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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.	:	(Jointly Administered)
	:	

OBJECTION OF FUTURES CUSTOMERS TO “STIPULATION AND AGREED ORDER BETWEEN THE CHAPTER 11 TRUSTEE AND THE STATUTORY CREDITORS’ COMMITTEE OF MF GLOBAL HOLDINGS LTD., ET AL. REGARDING CREDITOR ACCESS TO INFORMATION PURSUANT TO 11 U.S.C. §§ 105(a), 1102(b)(3) AND 1103(c)”

Kay P. Tee, LLC, Thomas G. Moran, John Andrew Szokolay, Donald Tran, William Fleckenstein, Mark Dwyer, Robert Marcin, and Thomas S. Wacker (collectively, the “Futures Customers”), by and through their undersigned counsel hereby file this objection to the “Stipulation and Agreed Order Between the Chapter 11 Trustee and the Statutory Creditors’ Committee of MF Global Holdings Ltd., et al., Regarding Creditor Access to Information

Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3) and 1103(c)" filed February 21, 2012 (the "Proposed Stipulation").¹

INTRODUCTION

1. The Futures Customers all had funds stolen from commodities futures customer accounts at MF Global Inc. ("MFGI"). The Futures Customers hold claims against MFGI and/or its affiliated debtors in an aggregate amount of at least \$2,448,717,² and have filed class actions against several defendants—including JPMorgan Chase & Co. ("JPMC"), one of five members of the Statutory Creditors' Committee—alleging violations of numerous state and federal laws, including the Commodity Exchange Act and the Racketeer Influenced Corrupt Organizations. In short, as MFGI was charging headlong into insolvency, individuals within MF Global were raiding customer accounts and transferring vast sums out of the company in order to, among other things, satisfy MF Global's own margin obligations. The sums misappropriated were recently estimated at \$1.6 billion by Mr. James Giddens, the MFGI Trustee. JPMC is one such recipient of hundreds of millions of dollars of these illegally misappropriated funds.

2. As customers of MFGI, the Futures Customers have a strong interest in ensuring that the Proposed Stipulation does not unfairly restrict their access to critical information about the Debtors that the Futures Customers need to investigate and prosecute their claims. One of the obvious problems with the Proposed Stipulation is that JPMC, a defendant in several lawsuits brought by customers of MFGI and allegedly the recipient of hundreds of millions of dollars in

¹ Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed in the Proposed Stipulation.

² See *Kay P. Tee Pls.' Omnibus Resp. to Mots. for Appointment of Lead Plaintiffs and Lead Counsel*, ECF No. 200, 11-cv-7866-VM (S.D.N.Y.), at 13.

funds stolen from customer accounts,³ is being given the right to deny customers access to information critical to recovering these funds.⁴ This procedural unfairness pervades the entire stipulation.

3. Moreover, MFGI is in a SIPA liquidation proceeding, and its operations are being wound down and will be permanently shuttered at the end of this proceeding. Thus, it has severely limited interests in keeping information about its operations confidential. Further, while MF Global Holdings, Ltd., MFGI's parent, is in reorganization, its confidentiality interests should be carefully limited by this Court, particularly with respect to documents relating to past operations at MFGI (which is in liquidation) and to the misappropriation of at least \$1.6 billion dollars of customer funds. Regardless of what confidentiality interests the MF Global Holdings Trustee may assert, any confidentiality protocol must balance the interests of all parties—including the Futures Customers—and cannot overly protect the debtors' purported confidentiality interests.⁵

4. Thus, Futures Customers object to the Proposed Stipulation and request that it be modified in a number of significant respects to avoid prejudice to customer information rights, as set forth below. The Futures Customers further request that the Court's ruling on this objection

³ See, e.g., <http://online.wsj.com/article/SB10001424052970203960804577239443350296440.html>.

⁴ See, e.g., *Kay P. Tee, LLC et al v. Corzine, et al.*, 1:12-cv-00195-VM (S.D.N.Y.); *Klinker v. JP Morgan Chase & Co. et al.*, 9:12-cv-00005-DWM (D. Mont.); *Paradigm Global Fund I Ltd. v. Corzine, et al.*, 1:12-cv-0740-UA (S.D.N.Y.).

⁵ *In re S&B Surgery Ctr., Inc.*, 421 B.R. 546, 548-549 (Bankr. C.D. Cal. 2009) (noting that, under § 1102(b)(3)(A), a committee of creditors has a "fairly extensive duty" to keep parties in interest informed, and the application of § 1102(b)(3)(A) "requires a balancing of a committee's duties of disclosure to its constituents (usually the unsecured creditors) with the need to protect sensitive information, to preserve the attorney-client privilege[,] and (where applicable) to comply with securities laws") (citing *In re Refco Inc.*, 336 B.R. 187, 190 n.1 (Bankr. S.D.N.Y. 2006)).

be explicitly made without prejudice to their rights in the separate civil proceedings now pending in this district before the Honorable Victor Marrero.⁶

RESPONSES OF CHAPTER 11 TRUSTEE AND COMMITTEE TO CUSTOMER REQUEST FOR ACCESS SHOULD BE PROVIDED WITHIN TEN BUSINESS DAYS

5. Under paragraph 4 of the Proposed Stipulation, the Committee is not required to provide access to any Confidential Information or Privileged Information of the Debtors or the Chapter 11 Trustee to any customer without an Order of this Court or the written consent of the Chapter 11 Trustee, which shall not be unreasonably withheld. For the Futures Customers and those similarly situated customers who lost an estimated \$1.6 billion when their customer accounts were willfully invaded by the Debtors and their employees and agents, time is of the essence. They need to find out everything they can about what happened to their money: where it went, who is responsible, and what they can do to get it back. Every day spent waiting for the Debtors to decide whether to grant permission for the Committee to share information with a customer reduces that customer's chances of finding out what happened to its money.⁷ The Futures Customers (and all other individual customers similarly situated) need to be able to make promptly informed challenges to any asserted claim of confidentiality or privilege by the Debtors. The Proposed Stipulation should provide that the Chapter 11 Trustee is required to respond in writing within ten (10) business days of a written request addressed to the Committee and the Debtor that the Committee share Confidential or Privileged Information with a customer

⁶ *DeAngelis v. Corzine, et al.*, 11-cv-07866; *Kay P. Tee, LLC et al v. Corzine, et al.*, 12-cv-00195; *Marvin v. Corzine, et al.*, 12-cv-00499; and *Wacker v. Corzine, et al.*, 12-cv-0705.

⁷ See, e.g., *In re Delphi Corp. Sec. Deriv. & "Erisa" Litig.*, No. 06-md-1725, 2007 U.S. Dist. LEXIS 10408, *23-24, 2007 WL 518626, *6-8 (E.D. Mich. Feb. 15, 2007) (observing that the potential prejudice from being denied prompt access to information produced in parallel proceedings is particularly acute in civil cases arising out of a bankruptcy, where there is a significant risk of being "left with nothing") (citations omitted).

and, where the request is denied, to set out the specific reason why. In that way, a customer will have a prompt answer to its request for access to information and can expeditiously seek a Court Order to compel access in cases where the Chapter 11 Trustee has denied it. The thirty (30) days provided for in the Proposed Stipulation is simply too long, given the extensive resources to respond to such requests at the Debtors' and Chapter 11 Trustee's command and the customers' urgent need for information.

6. Similarly, the thirty (30) day time period set out in Paragraph 6 of the Proposed Stipulation for the Committee to respond to written requests for disclosure of information unduly prejudices the customers in their attempts to investigate and pursue their claims. As an initial matter, it is patently unfair for JPMC, a member of the Creditors' Committee and a defendant in several of the class actions filed on behalf of futures customers, to have a say in whether customers will have access to information that will allow them to pursue their claims in the district court, including against JPMC. Moreover, like the Debtors and the Chapter 11 Trustee, the Committee has significant resources at its disposal to respond to information requests, and the Committee should also be required to respond within ten (10) business days to such requests.

DEBTORS AND CHAPTER 11 TRUSTEE SHOULD PROVIDE A LOG OF PRIVILEGED AND CONFIDENTIAL INFORMATION UPON DESIGNATION

7. Paragraph 5 of the Proposed Stipulation provides that the Chapter 11 Trustee shall assist the Committee in identifying any Confidential Information concerning the Debtors that is provided by the Chapter 11 Trustee to the Committee, and that any information so designated by the Debtors or Chapter 11 Trustee shall be treated as "Confidential Information." A customer can presumably challenge such designation by requesting the Committee to provide access to such Confidential Information and moving for a Court order (pursuant to the process set out in Paragraph 5 of the Proposed Stipulation) to compel access if denied by the Committee. To that

end, the Debtors or the Chapter 11 Trustee should be compelled to provide a log (identifying at a minimum the information type, date, and subject) of all information designated Confidential or Privileged in the manner prescribed by Federal Rule of Civil Procedure 26(b)(5)(A)(ii) and Local Bankruptcy Rules 7033-1(e)(3) and 7034-1(c) so that customers seeking information can determine up front the scope of supposedly Confidential/Privileged Information and assess in advance the likelihood that requests will be denied by the Committee and that motion practice will be required.⁸ Individual customers are already operating at an extreme informational disadvantage in these cases. Requiring the Chapter 11 Trustee to promptly (*e.g.*, within 14 days) prepare and distribute a Confidential and/or Privileged Information log at least enables a customer to know what it is up against in terms of requesting information and will better enable it to make informed decisions about which documents to pursue, thereby saving the resources of the parties.

"MEET AND CONFER" SESSIONS SHOULD BE HELD TELEPHONICALLY AT A CUSTOMER'S REQUEST

8. Paragraph 6 of the Proposed Stipulation further provides that where the Committee denies a customer's request for information, the customer must meet and confer "by telephone or in person, at the Committee's option" with a Committee representative prior to seeking a Court order to compel disclosure. Many of the Futures Customers are individuals, some are of limited means (and particularly so since substantial funds were stolen during the collapse of MFGI), and some reside far from this district. To require these customers to attend

⁸ By providing descriptions consistent with the Federal Rules of Civil Procedure and Local Bankruptcy Rules 7033-1(e)(3) and 7034-1(c), the Trustee and Creditors' Committee will ensure that they do not disclose more or less information that will be required in the civil proceedings. If appropriate descriptions are provided, this will ensure that the same privilege log entries can be used in any civil litigation involving the same documents and will not require supplementation, thereby making the process more efficient and limiting the additional resources that must be devoted to privilege descriptions in other proceedings.

conferences in person with the Committee would be a real and significant hardship on such creditors, both in terms of the expense of travel and the time taken away from their businesses. Moreover, there is no reason why such conferences need to be conducted in person which will save the limited resources of all parties. The Proposed Stipulation should be modified to provide that the pre-motion conferences can be held telephonically at the election of the individual making the request, not at the election of the party withholding the information.

PROPOSED FORM OF CREDITOR CONFIDENTIALTY AGREEMENT SHOULD BE PROVIDED NOW FOR REVIEW BY COURT AND PARTIES

9. Paragraph 6 of the Proposed Stipulation provides that the Committee may require an individual customer to enter into a Creditor Confidentiality Agreement prior to receiving Confidential Information. Paragraph 7 of the Proposed Stipulation also provides that a customer requesting access to this information be compelled to enter into a Creditor Confidentiality Agreement, and, where applicable, agree to certain trading restrictions. The Chapter 11 Trustee or the Committee should be required to provide the form of Creditor Confidentiality Agreement now so that the parties and the Court can assess its terms and conditions in advance of a customer being compelled to enter into it in order to obtain access to information and to ensure that they are not overly restrictive or prejudicial.

CONCLUSION

10. The customers of MFGI are in a race against the clock to recover funds stolen from their accounts. The Court must carefully limit any stipulation that would allow the Creditors' Committee, the Trustee, or the Debtors to restrict customers' access to information critical to recovering these funds. In order to protect the legitimate information rights of the Futures Customers (and all other similarly situated customers) and to prevent undue prejudice and hardship in their attempts to access information from the Debtors and the Committee that is

vital to their claims, the Proposed Stipulation should be modified as set forth above. The Futures Customers reserve the right to join in any other objections to the Proposed Stipulation as may be asserted by other parties.

RELIEF REQUESTED

11. For the reasons set forth above, the Futures Customers request that the Court decline to approve the Proposed Stipulation in its current form and order that the Proposed Stipulation be modified, and made more even-handed, as discussed above, and that the Court grant any other and further relief as may be just and proper.

12. Further, the Futures Customers request that this Court order that all decisions in this Court with respect to customers' rights of access to information in possession of the Trustee, the Committee, and/or the Debtors be explicitly without prejudice to the rights of the customers to seek information in the separate civil proceedings now pending in this district before the Honorable Victor Marrero, *DeAngelis v. Corzine, et al.*, 11-cv-07866; *Kay P. Tee, LLC et al v. Corzine, et al.*, 12-cv-00195; *Marcin v. Corzine, et al.*, 12-cv-00499; and *Wacker v. Corzine, et al.*, 12-cv-0705.

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