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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)
	:	Jointly Administered
Debtors.	:	

REQUEST OF MOVANTS-APPELLANTS SAPERE WEALTH MANAGEMENT LLC, GRANITE ASSET MANAGEMENT AND SAPERE CTA FUND, L.P. FOR CERTIFICATION OF APPEAL

Pursuant to 28 U.S.C. § 158(d)(2)(A), and Federal Rule of Bankruptcy Procedure 8001(f), movants-appellants Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund, L.P. (collectively, "Sapere") submits this request for certification to the US Court of Appeals for the Second Circuit of their appeal (docket no. 461) from this Court's February 1, 2012 Memorandum Opinion Denying Motion to Direct the Debtors' Estates to be Administered Pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190 (docket no. 400). The Memorandum Opinion's order denying Sapere's motion involves a matter of public importance, the determination of which will materially advance the progress of this reorganization and lead to a more rapid resolution. The order also involves a question of law as to which there is no controlling decision of the court of appeals for this Circuit or of the Supreme Court of the United

States. Section 158(d)(2)(A)(i) & (iii) require that the appeal to be certified for any or all of those reasons.[1]

1. **Facts Necessary to Understand the Questions Presented**

The appeal deals with an unprecedented legal matter of public importance, the resolution of which will materially advance Holdings' Chapter 11 reorganization.

On October 31, 2011, the MF Global enterprise—consisting of debtor MF Global Holdings, Ltd. ("Holdings"), its subsidiary MF Global, Inc. ("MFGI") (a CFTC-registered futures commission merchant ["FCM"]) and various affiliates—collapsed in a scandal that shook the commodities futures markets to their foundations. Not only did the Holdings Chapter 11 filing and its companion SIPA liquidation of MFGI comprise the eighth largest bankruptcy in American history, but hundreds of millions of dollars of US commodities futures customers' segregated account funds had been used for other purposes and were missing. The missing amount has since been estimated to exceed $1.6 Billion.

For the first time in US history, customer segregated funds held by an FCM went missing and commodities customers lost *their* assets held in *their* segregated accounts. A federally-mandated protective regime long-considered sacrosanct collapsed. The impact roiled the lives of people across the continent, including farmers in America's heartland and investors in its cities. The magnitude of the shortfall stunned the commodities and financial markets, federal regulators, the commodities exchanges and Congress. The scandal occurred as the result of Holdings' high-risk, multi-Billion dollar gambles wagered by politically-connected, former

[1] Certification of an appeal that meets any of the circumstances enumerated in 28 U.S.C. § 158(d)(2)(A) is mandatory. *In re Virissimo*, 332 B.R. 208, 209 (Bankr. D. Nev. 2005) ("Hence not merely one, but all three, of the criteria specified in § 158 exist and justify an immediate appeal in this case."); *Nickless v. Kessler*, 2007 Bankr. LEXIS 65, *4 (Bankr. D. Mass. Jan. 5, 2007) (noting that "certification is also required" when one of the factors listed in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) is present); 1 COLLIER ON BANKRUPTCY ¶ 5.06[1], at 5-20 (Alan S. Resnick & Henry J. Sommer eds., 2009) ("[I]f the bankruptcy court . . . determines that at least one of the conditions specified in section 158(d)(2)(A)(i), (ii) or (iii) exists, the court *'shall'* make the requested certification.") (emphasis added).

Goldman Sachs CEO and Chairman, former US Senator, former New Jersey Governor and thought-likely-to-be next US Secretary of the Treasury, Jon Corzine, then Chairman and CEO of Holdings.

Holdings' Chapter 11 Petition judicially admitted that "MF Global, a Delaware corporation, is one of the world's leading brokers in markets for commodities and listed derivatives." (Docket no. 1, Ex. A, p. 2, ¶ 3)[2] Holdings' SEC filings during the two years of Jon Corzine's tenure as CEO also render indisputable that MFGH was in-fact a centrally managed, single point of access, leading brokerage firm comprising in-fact a single intermediary with respect to customers. (Docket no. 355, Exs. A & B)

The enormity of the missing segregated account funds, the revelations at Congressional hearings and the media coverage of the scandal also triggered, *res ipsa loquitur*, that Holdings caused commodities customers' segregated accounts to be used to meet Holdings' margin, capital and financial needs. (Docket no. 1, Ex. A; Docket no. 217, Ex. A) Holdings had access to the commodities customers' segregated accounts because Holdings also ran a small securities broker-dealer business. As part of the securities broker-dealer operation, MFGI was also registered with the SEC as a broker-dealer ("BD"). That made available procedural mechanisms for MFGI to lend or invest, from the FCM business, commodities customers' segregated account assets to or with the BD business with MFGI thus having available a procedural mechanism to re-use assets to meet Holdings' margin, capital and financial needs. However, the existence of procedural mechanisms did not allow commodities customers' segregated account funds to go missing or to be used other than in strict conformity with the Commodity Exchange Act and CFTC regulations.

[2] In paragraph 1 of Exhibit A, MFGH states that any reference to "MF Global" refers to MF Global Holdings, Ltd.

Holdings and MFGI are both being liquidated. However, because Holdings filed under Chapter 11 and MFGI was to be liquidated under SIPA, this Court faced not only the unprecedented situation of missing commodities customers' segregated account assets but also a procedural situation in which Holdings was not in Chapter 7.

Pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190, commodity customers must receive priority in a liquidation. However, Holdings' financial creditors (typified by the members of the Chapter 11 Statutory Creditors' Committee) want commodities customers to have no participation in the Chapter 11 case. If the financial creditors have their way, commodities customers will be limited to partial recovery of their segregated accounts only from assets specifically-denominated or recovered as segregated-account property. However, Holdings' Chapter 11 estate (and if the financial creditors have their way, MFGI's general estate) would be deemed to be outside the reach of commodities customers.

Sapere is a commodities customer with one of the largest, if not the largest, losses from commodities customers' segregated accounts. Sapere, as other commodities customers, kept this money on deposit in segregated accounts at MFGI in the form of cash and T-Bills. Corzine and other individuals facilitated highly risky transactions upwards of $6 Billion in off-balance sheet Euro-denominated repo-to-maturity and internal repo transactions. Effectively, Holdings transformed segregated account customers into involuntary and unknowing participants in these transactions. On December 15, 2011, Sapere filed its Motion to Direct the Debtors' Estate to be Administered Pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190.

The effect of Sapere's motion would bestow priority status upon commodities customers (including Sapere) in the administration of Holdings' Chapter 11 reorganization and ensure the prompt return of customer funds to which Sapere and other commodities customers are owed.

The Statutory Creditors Committee and the Chapter 11 Trustee objected to Sapere's motion, arguing that because Holdings was in a Chapter 11 reorganization, 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190 could not be applied. On February 1, 2012, the Court issued an opinion in which it denied Sapere's motion and held (i) that Sapere and other commodities customers are not entitled to priority in the return of their customer funds, (ii) that the administration of Holdings' estate is not subject to the rules applicable to a commodities broker, and (iii) that conversion to a Chapter 7 proceeding is not an available option.

Sapere appealed and requests certification to the US Court of Appeals for the Second Circuit to address the unprecedented legal question of how to administer the estate of Holdings in these circumstances.

An immediate appeal will lead to a more rapid resolution, and will materially advance the progress, of this Chapter 11 case. A fundamental conflict exists between the commodities customers—such as Sapere—and the financial creditors of Holdings who dominate the Statutory Committee of Unsecured Creditors and whose interest the Chapter 11 Trustee backs to the exclusion of the commodities customers. If the commodities customers are direct, priority creditors of the Chapter 11 estate, then the landscape on which the formulation of a plan of reorganization that liquidates Holdings will differ materially from one where commodities customers have no rights to participate in formulating the plan and participating in the distribution of the estate's proceeds.

Although this is a Chapter 11 case, the debtor is in fact in liquidation. This Court has acknowledged that a key reason for liquidating in Chapter 11 instead of Chapter 7 is to give the affected creditors a seat at the table. The question is, who are the creditors that are invited to sit at the table? The Chapter 11 Trustee and the Unsecured Creditors' Committee assert that the

commodities customers have no rights in the Chapter 11 case, not even standing to be heard. If the Court of Appeals upholds Sapere's motion, then the commodities customers have a meaningful seat at the table and will probably get the lions' share of the Chapter 11 estate in liquidation. However, if the case proceeds in the fashion intended by the Chapter 11 Trustee and the Creditors' Committee, and if no immediate appeal is allowed, then a later ruling by the Court of Appeals in favor of the commodities customers would require a major do-over of the reorganization process including the plan of liquidation.

2. Issues on Appeal

The fundamental question to be answered on appeal is whether in these circumstances a parent company not registered as an FCM is subject to FCM obligations that protect commodities customers' segregated accounts—that is, 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190. This overarching legal question implicates the following issues specific to this appeal:

A. Whether the Bankruptcy Court erred in ruling that MF Global Holdings, Ltd. was not to be deemed a commodities broker and therefore not subject to the estate administration rules set forth in 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190?

B. Whether the Bankruptcy Court erred in disregarding the debtor's judicial admission in its Petition and accompanying exhibits that debtor "is one of the world's leading brokers in markets for commodities" and allowing the case to proceed under Chapter 11?

C. Whether the Bankruptcy Court erred in ruling that conversion of this Chapter 11 case to a Chapter 7 case was not warranted, and therefore ruling that the estate's administration was not subject to the rules set forth in 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190?

D. Whether the Bankruptcy Court erred in ruling that there is no legal basis for administering this case under 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190, including ruling that:

   i. The doctrine of *United States v. Bestfoods,* 524 U.S. 51, 62 (1998), cannot and/or does not subject MF Global Holdings, Ltd. to fulfilling the regulatory obligations of MF Global, Inc.;

   ii. Section 2(a)(1)(b) of the Commodity Exchange Act cannot and/or does not subject MF Global Holdings, Ltd. to fulfilling the regulatory obligations of MF Global, Inc.; and

   iii. MF Global Holdings, Ltd. cannot be and/or is not a *de facto* commodities broker even though it operated as a central managed, single point of access, single intermediary commodities broker that directly accessed $1.6+Billion in commodities customers' segregated-account funds to cover debtors' (not commodities customers') obligations in contravention of law?

E. Whether the Bankruptcy Court erred in holding that Sapere had to cite specific facts that do not come from news articles and public revelations in order to prove that the debtor is a commodities broker, while the Bankruptcy Court simultaneously denied Sapere the opportunity to conduct the discovery necessary to provide such specific factual evidence?

F. Whether the Bankruptcy Court erred in not imposing the burden of proof on the debtor, its Chapter 11 Trustee and/or the Statutory Creditors' Committee?

G. Whether the Bankruptcy Court's equity powers, including those under Section 105 of the Bankruptcy Code, provide a fair and just remedy for commodities customers of MF Global under these circumstances?

3. Relief Sought

Sapere seeks a reversal of this Court's order.

4. Statutory Basis for Appeal and Why it Should be Heard

11 U.S.C. § 158(d)(2)(A)(i) requires certification to the US Court of Appeals for the Second Circuit of Sapere's appeal because (i) this appeal addresses a matter of public importance, (ii) an immediate appeal may materially advance the progress of this case, and (iii) this appeal addresses a question of law as to which there is no controlling decision in this Circuit or in the Supreme Court of the United States. It is important to answer this question now because it will determine who participates in formulating the plan of reorganization, the relative importance of their participation, and the priority rights in the eventual distribution of Holdings' estate and will reduce the delay and disruption inherent in future objections to plan confirmation when a plan is fashioned and submitted by the Chapter 11 Trustee and the Statutory Creditors' Committee that rejects participation by commodities customers.

Certification is mandatory whenever any of the Section 158(d)(2)(A) criteria are present. *In re Virissimo*, 332 B.R. 208, 209 (Bankr. D. Nev. 2005); *Nickless v. Kessler*, 2007 Bankr. LEXIS 65, *4 (Bankr. D. Mass. Jan. 5, 2007).

The public importance of this appeal cannot be genuinely disputed, and its immediate resolution is vital for the material advancement of Holdings' reorganization. For the first time in American history, commodities customers' supposedly tightly-controlled, segregated account funds putatively vanished—in the words of the *Wall Street Journal* "vaporized"—and the

commodities customers were left without *their* money. The magnitude of the "missing" segregated account funds, originally estimated at $600 Million, has now grown to $1.6 Billion. The US commodities futures market has been rocked, shaken to its foundation. The debtor MF Global Holdings, Ltd. is the parent of MF Global, Inc., the CFTC-registered jural entity that formally held the commodities customers' segregated accounts. The parent helped itself to $1.6 Billion of the commodities customers' money. Because of the unprecedented nature of this situation, no court could have possibly addressed the proper administration of a Chapter 11 debtor's estate when it improperly exercises dominion and control—thereby causing a shortfall—in the segregated accounts held by its commodity broker subsidiary. If Holdings' estate is not administered pursuant to the rules set forth in 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190, the commodities customers stand to have the hundreds of millions of dollars that were stolen from their accounts lost, although assets will exist in Holdings' chapter 11 estate to alleviate those losses, but they will be distributed in favor of large banks and financial institutions, instead of being returned to the commodity customers.

The US Court of Appeals for the Second Circuit and the US Supreme Court have not ruled on the questions stated above.

Certification of this appeal and resolution of this issue of estate administration now is vital. This is because an immediate appeal will materially advance the progress of this case and lead to a more rapid resolution of Holdings' Chapter 11 reorganization. In the coming months and years, the Chapter 11 reorganization of Holdings' estate will depend upon the participation of affected creditors who are invited to sit at the table and negotiate the plan of reorganization. No one represents the interest of commodities customers in that process. The plan, if confirmed, will determine how, and to whom, the estate's assets are distributed. In order to avoid prolonging

the determination and confirmation of the reorganization plan, it is vital to establish commodities customers' right to participate and priority *now* to avoid future objections and alterations to the plan.

5. **Copy of Ruling Appealed**

Attached as Exhibit A is a copy of the Memorandum Opinion Denying Motion to Direct the Debtors' Estates to be Administered Pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190, issued on February 1, 2012 [docket no. 400].

Dated: New York, New York
March 30, 2012

Respectfully submitted,

FORD MARRIN ESPOSITO WITMEYER & GLESER, L.L.P.

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Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

In re

MF GLOBAL HOLDINGS LTD., *et al.*,

Debtors.

Case No. 11-15059 (MG)

MEMORANDUM OPINION DENIYING MOTION TO DIRECT THE DEBTORS' ESTATES TO BE ADMINISTERED PURSUANT TO 11 U.S.C. §§ 761-767 AND 17 C.F.R. § 190

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MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

The bankruptcy proceedings of MF Global Holdings Ltd. and its debtor-affiliates have fostered a great deal of doubt in the commodities-trading industry. And, this is the not the first time—nor will it likely be the last—that a group of commodities customers has sought relief which the Court cannot provide under the Bankruptcy Code. A group of commodities customers now seeks to have the Court administer the chapter 11 cases of MF Global Holdings, Ltd. and its debtor-affiliates pursuant to subchapter IV of chapter 7 of the Bankruptcy Code and Part 190 of regulations promulgated by the Commodity Futures Trading Commission (the "CFTC"). For the reasons explained below, the Court does not have the statutory authority to grant the relief requested and, even if it did, the Court would decline to do so. Additionally, as discussed below, the Court will not grant the alternative relief requested allowing private-party discovery at this time pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

Pending before the Court is the *Motion by Sapere Wealth Management, LLC, Granite Asset Management and Sapere CTA Fund, L.P. To Direct the Debtors' Estate* [sic] *to be Administered Pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190* (collectively, the "Motion"). (ECF Doc. # 278.)[1] Sapere Wealth Management LLC, Granite Asset Management and Sapere CTA Fund, L.P. (collectively, "Sapere"), commodity customers of MF Global, Inc. ("MFGI"), the subsidiary, registered broker-dealer, and futures commission merchant of MF Global Holdings Ltd. ("MFGH"), seek an order directing James Giddens (the "SIPA Trustee") and Louis J. Freeh (the "Chapter 11 Trustee") to administer the estates of MFGH, MF Global Finance USA Inc., MF Global Capital LLC, MF Global Market Services LLC, and MF Global FX Clear LLC (the "Chapter 11 Debtors") pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190 ("Part 190"). According to Sapere, the "effect of this order will provide priority status to commodity customers to the extent of their segregated accounts at MFGI," which is currently being liquidated in a proceeding under the Securities Investor Protection Act ("SIPA") before this Court. (Mot. at 1.)

The Chapter 11 Trustee (ECF Doc. # 341), the statutory creditors' committee in the chapter 11 cases (the "Committee") (ECF Doc. # 339), and the CFTC (ECF Doc. # 342) filed objections to the Motion. The SIPA Trustee also filed a statement with respect to the Motion (the "SIPA Statement"). (ECF Doc. # 358.) Sapere filed a reply (the "Sapere Reply") to the objections. (ECF Doc. # 355.) Additionally, the Commodities Customer Coalition (ECF Doc. # 368) and the Sangani Family LP (ECF Doc. # 345) filed statements in support of the

[1] The Motion was first filed on December 5, 2011. (ECF Doc. ## 217, 218.) However, the Court declined to hear the Motion on shortened notice, and the Motion was re-filed and scheduled to be heard on January 19, 2012.

Motion. The Court held a hearing on the Motion on January 19, 2012 and took the Motion under submission. The Court now denies the Motion in its entirety.

DISCUSSION

A. The Relief Sought in the Motion

Sapere seeks an order directing that the Chapter 11 Debtors' cases be administered pursuant to 17 C.F.R. § 190.08(a)(1)(ii)(J) and 11 U.S.C. § 766(h). (Mot. at 7.) This administration would treat MFGI commodities customers that held segregated accounts as a customer class of the Chapter 11 Debtors, entitling them to receive payment from the Chapter 11 Debtors' estates of 100% of their segregated-account funds on a first-priority basis, ahead of all creditors of the Chapter 11 Debtors.

Sapere sets forth a number of bases for applying Part 190 and section 766 of the Bankruptcy Code to the Chapter 11 Debtors' cases. First, relying upon the United States Supreme Court's decision in *United States v. Bestfoods,* 524 U.S. 51, 62 (1998), Sapere argues that the Court may pierce the corporate veil between MFGI and MFGH. Second, Sapere asserts that section 2(a)(1)(b) of the Commodity Exchange Act (the "CEA") subjects the Chapter 11 Debtors to CFTC regulations.[2] Finally, Sapere contends that when the Chapter 11 Debtors allegedly began accessing customer funds held by MFGI, they became *de facto* futures commission merchants ("FCMs"). Sapere does not cite any authority for its arguments other than the text of the relevant statutes.

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[2] In relevant part, section 2(a)(1)(b) of the CEA states:

> The act, omission, or failure of any official, agent, or other person acting for a . . . corporation within the scope of his employment or office shall be deemed the act, omission, or failure of such . . . corporation . . . as well as such official, agent, or other person."

7 U.S.C. § 2(a)(1)(b).

Additionally, Sapere fails to allege any specific facts supporting its Motion and merely cites news articles that discuss the shortfall of MFGI customer money, a fact that has plagued these cases since their commencement. (*See* Mot., Ex. A.) Relying on those articles and the fact that customer money is missing, Sapere argues that "this is at least a *res ipsa loquitur* situation." (Mot. at 8.)

As an alternative to the relief it seeks in the Motion, Sapere requests that the Court allow it to conduct examinations of any party-in-interest relating to the relevant facts pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure. According to Sapere, the proposed Rule 2004 examinations would cover: (1) the existence, amount and/or disposition of commodities customers' segregated account funds at MFGI; (2) the circumstances under which any such funds became missing and/or have not been 100% transferred post-petition to commodities customers owning those segregated accounts; and/or (3) the existence, description, nature, custody, condition, and location of any documents and the identity of persons who know of any matter relevant to the subject matter of the Motion.

The Court concludes that there is no legal basis for administering these cases pursuant to sections 761-767 of the Bankruptcy Code. With respect to the request to conduct Rule 2004 discovery, the request is denied at this time; the Justice Department, FBI, CFTC, SEC, SIPA Trustee, and Chapter 11 Trustee are all actively investigating the collapse of MFGI and MFGH. Now is definitely not the time for discovery by private parties, such as Sapere.

B. The Bankruptcy Code Bars the Relief Sought in the Motion

Section 766 of the Bankruptcy Code is located in subchapter IV of chapter 7 of the Code. It "applies only in a case under such chapter concerning a commodity broker" and does not apply in cases under chapter 11 or in cases under chapter 7 that do not "concern[] a commodity

broker." 11 U.S.C. § 103(d). Therefore, subchapter IV of chapter 7 of the Bankruptcy Code cannot apply to the Chapter 11 Debtors' cases unless (1) the cases of the Chapter 11 Debtors are converted to cases under chapter 7 and (2) the Chapter 11 Debtors are "commodity brokers" as defined by the Bankruptcy Code, the CEA, or Part 190.

To obtain the relief requested, Sapere must show that the Chapter 11 Debtors' cases should be converted to cases under chapter 7 (relief not sought in the pending Motion) and then establish that the Chapter 11 Debtors were acting as "commodity brokers." The Court cannot, as Sapere argues, apply section 766 to the Chapter 11 Debtors' cases pursuant to section 105 of the Bankruptcy Code without converting these cases to cases under chapter 7. Such an application would directly violate the express requirements of section 103(d) of Bankruptcy Code. *See* 11 U.S.C. § 103(d) ("Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker."). As the court held in *In re Dairy Mart Convenience Stores, Inc.*, "[s]ection 105(a) limits the bankruptcy court's equitable powers, 'which must and can only be exercised within the confines of the Bankruptcy Code.'" 351 F.3d 86, 91-92 (2d Cir. 2003) (internal citations omitted). Section 105 does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *Id.* (citing *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)).

C. Conversion to Chapter 7 Is Not Warranted at This Time

Although Sapere has not moved to convert the Chapter 11 Debtors' cases to cases under chapter 7, the Court has considered whether conversion is warranted at this time. Under section 1112(b) of the Bankruptcy Code, the Court may dismiss a chapter 11 case or convert it to a case under chapter 7 "for cause" as long as it is in the best interests of both the creditors and the

estate. 7 COLLIER ON BANKRUPTCY ¶ 1112.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011). Subsection (b)(4) contains sixteen examples of events that may constitute cause. This list, however, is "not exhaustive" and courts are free to consider other factors. *See, e.g., In re Ameribuild Const. Mgmt., Inc.*, 399 B.R. 129, 131 n.3 (Bankr. S.D.N.Y. 2009) (citing legislative history).

The moving party has the burden of demonstrating cause for dismissal or conversion. *In re Loco Realty Corp.*, No. 09-11785, 2009 WL 2883050, at *2 (Bankr. S.D.N.Y. June, 25 2009) (Gonzalez, J.). "Once the movant has established cause, the burden shifts to the respondent to demonstrate by evidence the unusual circumstances that establish that dismissal or conversion is not in the best interests of creditors and the estate." 7 COLLIER ON BANKRUPTCY ¶ 1112.05[1]. Moreover, once cause has been established, dismissal and conversion are not the only two options before a court; a court may also appoint a trustee or examiner. *See* 11 U.S.C. § 1104(a)(3). The bankruptcy judge has wide discretion to determine whether cause exists to dismiss or convert a case under section 1112(b). *In re Kholyavka*, No. 08-10653DWS, 2008 WL 3887653, at *5 (Bankr. E.D. Pa. Aug. 20, 2008) (quoting H. REP. 595, 95th Cong., 1st Sess. 405 (1977)).

The Motion fails to establish or allege any facts that would constitute "cause" under section 1112(b). The Chapter 11 Debtors were acting as debtors-in-possession when the cases were filed. On November 21, 2011, the Committee and the Chapter 11 Debtors moved for the appointment of a chapter 11 trustee. (ECF Doc. # 131.) On November 25, 2011, Louis J. Freeh was appointed as the Chapter 11 Trustee. (ECF Doc. # 168.) The Court approved the appointment of the Chapter 11 Trustee to allay the fears and concerns of creditors of the Chapter 11 Debtors. (ECF Doc. # 170.) Although both MFGI and the Chapter 11 Debtors have ceased

operations and are winding-down their businesses, conversion would only increase the administrative expenses to the estates and decrease available recoveries for all creditors. For these reasons, the Court finds that cause does not exist to convert the chapter 11 cases to cases under chapter 7.

D. The Chapter 11 Debtors Are Not "Commodity Brokers"

Even if the Court were to convert these cases to cases under chapter 7, the Chapter 11 Debtors' estates could not be administered under subchapter IV of chapter 7. Subchapter IV is specifically reserved for debtors who are "commodity broker[s]" under the Bankruptcy Code. *See* 11 U.S.C. § 103(d). Because the Chapter 11 Debtors do not fall under the definition of a "commodity broker," if the Chapter 11 Debtors' cases were converted to cases under chapter 7, subchapter IV would not apply to the Chapter 11 Debtors' cases.

Section 101(6) of the Bankruptcy Code provides two requirements for an entity to be considered a "commodity broker." Section 101(6) defines a commodity broker as, among other things, a "[1] futures commission merchant . . . [2] with respect to which there is a customer, as defined in section 761 of" the Bankruptcy Code. 11 U.S.C. § 101(6). Section 761(8) of the Bankruptcy Code provides that the term "futures commission merchant" shall have the meaning assigned to it in the CEA. The CEA defines an FCM as any entity that (1) solicits or accepts orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility and in connection therewith accepts money, securities, or property to margin, guarantee or secure any trades or contracts that result therefrom or (2) is registered with the CFTC as an FCM. *See* 7 U.S.C. § 1(a)(28). Section 761(9) of the Bankruptcy Code provides that a "customer" is an:

> (i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission

> merchant on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant *in the ordinary course of such futures commission merchant's business* as a futures commission merchant from or for the commodity futures account of such entity; or
>
> (ii) entity that holds a claim against such futures commission merchant arising out of -
>
> . . . .
>
> (II) a deposit or payment of cash, a security or other property with such futures commission merchant for the purpose of making or margining such a commodity contract . . . .

11 U.S.C. § 761(9)(A) (emphasis added).

Thus, to be considered a commodity broker, Sapere must show that the Chapter 11 Debtors (1) solicited or accepted orders for the purchase or sale of a commodity, (2) accepted property to margin trades that result from the purchase or sale of a commodity and (3) had a "customer" in the ordinary course prior to its bankruptcy filing. Additionally, the Chapter 11 Debtors must have actually solicited and accepted customer funds in connection with *their specific* solicitation or acceptance procedures. Based on the foregoing, it follows that if customer funds were solicited and accepted by MFGI and then transferred to the Chapter 11 Debtors, the Chapter 11 Debtors would still not be considered an FCM or "commodity broker" under the Bankruptcy Code and the CEA.

Although "an entity may be determined to be a commodity broker for purposes of the commodity broker liquidation subchapter even though it is not registered with the CFTC as an FCM," the Motion fails to allege facts necessary for this determination. 6 COLLIER ON BANKRUPTCY ¶ 761.09[7]; *see also State Bank of Spring Hill v. Bucyrus Grain Co. (In re Bucyrus Co.)*, 127 B.R. 45 (D. Kan. 1988) (holding that an unregistered entity that accepted funds from customers for the purchase and sale of exchange-traded commodity futures contracts is an FCM,

with its "customers" being entitled to customer priority). Sapere provides no factual allegations to suggest that the Chapter 11 Debtors solicited or accepted orders for the purchase and sale of any commodity. Moreover, at the January 19 hearing, counsel to Sapere acknowledged that Sapere had no direct dealings with the Chapter 11 Debtors. In its Motion, Sapere merely alleges that the Chapter 11 Debtors were "accept[ing] money that FCM customers had deposited 'to margin, secured [sic], or guarantee any trades or contracts,' which the [Chapter 11 Debtors] used in futures activities." (Mot. at 7.) Sapere's Motion is supported only by conclusory allegations; there is no evidence before the Court that the Chapter 11 Debtors acted as FCMs and are thus subject to subchapter IV and the CEA.

E. Rule 2004 Examination

Sapere's request for Rule 2004 discovery is denied. Numerous government agencies as well as the SIPA Trustee and the Chapter 11 Trustee are actively investigating the circumstances surrounding the collapse of MFGI and MFGH. Permitting private-party discovery at this time, either under Rule 2004 or the discovery rules applicable to contested matters, is unnecessary and would hinder the ongoing investigations. Under 15 U.S.C. § 78fff-1(d), "the SIPA Trustee has a duty to investigate the circumstances surrounding the failure of MFGI and report to the Court 'any facts with respect to fraud, misconduct, mismanagement, and irregularities,' as well as 'any causes of action available to the estate.'" (SIPA Statement ¶ 3.) The Court has already granted the SIPA Trustee the authority to conduct an independent investigation on missing customer property and all possible sources for recovery. (*See* Adv. Proc. No. 11-02790, ECF Doc. ## 34, 36.) If the SIPA Trustee finds improper transactions involving customer property between the Chapter 11 Debtors and MFGI, the SIPA Trustee can bring a number of causes of action under the Bankruptcy Code to recover missing funds. The SIPA Trustee is also investigating other

transactions and conduct, including potential claims and causes of action against the Chapter 11 Debtors, their principals, and affiliates. Additionally, the Court directed the Chapter 11 Trustee "to undertake a limited investigation and thereafter report to the Court on the narrow issue whether the funds on deposit in the [MF Global Finance USA Inc.] account at [JPMorgan Chase Bank, N.A.], as of the petition date, included 'customer property,' and if so, how much." (ECF Doc. # 272, at 6.) There may well be a time when private-party discovery is appropriate, but now is clearly not that time.

F. Rules Governing Distributions to MFGI Customers Have Not Been Determined

It is important to emphasize that the denial of Sapere's Motion to administer these cases pursuant to sections 761-767 of the Bankruptcy Code does not determine the rules that apply to distributions from the Chapter 11 Debtors' estates to MFGI customers. Notably, the CFTC has argued that, pursuant to 17 C.F.R. § 190.08(a)(1)(ii)(G), "property that should have been segregated, but was not, or as to which segregation was not maintained, remains customer property subject to priority distribution." (ECF Doc. # 724 ¶ 2(c).) These issues may have to be resolved by the Court, but not in the guise of Sapere's Motion.

CONCLUSION

For the reasons discussed above, the Court denies the Motion. Under the Bankruptcy Code, the Court does not have the power to grant the relief requested, and Sapere has failed to allege any facts to support its Motion.

Dated: February 1, 2012
New York, New York

/s/Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge