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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MF GLOBAL HOLDINGS LTD., et al.,	:	**Case No. 11-15059 (MG)**
Debtors.[1]	:	**(Jointly Administered)**

OBJECTION TO THE MOTION OF THE INDIVIDUAL INSUREDS TO LIFT AUTOMATIC STAY AND MODIFY PLAN INJUNCTION AS TO PROCEEDS OF CERTAIN MF GLOBAL POLICIES OF DIRECTORS AND OFFICERS' LIABILITY INSURANCE

The Court should deny the Motion of the Individual Insureds to Lift Automatic Stay and Modify Plan Injunction as to Proceeds of Certain MF Global Policies of Directors and Officers' Liability Insurance (Docket No. 1956) (the "Motion") because (a) a portion of the

[1] The debtors in the chapter 11 cases (the "Chapter 11 Cases") are MF Global Holdings Ltd.; MF Global Finance USA Inc.; MF Global Capital LLC; MF Global Market Services LLC; MF Global FX Clear LLC; and MF Global Holdings USA Inc. (collectively, the "Chapter 11 Debtors").

proceeds of the relevant insurance policies is property of the Chapter 11 Debtors' estates, and (b) whether or not the insurance proceeds are estate property, the Court has the authority to continue to monitor the Individual Insureds' use of the proceeds because such use has a direct impact on the recoveries of creditors under the Chapter 11 Debtors' confirmed plan (Docket No. 1382) (the "Plan").[2]

In support of this objection, MF Global Holdings Ltd., as plan administrator ("Holdings Ltd." or the "Plan Administrator") under the Plan, respectfully states as follows:

I. PRELIMINARY STATEMENT

1. Insurance issues are not new to this case. The Court has repeatedly recognized that there are competing interests in the proceeds of the Chapter 11 Debtors' D&O insurance policies (collectively, the "D&O Proceeds"), and accordingly, the Court has attempted to restrain the Individual Insureds from unfettered spending of the proceeds by imposing a "Soft Cap" on the amount of defense costs to be reimbursed to the Individual Insureds. The Soft Cap was initially set at $30 million, and, after the Individual Insureds exhausted that $30 million limit, the Court eventually increased the Soft Cap to approximately $40 million.[3]

2. Through the Motion, the Individual Insureds seek access to the D&O Proceeds without further involvement of the Court by lifting the stay in the SIPA liquidation proceeding (the "SIPA Case") of MF Global Inc. ("MFGI") and by modifying the Plan injunction under the Chapter 11 Debtors' Plan (the "Plan Injunction").[4] Nothing has changed since the

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2 Capitalized terms not otherwise defined in this motion shall have the meaning given to them in the Plan.

3 The Soft Cap amounts include both the D&O Proceeds and the proceeds of separate E&O insurance policies. *See In re MF Global Holdings Ltd.*, 469 B.R. 177, 197 n.18 (Bankr. S.D.N.Y. 2012). The Motion seeks relief solely with respect to the D&O policies, and thus, unless otherwise specified, references herein to insurance policies or insurance proceeds refer only to the D&O policies and proceeds, and not the E&O policies and proceeds.

4 The Plan Injunction is found in section XI.D of the Plan.

Individual Insureds' last attempt to take exclusive control over the D&O Proceeds, however, and the Court's concerns regarding the exhaustion of Proceeds by the Individual Insureds remain. In short, the relief requested by the Motion is no more appropriate now than it was over two years ago when the Court declined to lift the automatic stay or, more recently, when the Court cautiously agreed to raise the Soft Cap while reaffirming its concern about the rate at which the Individual Insureds have been spending the D&O Proceeds.

3. The Court has the authority to continue monitoring the use of the D&O Proceeds and to ensure that the Individual Insureds are reimbursed only for reasonable defense costs because the exhaustion of the D&O Proceeds has a direct impact on creditors' recoveries under the Plan and because at least some of the D&O Proceeds are property of the Chapter 11 Debtors' estates. In particular, every dollar of D&O Proceeds that is spent by the Individual Insureds defending the various lawsuits filed against them is a dollar that is unavailable to satisfy any judgment or settlement in the Litigation Trust Lawsuit (as defined below), which lawsuit is being prosecuted exclusively for the benefit of creditors under the Plan, and the Customer Class Action (as defined below), which, if successful, will lead to increased creditor recoveries as well.

4. The Plan Administrator recognizes that the Individual Insureds are entitled to an adequate defense of the claims asserted against them, and the Plan Administrator in no way seeks to deny the Individual Insureds the right to such a defense. But the Individual Insureds are not entitled to spend the D&O Proceeds without regard for the negative impact that their spending has on creditors and without providing this Court with convincing evidence that their defense costs are reasonable. Without this Court's oversight, counsel to the Individual Insureds could conceivably exhaust the D&O Proceeds in their entirety, or, at the very least, spend enough of the D&O Proceeds such that the remaining proceeds will be insufficient to satisfy any

judgment against, or settlement with, the Individual Insureds. Neither the Individual Insureds nor the creditors of the Chapter 11 Debtors' estates benefit from the continued exhaustion of the D&O Proceeds solely to pay defense costs, and under those circumstances, the plaintiffs would have no choice but to pursue recovery of any such judgment or settlement from the Individual Insureds' personal assets. To ensure that creditors in the Chapter 11 Cases are adequately protected, therefore, the Court should continue to monitor the Individual Insureds' spending of the D&O Proceeds.

II. OBJECTION

A. The Court has the authority to continue to monitor the Individual Insured's defense costs.

5. The Motion is based on the false premise that the Court can only exercise oversight and control of the D&O Proceeds, as it has for the past two and a half years by implementing the Soft Cap, if the proceeds are property of the Chapter 11 Debtors' estates.[5] Applicable case law and the terms of the Plan Injunction compel the conclusion, however, that the Court's authority over the D&O Proceeds extends beyond those D&O Proceeds that are estate property. [6]

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[5] The Plan Administrator does not concede that any D&O Proceeds are not property of the Chapter 11 Debtors' estates. As the Court and parties in interest are aware, Holdings Ltd. is the policyholder, the "named corporation," and an insured under the D&O policies, and the Individual Insureds do not dispute that the D&O policies are property of the Chapter 11 Debtors' estates. As set forth herein, however, the Plan Administrator does not believe that the Court needs to reach the issue of whether the D&O Proceeds are estate property because the Court has the authority to continue to impose a Soft Cap under the Plan Injunction and the authorities cited herein even if none of the D&O Proceeds are estate property. The Plan Administrator recognizes that the Court has stated on the record that it believes that the only basis for concluding that the D&O Proceeds might be estate property is as a result of the Chapter 11 Debtors' indemnification obligations, which could support the Debtors' rights to recover under the D&O policies as insureds. Nonetheless, the Plan Administrator submits that the issue has not been resolved by the Second Circuit Court of Appeals, and the Plan Administrator reserves the right to challenge the Individual Insureds' assertion that the D&O Proceeds are not estate property.

[6] As discussed below, at least $15 million of D&O Proceeds are property of the estate. *See infra* § I.A.2.

6. The Second Circuit Court of Appeals has adopted the well-known *Pacor* test, which broadly provides that a bankruptcy court has jurisdiction over a proceeding if the outcome of the proceeding "might have any conceivable effect on the bankruptcy estate." *See Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011) (quoting *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992)) (emphasis added); *see also Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) ("The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is *whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*.") (citing *In re Gen. Oil Distribs., Inc.*, 21 B.R. 888 (Bankr. E.D.N.Y. 1982), and *In re U.S. Air Duct Corp.*, 8 B.R. 848 (Bankr. N.D.N.Y. 1981)). Furthermore, the Bankruptcy Code provides the Court with expansive authority to issue any order that is consistent with the provisions of the Bankruptcy Code or that is necessary for the implementation of a confirmed bankruptcy plan. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); 11 U.S.C. § 1142(b) ("The court may direct the debtor and any other necessary party to . . . perform any . . . act . . . that is necessary for the consummation of the plan.").

7. Second Circuit courts have found that matters related to insurance policies owned by the debtor and matters that affect distributions to creditors undeniably have at least a "conceivable effect" on the debtor's bankruptcy case. *See, e.g., Fed. Ins. Co. v. Sheldon*, 167 B.R. 15, 19-20 (S.D.N.Y. 1994) (concluding that the bankruptcy court had jurisdiction over insurance issues even where the debtor's insurance policies covered the debtor's directors and not the debtor); *In re 610 W. 142 Owners Corp.*, 219 B.R. 363, 370-71 (Bankr. S.D.N.Y. 1998) (bankruptcy court had jurisdiction over lawsuits filed against debtor's officers and directors

because the lawsuits' "outcome[s] will affect property available for distribution to creditors of the bankruptcy estate through the proceeds of . . . the Directors and Officers' liability insurance coverage . . ."); *Fried v. Lehman Bros. Real Estate Assocs. III, L.P.*, 496 B.R. 706, 709-10 (S.D.N.Y. 2013) (bankruptcy court retained jurisdiction over proceeds of debtor's insurance policies even after confirmation of liquidating plan); *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 2004 U.S. Dist. LEXIS 8168, at *7-8 (S.D.N.Y. May 6, 2004) ("federal courts have found jurisdiction . . . in cases where the debtor is not even a party, such as . . . proceedings against officers or employees of the debtor that could exhaust the debtor's insurance limits or give rise to claims against the debtor for contribution or indemnity"); *Macarthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988) ("Numerous courts have determined that a debtor's insurance policies are property of the estate, subject to the bankruptcy court's jurisdiction.").

8. Moreover, courts have also found, under facts similar to the present case, that it was appropriate for the bankruptcy court to oversee and to restrict the spending of D&O proceeds where that spending could conceivably impact the administration of the bankruptcy case or creditor recoveries under the debtor's plan. In *Megliola v. Maxwell*, 293 B.R. 443 (N.D. Ill. 2003), for example, the chapter 7 trustee and a group of class action plaintiffs filed separate lawsuits against the debtor's officers and directors, and each sought to satisfy the potential judgments in those actions with the proceeds of the debtor's D&O insurance policies. *Id.* at 445. The trustee filed an adversary proceeding to enjoin the class action plaintiffs from prosecuting their lawsuit on the grounds that the class action could exhaust the D&O proceeds. The bankruptcy court found that the D&O proceeds were <u>not</u> property of the debtor's estate, but it nonetheless granted the trustee's request to enjoin the class action lawsuit under section 105(a) of

the Bankruptcy Code. *Id.* at 445-46. The district court found it particularly relevant that the exhaustion of insurance proceeds in the class action would not leave any proceeds for the satisfaction of a judgment in the chapter 7 trustee's lawsuit: "a judgment obtained by the [class action plaintiffs] in the [class action] has the potential of leaving no funds available to pay a judgment obtained by the Trustee in the Trustee Action." *Id.* at 446 (quoting the bankruptcy court). Thus, because the class action lawsuit could reduce the potential distributions to creditors in the bankruptcy case, the court had the authority to enjoin the class action and preserve the D&O proceeds for use in the chapter 7 trustee's lawsuit. *Id.* at 449 ("The relevant inquiry . . . is whether the Class Action affects the bankruptcy estate or the allocation of property among creditors.") (emphasis added). *See also In re Adelphia Commc'ns Corp.*, 298 B.R. 49, 54 (S.D.N.Y. 2003) (concluding that under certain circumstances, a bankruptcy court has the authority under section 105(a) of the Bankruptcy Code to enjoin third-party lawsuits involving the proceeds of a debtor's insurance policies, even if the proceeds are not estate property, and remanding to the bankruptcy court); *In re Adelphia Commc'ns Corp.*, 302 B.R. 439, 444-46, 449-50 (Bankr. S.D.N.Y. 2003) (following the district court's directive on remand and enjoining third-party insurance actions under section 105(a) because such actions would impair the debtor's reorganization, irrespective of whether the proceeds were estate property); *In re Rusty Jones, Inc.*, 124 B.R. 774, 778 (Bankr. N.D. Ill. 1991) (citing section 1142(b) of the Bankruptcy Code and concluding that, where proceeds of the debtor's insurance policy would not "flow directly into the coffers of the estate" but would nevertheless "result in a more extensive distribution" to creditors, the court had jurisdiction over proceedings related to the insurance proceeds); *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413 (Bankr. E.D. Pa. 1995) (where payment to directors and officers would diminish the pot available to cover insured claims against the debtor,

the proceeds were property of the estate and the debtor could "regulate access to this property in relation to other assets").

9. As these cases demonstrate, a bankruptcy court may control the spending of insurance proceeds, even if those proceeds are not estate property, where the spending of such proceeds could negatively impact creditor recoveries or otherwise affect the administration of the debtor's bankruptcy case or the implementation of the debtor's plan.

10. Likewise, the Plan Injunction applies to actions not only with respect to property of the estate but also actions "against or affecting the Protected Parties.[7]" *See* Plan § XI.D (enjoining actions "against or affecting the Protected Parties or the property of the Debtors") (emphasis added). The Plan Injunction also enjoins "any actions to interfere with the implementation or consummation of the Plan." *Id.* Thus, the Plan plainly contemplates that the Court can enforce the Plan Injunction with respect to matters that do not directly concern estate property.[8]

11. As described below, certain of the D&O Proceeds are property of the Chapter 11 Debtors' estates, and to the extent the D&O Proceeds are not, the Court nonetheless has the authority to continue to impose a Soft Cap on the Individual Insureds' spending of D&O Proceeds and to evaluate the reasonableness of the Individual Insureds' defense costs because the exhaustion of the proceeds has a direct and material impact on creditor recoveries in the Chapter 11 Cases.[9]

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7 The Protected Parties includes the Chapter 11 Debtors. *See* Plan § I.A.135.

8 Counsel to each of the Individual Insureds, as well as counsel to U.S. Specialty Insurance Co., received notice of the Plan and confirmation hearing in the Chapter 11 Cases, and none of these parties objected to the Plan Injunction. *See* Affidavit of Service (Docket No. 1155).

9 Indeed, under *Megliola*, the Court conceivably has the authority to go one step further and enjoin any lawsuit against the Individual Insureds that threatens to exhaust D&O Proceeds at the expense of creditors (Cont.'d)

1. Exhaustion of the D&O Proceeds negatively impacts creditors in the Chapter 11 Cases because recoveries in the Litigation Trust Lawsuit and Customer Class Action will increase distributions to creditors under the Plan.

12. Pursuant to the Plan and the corresponding Litigation Trust Agreement, a Litigation Trust was created for the purpose of pursuing the claims asserted in the adversary proceeding captioned *Louis J. Freeh, as Chapter 11 Trustee of MF Global Holdings Ltd., v. Jon S. Corzine*, No. 13-1333 (Bankr. S.D.N.Y.) (the "Litigation Trust Lawsuit"). *See* Plan § IX-2; Litigation Trust Agreement (Docket No. 1353) § 1.3. The defendants in the Litigation Trust Lawsuit are Jon Corzine, Bradley Abelow, and Henri Steenkamp, all of whom are Individual Insureds.

13. Under the Plan and the Litigation Trust Agreement, the Litigation Trust's recoveries in the Litigation Trust Lawsuit constitute Available Cash, which will be transferred to the Disbursing Agent to be distributed to creditors:

> The Litigation Trust shall be established for the sole purpose of liquidating the Litigation Trust Claims and transferring Available Cash, subject to the terms of the Litigation Trust Agreement, to the Disbursing Agent for the benefit of Holders of Allowed Claims and Holders of Allowed Interests.

Plan § IX-2.B. *See also* Litigation Trust Agreement § 1.3 (identifying the same purpose of the Litigation Trust); § 3.3 (providing that all Available Cash held by the Litigation Trust shall either be used to pay the expenses of the trust or transferred to the Disbursing Agent for the benefit of creditors).

14. Under the Plan, holders of General Unsecured Claims are entitled to a pro rata share of all Available Cash. *See* Plan § III.B.8 ("each Holder of an Allowed Class 6A

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in the Chapter 11 Cases. *See Megliola*, 293 B.R. at 449 (enjoining a class action lawsuit filed by a third party because the class action lawsuit would exhaust insurance proceeds that would otherwise be used to satisfy claims asserted by the bankruptcy trustee).

General Unsecured Claim shall receive . . . its Pro Rata Share of Holdings Ltd.'s Available Cash . . ."); § III.B.9 (same with respect to the other Chapter 11 Debtors). The vast majority of holders of General Unsecured Claims will never be paid in full under the Plan. *See* Disclosure Statement (Docket No. 1111-1) § I.C.2 (showing that over 97% of allowed General Unsecured Claims will likely receive a distribution of less than 40 cents on the dollar).

15. If the Litigation Trust obtains a judgment in the Litigation Trust Lawsuit, or if the parties agree to a settlement, then the Individual Insureds' payment of such a judgment or settlement to the Litigation Trust could come from the D&O Proceeds, assuming the proceeds have not been exhausted. And as described above, any recovery by the Litigation Trust in the Litigation Trust Lawsuit directly benefits holders of allowed General Unsecured Claims under the Plan, and because General Unsecured Claims will not be paid in full under the Plan, every dollar that the Litigation Trust can recover in the Litigation Trust Lawsuit directly increases creditors' recoveries.

16. Creditors in the Chapter 11 Cases also stand to benefit from the prosecution of claims in the various customer class action lawsuits that have been consolidated under the caption *In re MF Global Holdings Ltd. Investment Litigation*, No. 11-Civ-7866 (S.D.N.Y.) (collectively, the "Customer Class Action"). In the Customer Class Action, certain customers of MFGI have asserted claims against certain of the Individual Insureds. Customers in MFGI's SIPA Case, however, have already been paid in full, and thus, pursuant to an order of this Court in the SIPA Case (SIPA Case Docket No. 7208) (the "Reallocation Order"), recoveries in the Customer Class Action are property of the general estate in the SIPA Case. *See* Reallocation Order at 3. Because Holdings Ltd. is one of the largest holders of a general estate

claim in the SIPA Case, recoveries in the Customer Class Action ultimately flow into the chapter 11 estate of Holdings Ltd. to be distributed to creditors in the Chapter 11 Cases.

17. If the D&O Proceeds are insufficient to satisfy any judgment in the Litigation Trust Lawsuit or Customer Class Action or are insufficient for purposes of settlement, creditors under the Plan will suffer direct and material harm. The Court, therefore, must balance the interests of creditors in recovering under the Plan with the interests of the Individual Insureds in using the D&O Proceeds to defend themselves in the various lawsuits in which they are defendants. By continuing to monitor the spending of D&O Proceeds, the Court can ensure that the Individual Insureds continue to be adequately represented while also protecting the interests of creditors, whose potential recoveries continue to decrease as the Individual Insureds continue to spend the D&O Proceeds.

2. At least $15 million in D&O Proceeds are property of the Chapter 11 Debtors' estates.

18. Where a debtor and its officers and directors both have a right to receive the proceeds of the debtor's D&O insurance policy, courts have generally found that "the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution." *See In re MF Global Holdings Ltd.*, 469 B.R. 177, 190-91 (Bankr. S.D.N.Y. 2012) (quoting *In re Downey Fin. Corp.*, 428 B.R. 595, 603 (Bankr. D. Del. 2010)); *see also In re Motto*, 263 B.R. 187, 193 (Bankr. N.D.N.Y. 2001) ("The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on the claim.") (quoting *In re Edgeworth*, 993 F.3d 51, 55 (5th Cir. 1993)); *In re Hereford Biofuels, L.P.*, 466 B.R. 841, 856 (Bankr. N.D. Tex. 2012) ("The central question in deciding whether insurance proceeds associated with a policy are

'property of the estate' is whether, in the absence of a bankruptcy proceeding, proceeds would belong to the debtor when the insurer pays on a claim.").

19. Here, there is no doubt that the Individual Insureds' exhaustion of the D&O Proceeds would "have an adverse effect on the estate," that the Chapter 11 Debtors have a "right to receive and keep those proceeds," and that in the absence of bankruptcy, at least a portion of the D&O Proceeds would "belong to the [Chapter 11 Debtors]" if the Chapter 11 Debtors made any indemnification payments to the Individual Insureds.

20. Many of the Individual Insureds filed proofs of claim in the Chapter 11 Cases asserting a right to indemnification from the Debtors. *See* Proof of Claim No. 1225 (Bolger); 1226 (Fusco); 1227 (Gelber); 1228 (Glynn); 1229 (Goldberg); 1230 (Schamis); 1231 (Sloan); 1360 (MacDonald); 1276, 1277, and 1281 (Abelow); 1376, 1377, and 1380 (Steenkamp); 1593 (Corzine) (collectively, the "Indemnification Claims"). On June 5, 2014, the Plan Administrator filed the Motion to Estimate the Maximum Allowed Amount of Certain Indemnification Claims Against MF Global Holdings Ltd., MF Global Holdings USA Inc., and MF Global Finance USA Inc. (Docket No. 1907) (the "Estimation Motion"). In the Estimation Motion, the Plan Administrator asked the Court to (a) estimate certain of the Indemnification Claims at zero dollars, (b) disallow, subordinate, or estimate at zero dollars certain securities-related Indemnification Claims, and (c) estimate the Indemnification Claims of Abelow, Corzine, and Steenkamp at a maximum amount of $5 million each. *See* Estimation Motion § IV. Abelow, Corzine, and Steenkamp filed a joint statement in response to the Estimation Motion (Docket No. 1960) advising the Court that they did not have any objection to the Estimation Motion or to the proposed order submitted by the Plan Administrator. No other party objected or otherwise responded to the Estimation Motion.

21. Assuming that the Court grants the Estimation Motion, Abelow, Corzine, and Steenkamp's Indemnification Claims will be estimated in the maximum allowed amount of $15 million ($5 million for each claimant). Although the Plan Administrator believes that these Indemnification Claims have no merit and should ultimately be disallowed, they remain pending at this point, and the Court may ultimately determine that they should become allowed claims in an aggregate amount less than or equal to $15 million.

22. Any amount that the Plan Administrator pays to Abelow, Corzine, or Steenkamp on account of their Indemnification Claims gives rise to a claim on behalf of the Plan Administrator against the D&O Policies. Thus, the movants do not dispute that at least $15 million of D&O Proceeds constitute property of the Chapter 11 Debtors' estates. *See Downey*, 428 B.R. at 603; *Edgeworth*, 993 F.3d at 55; *Hereford Biofuels*, 466 B.R. at 856; *see also* Hr'g Trans. (May 19, 2014) at 70:3-5 (the Court stating that if the Chapter 11 Debtors pay indemnification claims to the Individual Insured, then they "have a claim under the D&O").

III. CONCLUSION

23. The Court should not permit the Individual Insureds to exhaust the D&O Proceeds without this Court's continued oversight because (a) the exhausting of the D&O Proceeds will reduce creditor recoveries under the Plan and (b) a portion of the D&O Proceeds are property of the Chapter 11 Debtors' estates. Accordingly, the Court should deny the Motion.

Dated: August 14, 2014
New York, New York

Respectfully submitted,

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