm not a big fan of
21 default judgments, but if they get entered they get entered.

22 Mr. Wiles, have you or your colleagues had any
23 discussion with the other defendants or --

24 MR. WILES: No, not a -- not a bid. I believe
25 we've heard from the Klestadt firm and that's it.

1 MR. HARWOOD: We'll send letters first, Your
2 Honor, before filing a motion for default --

3 THE COURT: Sure.

4 MR. HARWOOD: -- to see if we can get a response.

5 THE COURT: And I'm sure you know the procedure,
6 you -- when -- you first seek a certificate of default from
7 the clerk and after you get that then you actually file a
8 motion for entry of default.

9 MR. HARWOOD: Right. But what we can do now, now
10 that we've had today, we can write the letter and say that
11 the Court has denied the pending motion to dismiss, so it's
12 time for them to take some action.

13 THE COURT: Yeah. And after the Arkinson (ph)
14 decision our procedure for entry of default judgments
15 remains viable, I guess I'd describe it as that, and refer
16 you to my decision in Oldco M with respect to entry of
17 default judgments.

18 MR. HARWOOD: Very good, Your Honor.

19 THE COURT: Okay. It's the procedure you need to
20 follow.

21 All right, we're adjourned. Thank you very much.

22 MR. HARWOOD: Thank you.

23 (Whereupon these proceedings were concluded at 12:15
24 PM)

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I N D E X

RULINGS

Page Line

(CC: Doc# 1159) Adj. Hearing RE: Ninth

Omnibus Objection of Plan Proponents

Seeking to Disallow Certain Duplicate MFGI

Customer Claims 7 2

(CC: Doc# 1503) Adj. Hrg. RE: Twenty-Fourth

Omnibus Objection of Plan Administrator

Seeking to Disallow Certain Duplicate MFGI

Customer Claims 7 17

Doc# 1889, 1890 Motion for Omnibus Objection

to Claim(s)/Fifty-Second Omnibus Objection of

Plan Administrator Seeking To, in Part, (1)

Subordinate and Reclassify and (2) Disallow

and Expunge Certain Non-Debtor Employee

Claims 8 20

Adv. 13-01663 - (CC: Doc. nos. 16, 17, 26,

27) Motion to Dismiss Filed by Debevoise &

Plimpton 81 20

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

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dawn South

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