UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC. et al.	Case No. 11-15059 (MG) Case No. 11-15058 (MG) (Jointly Administered)
Debtors.	

TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, AND ARTON SINA, individually, and on behalf of all other similarly situated former employees,

Plaintiffs, Adv. Pro. No. 11-02880 (MG)

v.

MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA, INC.; MF GLOBAL INC., et al.,

Defendants.

GENITRA GREENE and VICTOR HURTADO, on behalf of themselves and all others similarly situated,

Plaintiffs,

v. Adv. Pro. No. 11-02921-mg

MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA INC., and MF GLOBAL INC,

Defendants

RESPONSE OF THIELMANN PLAINTIFFS OPPOSING GREENE PLAINTIFFS' MOTION TO CONSOLIDATE RELATED ACTIONS AND APPOINT LEAD COUNSEL

Plaintiffs Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles and Arton Sina (referred to collectively herein as "Thielmann Plaintiffs") in the amended, combined adversary proceeding 11-02880-mg[1] (originally filed as three separate actions: 11-02880-mg, 11-02881-mg, and 11-02882-mg), jointly and on behalf of all others similarly situated, respectfully respond to the motion by Plaintiffs Genitra Greene and Victor Hurtado (referred to collectively herein as "Greene Plaintiffs") to consolidate related actions and appoint "lead counsel," filed on December 7, 2011 (the "Motion") in each of the above-captioned adversary proceedings. Greene Plaintiffs' Motion seeks an order: (1) consolidating adversary proceedings 11-02880-mg, 11-02881-mg, 11-02882-mg, and 11-02921-mg; and (2) appointing the law firm of Harwood Feffer LLP as "lead counsel" in the consolidated adversary proceeding. Thielmann Plaintiffs oppose consolidation of these adversary proceedings and seek dismissal or stay of the Greene Plaintiffs' action because the Greene Complaints (original and amended) are audacious carbon-copies of the Thielmann Complaints that add nothing and thus are duplicative under the first-filed rule.

In the event this Honorable Court deems consolidation appropriate rather than dismissal or stay of the Greene action, Thielmann Plaintiffs oppose the appointment of the law firm of Harwood Feffer LLP ("Greene Counsel") as "lead counsel" in the consolidated adversary proceeding. Rather, Thielmann Plaintiffs respectfully maintain

[1] The Thielmann Plaintiffs filed an amended adversary proceeding complaint on December 12, 2011 as Plaintiffs and counsel in the three initial WARN Act Adversary actions (filed between November 11 and November 14, 2011) reached an agreement to prosecute their claims jointly. In light of that, Thielmann Plaintiffs have voluntarily dismissed, without prejudice, Case Nos. 11-02881and 11-02882.

that this Court should appoint the law firms of Lankenau & Miller, LLP, The Gardner Firm, P.C., Klehr, Harrison, Harvey, Branzburg, LLP and Outten & Golden LLP (collectively, "Thielmann Counsel") as interim class counsel in any consolidated adversary proceeding for the same reasons set forth in Plaintiffs' Memorandum of Law in Support of Appointment of Interim Class Counsel Pursuant to Fed. R. Bankr. P. 7023(g) ("Thielmann Plaintiffs' MOL") [Doc.11]. Each of the factors to be considered in appointing interim class counsel under Fed. R. Civ. P. 23(g), made applicable to this proceeding by Fed. R. Bankr. P. 7023, overwhelmingly favor the appointment of Thielmann's Counsel as interim class counsel over the appointment of Greene Counsel.

I. BACKGROUND

The WARN Act claims against Defendants in this matter arise from Defendants' abrupt termination of their employees from their facilities, including those in New York and Illinois, without cause, on or about November 11, 2011 without providing 60 days advance written notice of the terminations as required by the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101 *et seq.*, and the New York Worker Adjustment and Retraining Notification Act ("NY WARN Act") New York Labor Law ("NYLL") § 860 *et seq*. As noted above, Thielmann Plaintiffs recently amended and combined the WARN Act class action claims which were initially asserted in three separate actions (i.e., Adv. Pr. No. 11-02882-mg, filed on November 11, 2011 by Lankenau & Miller, LLP and The Gardner Firm, P.C.; Adv. Pr. No. 11-02881-mg, filed on November 14, 2011 by Outten & Golden LLP and Adv. Pr. No. 11-02880-mg, filed on November 14, 2011 by Klehr, Harrison, Harvey, Branzburg, LLP). In the amended action, Thielmann Plaintiffs have also asserted claims against the Defendants for unpaid, accrued vacation pursuant to New York and Illinois wage laws.

On December 1, 2011, some three weeks after the initial filings by Thielmann Plaintiffs, Greene Plaintiffs filed a class action adversary proceeding asserting virtually identical claims under the WARN Act and NY WARN Act (the "Greene Action") to those originally asserted by Thielmann Plaintiffs. Greene Plaintiffs have not asserted any additional claims beyond the WARN Act claims in the Greene Action. On December 7, 2011, Greene Plaintiffs filed the instant Motion. On December 12, 2011, the Thielmann Plaintiffs filed an Amended Complaint consolidating all three actions and adding more than 40 paragraphs of facts in support of the single-employer allegation (the "Amended Thielmann Complaint"). On December 20, 2011, Thielmann Plaintiffs moved for appointment of Thielmann Counsel as interim class counsel. The following day, on December 21, 2011, the Greene Plaintiffs filed an Amended Class Action Adversary Complaint copying verbatim the allegations from the Amended Thielmann Complaint, retaining the *in haec verba* allegations copied from one of the original Thielmann Plaintiffs' complaints, and adding little else. Thielmann Plaintiffs now file this opposition to Greene Plaintiffs' Motion.

II. ARGUMENT

A. The First-Filed Rule Warrants Dismissal or Stay of the Duplicative Greene Action.

The first-filed rule is a well-established legal doctrine intended to avoid duplicative litigation and conserve judicial resources. "As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit." *Brown v. Plansky*, 24 F. Appx. 26, 28 (2d Cir. 2001) *citing Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d. Cir. 2000) (dismissing duplicative claims because "[t]he power to dismiss a duplicative lawsuit is meant to foster judicial economy

and the 'comprehensive disposition of litigation.'"). In *Brown*, the Second Circuit affirmed dismissal of the complaint substantially because it duplicated the allegations raised in the prior action, and all of the claims in the second action could have been brought in the first. *See id.* at 139-40; *Brown*, 24 F. Appx at 28.

Although *Brown* involved the same plaintiff, the first-filed rule has been consistently applied in the context of overlapping Rule 23 class actions when class action claimants bring the same action filed first by other class members where the second claims are fully encompassed by the first. *James v. AT & T Corp.*, 334 F. Supp. 2d 410, 411-12 (S.D.N.Y. 2004). As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d at 138. "The complex problems that can arise from multiple federal filings do not lend themselves to a rigid test, but require instead that the district court consider the equities of the situation when exercising its discretion." *Id.* "The power to dismiss a duplicative lawsuit is meant to foster judicial economy and the 'comprehensive disposition of litigation.' " *Id.* "[T]hough no precise rule has evolved, the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976).

In *James v. AT & T Corp.*, the putative classes were composed of the same members, and were organized to vindicate the same rights. 334 F. Supp. 2d at 411-12. The class representatives in the competing actions represented "precisely the same interests, and each is a member of the putative class in both *Leykin* and *James* .... [a]side from immaterial corrections, the claims in the *Leykin* and *James* complaints are identical." The court found the "issues and facts to be determined, the witnesses and

evidence required, and the relief requested" were exactly the same." *Id. citing Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir.1993) (quoting *Ridge Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 572 F.Supp. 1210, 1213 (N.D.Ill.1983)); see also *Northern Assur. Co. of America v. Square D Co.*, 201 F.3d 84, 89 (2nd Cir.2000)(adopting the same standard). Accordingly, the court found the dismissal of the second-filed, duplicative complaint was warranted.

As in *James*, the Greene complaint includes no claims or significant facts that were not previously filed in the Thielmann action. The consolidated Amended Thielmann Complaint contains new and more detailed allegations that make it broader than the original Thielmann and Greene complaints. The Greene Plaintiffs have had adequate time to display some additional value they bring to this litigation. Instead, they have demonstrated that they are only capable of copying the original, investigative work of veteran Thielmann WARN counsel. While imitation is the truest form of flattery, Greene's Plaintiffs' palming off of Thielmann Plaintiffs' personal knowledge and the investigative work of Thielman Counsel's as their own makes their bid to play any role in a serious litigation a non-starter.

Bankruptcy court have the discretion allowed to district courts to dismiss or stay duplicative actions courts in order to control their dockets – therefore nothing prevents this Court from dismissing or abstaining from hearing the duplicative Greene case. *In re Barney's, Inc.*, 206 B.R. 336, 343-44 (Bankr. S.D.N.Y. 1997).

The court should be sensitive about the cost of the professionals and other expenses in this case. WARN Plaintiffs and the Official Creditors Committee's constituents ultimately bear the financial risk arising from defense expenses spent on the

WARN claims. Consistent with the concern of maximizing efficiency and minimizing costs, Thielmann counsel has exercised appropriate caution with respect to working cooperatively amongst themselves and with opposing counsel, and will continue to exercise care in this regard. These objectives would be compromised if the Court gave the green light to class members to file and litigate separate adversaries that swell the ranks of professionals beyond necessity in the ongoing adversary proceeding.

The first-to file rule underscores that need to maintain efficiency. '[W]here there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience ... or ... special circumstances ... giving priority to the second.' " *First City Nat'l Bank and Trust Co. v. Simmons,* 878 F.2d 76, 79 (2d Cir.1989) (citations omitted). Deference to the first filing "embodies considerations of judicial administration and conservation of resources." *Id.* at 80 (citations omitted). The decision whether or not to stay or dismiss a proceeding rests within a district judge's discretion. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.,* 342 U.S. 180, 183-84, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952). See also *Adam v. Jacobs,* 950 F.2d 89, 94 (2d Cir. 1991)("we conclude that the district court erred by failing to transfer or dismiss this action.") *See also AEP Energy Services Gas Holding Co. v. Bank of America, N.A.,* 626 F.3d 699, 722-23 (2d Cir. 2010) (abusive of discretion to hear second case); *First City Nat'l Bank & Trust Co. v. Simmons,* 878 F.2d 76, 79 (2d Cir.1989) (quoting *Motion Picture Lab. Technicians Loc. 780 v. McGregor & Werner, Inc.,* 804 F.2d 16, 19 (2d Cir.1986).

There can be no dispute that Thielmann Plaintiffs have the first filed action. Although Thielmann Plaintiffs and Greene Plaintiffs are different people, the class definitions asserted by the Greene Plaintiffs track the WARN Act and NY WARN Act

class definitions nearly word for word from *Sivova et al. v MF Global Holdings Ltd., et al.*, one of the original Thielmann Plaintiffs' filings (Adv. Pro. No. 11-02881-mg).[2] The day after the Thielmann Plaintiffs filed their Motion under Rule 7023(g) calling attention the Greene Complaint's shameless copying of the *Sivova* Complaint. The Greene Plaintiffs compounded their copy-cat distinction by essentially reproducing the Amended Thielmann Complaint: they substituted their names and their counsel's, shuffled and sub-titled some paragraphs, added a few nominal lines, and passed it off as their own. The Greene motion offers no explanation for its virtual carbon-copy duplication of the *Sivova* complaint or of the Amended Thielmann Complaint. The Greene Plaintiffs do not even try to differentiate themselves or their claims from the previously filed Thielmann case in any way. The Greene Plaintiffs nevertheless seek to employ their counsel as primary "lead" counsel for the class without detailing the need for additional counsel to play any part in the WARN litigation. This is especially curious given the wide disparity between the WARN/bankruptcy experience of Thielmann counsel and the Harwood firm which apparently has never litigated a WARN claim.

In short, Greene Plaintiffs and Greene Counsel have simply copied Thielmann Plaintiffs' original WARN Act claims and made a power-play by filing the instant Motion. Neither the Greene Plaintiffs nor Greene Counsel add any benefit or value to the putative class because they do not assert anything new or different with regard to the WARN claims than what Thielmann Plaintiffs' complaint had done weeks before. Conversely, Thielmann Plaintiffs' amended combined complaint adds new, additional claims under New York and Illinois wage laws which have not even been identified by

[2] The class definition from Adv. Pro. No. 11-02881 was carried forward by Thielmann Plaintiffs in the amended combined action filed on December 12, 2011.

Greene Plaintiffs. This is precisely the sort of situation where the first-filed action should be allowed to proceed while the second filed action is dismissed or stayed. There is no risk of prejudice to the Greene Plaintiffs (as they are encompassed within the putative class defined in Thielmann Plaintiffs' complaint). Further, the claims bar date has not passed. There are no special circumstances here that support consolidation over dismissal or stay.[3] Thus, Greene Plaintiffs' request for consolidation should be denied and the Greene Action should be dismissed or stayed. Further, a decision to dismiss or stay the Greene Action would render Greene Plaintiffs' Motion moot in so far as it seeks the appointment of Greene Counsel as "lead counsel".

B. Should the Court Grant Consolidation, Thielmann Counsel Should Be Appointed Interim Class Counsel.

In the event that the Greene Plaintiffs' WARN Act claims are consolidated with the first filed actions, Thielmann Plaintiffs oppose the appointment of Greene Counsel as "lead counsel" and instead maintain that Thielmann Counsel should be appointed interim class counsel in any consolidated action for all the reasons set forth in Thielmann Plaintiffs' Memorandum of Law to appoint the Thielmann Counsel as interim class counsel.

While no class has been certified in this matter, "Rule 23(g)(3), Fed. R. Civ. P. provides the Court with the authority to 'designate interim counsel to act on behalf of a putative class.' 'Although neither the federal rules nor the advisory committee notes

[3] In *Naula, et al. v. Rite Aid of New York*, 2010 WL 2399364 at *1 (S.D.N.Y. March 23, 2010), the Court ordered a consolidation of two similar actions rather than dismissing or staying the second filed action. There, however, the plaintiffs in the second filed action successfully argued that the second filed action prevented the risk of prejudice to a group of employees not represented in the first action. *Id.* at *4. Importantly, defendants had already argued that the named class representative in the first filed suit lacked standing to assert claims on behalf of those represented in the second filed action. *Id.* Greene Plaintiffs cannot make the same showing here. Further, if the Court has any concerns in this regard, those could be addressed by staying the Greene Plaintiffs' case until such time that a true risk of prejudice arises.

expressly so state, it appears to be generally accepted that the considerations set out in Rule 23(g)(1)(C), which governs appointment of class counsel once a class is certified, apply equally to the designation of interim class counsel before certification.'" *In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 2009 WL 50132, at *11 (S.D.N.Y. Jan. 5, 2009) (quoting *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56 (E.D.N.Y. 2006)).

"Under Rule 23(g)(2), '[i]f more than one applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.' In making that determination, the Court must consider: '(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.' Fed. R. Civ. P. Rule 23(g)(1)(A). The Court can also consider 'any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.' 23(g)(1)(B). The Manual for Complex Litigation further instructs that, in selecting lead counsel for a proposed class, the court should 'conduct an independent review . . . to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable.' § 10.22 (4th ed. 2004)." *Id.*, at *36-37.

Applying the factors set forth in Fed. R. Civ. P. 23(g)(1)(A) briefly below, and as set forth in greater detail in Thielmann Plaintiffs' MOL, it is apparent that Thielmann Counsel are the most qualified to serve as interim class counsel in any consolidated

adversary proceeding to adjudicate the WARN Act claims in this matter and other class claims of Thielmann Plaintiffs.

1. Identifying or investigating potential claims

As the preeminent WARN Act firms in the country, each of the Thielmann Counsel were monitoring the MF Global situation from the moment the Debtor-Defendants' bankruptcy was filed on October 31, 2011. Subsequently, on the day of the layoffs (November 11, 2011) after having identified and investigated potential class action claims of the former employees of Defendants under the WARN Act and NY WARN Act, Thielmann Counsel's extensive WARN Act litigation experience allowed them to react immediately on behalf of Thielmann Plaintiffs and putative class members through the filings of separate WARN Act complaints. By November 15, 2011, after realizing that multiple WARN Act class adversary proceeding filings had been made (which concerned the same claims), Thielmann Counsel conferred and agreed to work cooperatively with one another.

Unlike Greene Counsel, who have devoted their energies to copying a prior filed complaint and attempting to catapult themselves to the top of the WARN Act counsel heap, Thielmann Counsel focused on identifying and investigating other potential claims of Defendants' terminated employees. This resulted in the addition of class member claims under the New York Wage Payment Law, Labor Law § 190 *et seq.* and the Illinois Wage Payment and Collection Act, IL ST CH 820 § 115/1 *et seq.*, to the Thielmann Plaintiffs' combined amended complaint. Finally, Thielmann Counsel have, through their investigation since the November filings, benefitted the putative class by adding significant detail to the "single-employer" allegations contained in the complaint. Affiliated corporate liability under the WARN Act is ultimately an inquiry into whether

nominally separate entities operated at arm's length. *Pearson v. Component Technology Corp.*, 247 F.3d 471, 495 (3d Cir. 2001). In the combined amended complaint, Thielmann Plaintiffs have added more than forty specific, factual allegations in support of the single employer allegations made in this matter – many of them based on the personal knowledge of the Thielmann Plaintiffs and investigative legwork by Thielmann counsel who have interviewed numerous putative class members and witnesses. Greene Plaintiffs simply copy these allegations as if they possessed this knowledge or had done some legwork.

Based on the foregoing, and the arguments contained in Thielmann Plaintiffs' MOL, Thielmann Counsel are the most qualified to be appointed interim class counsel under Fed. R. Civ. P. 23(g)(1)(A)(i).

2. Experience of counsel

This factor also favors the appointment of Thielmann Counsel as interim class counsel in any consolidated adversary proceeding. Together, Lankenau & Miller, LLP and The Gardner Firm, P.C. have handled more than 175 WARN Act claims; Klehr, Harrison, Harvey, Branzburg, LLP has handled more than 20 WARN Act cases; and Outten & Golden LLP has handled more than 50 WARN Act cases. This combined, experience handling WARN Act class action claims is unparalleled.

Noticeably absent from the Motion is any mention of Greene Counsel's experience in handling WARN Act or related state law class action claims. Compared to the combined experience of Thielmann Counsel in this regard, Greene Counsel's complete lack of experience handling these types of cases should be fatal to Greene Plaintiffs' efforts to appoint Greene Counsel as "lead counsel." Indeed it is "counsel's

'*experience* in, and knowledge of, the applicable law in this field' [that] is the '*most persuasive* factor when choosing lead counsel.'" *In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 2009 WL 50132, at *11-12 (quoting *United Wis. Servs. v. Abbott Labs. (In re Terazosin Hydrochloride Antitrust Litig.)*, 220 F.R.D. 672, 702 (S.D. Fla. 2004)) (emphasis added). Greene Counsel's utter lack of experience in WARN Act litigation is precisely why Thielmann Counsel should be appointed interim class counsel, instead.

3. Knowledge of counsel

With Thielmann Counsel's combined experience handling and litigating class action claims under the WARN Act comes extensive knowledge of the WARN Act. Greene Counsel has not demonstrated any first hand familiarity with WARN Act litigation, much less the body of case law interpreting the statute. Therefore, the knowledge of the applicable law factor under Fed. R. Civ. P. 23(g)(1)(A)(iii) again favors the appointment of Thielmann Counsel as interim class counsel in any consolidated proceeding.

4. Resources committed to representing the class

The extensive experience of Thielmann Counsel in litigating WARN Act class action cases demonstrates that these law firms are willing to and are capable of committing the necessary resources to represent the putative class in this case. Thielmann Counsel have already demonstrated this commitment here by agreeing to work together and to combine the resources of four experienced law firms to further the goals of Thielmann Plaintiffs and the putative class rather than to fight about who should represent the class. Greene Plaintiffs made no mention in the Motion of any other firms with whom Greene Counsel would work. Thielmann Counsel can only assume that Greene Counsel will rely exclusively upon its own resources to pursue this case, bearing

all the risk associated with pursuing a class action WARN Act claim against Defendants. This cannot be in the best interest of the class. Accordingly, the commitment of resources factor under Fed. R. Civ. P. 23(g)(1)(A)(iv) weighs in favor of appointing Thielmann Counsel as interim class counsel in any consolidated proceeding.

III. CONCLUSION

Under the circumstances, consolidation of the above-captioned adversary proceedings is inappropriate and the Greene Action should be dismissed or stayed as duplicative of the WARN Act class action claims previously asserted in the first-filed actions, which have now been combined. However, should the Court determine that consolidation of all the WARN Act actions is appropriate, Greene Counsel should not be appointed "lead counsel" for the reasons set forth herein and those set forth in Thielmann Plaintiffs' MOL. Rather, Thielmann Plaintiffs respectfully ask the Court to appoint Thielmann Counsel as interim class counsel in any consolidated adversary proceeding to adjudicate the WARN Act claims and other claims of the putative class in this matter.

Dated: January 12, 2012

By: /s/ Jack A. Raisner

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UNITED STATES BANKRUPTCY COURT
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Debtors.	:	Case No. 11-02790 (MG) SIPA
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, and ARTON SINA, individually, and on behalf of all others similarly situated former employees,	:	Adv. Case No. 11-02880 (MG)
Plaintiffs,	:	
v.	:	
MF GLOBAL HOLDINGS LTD, MF GLOBAL HOLDINGS USA INC., MF GLOBAL FINANCE USA, INC.; MF GLOBAL INC., et al.,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Sabrina Echegaray, under penalties of perjury, certify the following as true and correct:

I am not a party to this action and I am over 18 years of age. On the 12th day of January, 2012, I electronically filed the *Response of Thielmann Plaintiffs Opposing Greene Plaintiffs' Motion To Consolidate Related Actions and Appoint Lead Counsel.*

I also served a copy via U.S. First Class Mail and electronic mail to the following:

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