

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 11-15059 (MG)

4 Adv. Case. No. 11-02880 (MG)

5 Adv. Case No. 12-01754 (MG)

6 - - - - - x

7 In the Matter of:

8

9 MF GLOBAL HOLDINGS LTD.,

10

11 Debtor.

12 - - - - - x

13 THIELMANN, ET AL.,

14 Plaintiffs,

15 v.

16 MF GLOBAL FINANCE USA, INC., et al.,

17 Defendants.

18 - - - - - x

19 KOCH SUPPLY & TRADING, LP

20 Plaintiff,

21 v.

22 GIDDENS,

23 Defendant.

24 - - - - - x

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U.S. Bankruptcy Court

One Bowling Green

New York, New York

September 12, 2012

10:04 AM

B E F O R E :

HON MARTIN GLENN

U.S. BANKRUPTCY JUDGE

1 Hearing re: Adversary proceeding: 11-02880-mg - (CC: doc  
2 no. 42) Motion to Dismiss Adversary Proceeding/Memorandum of  
3 Law of James W. Giddens, SIPA Trustee for the Liquidation of  
4 MF Global Inc. in Support of Trustee's Motion to dismiss the  
5 Amended Class Action Adversary Proceeding Complaint filed by  
6 Christopher K. Kiplok on behalf of James W. Giddens, Trustee  
7 for the SIPA Liquidation of MF Global Inc.

8  
9 Hearing re: Adversary proceeding: 11-02880 - (CC: Doc no.  
10 44) Motion to Dismiss Adversary Proceeding, Memorandum of  
11 Law in Support, and Certificate of Service filed by Robert  
12 S. Hertzberg on behalf of Louis J. Freeh, MF Global Finance  
13 USA, Inc., MF Global Holdings USA INC., MF Global Holdings,  
14 Ltd.

15  
16 Hearing re: Adversary proceeding: 12-01754 - Pre-trial  
17 Conference

18  
19 Hearing re: Pre-motion Conference

20  
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25 Transcribed by: Dawn South and Penny A. Skaw

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ALSO APPEARING TELEPHONICALLY:

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. I would  
3 actually like to take the pretrial conference in Koch Supply  
4 & Trading versus Giddens first. Then I guess it's going to  
5 be shorter. Is that -- have we -- you've all lined up?

6 MR. MARGOLIN: Good morning, Your Honor, Jeffrey  
7 Margolin --

8 THE COURT: Good. Thank you, Mr. Margolin.

9 MR. MARGOLIN: -- Hughes Hubbard & Reed. Yes,  
10 Your Honor, we propose to take the Koch Supply & Trading  
11 premotion conference first and then the motions to dismiss  
12 the WARN Act claims.

13 THE COURT: Okay, that's fine.

14 MR. MARGOLIN: My colleague, Kenneth Lee from the  
15 firm Levin Lee, trustee, special counsel is handling that  
16 matter for the SIPA trustee.

17 THE COURT: Thank you very much. Mr. Lee?

18 MR. LEE: Good morning, Your Honor, Ken Lee from  
19 Levine Lee representing the SIPA trustee.

20 As you're aware, there has been an application by  
21 Koch Supply & Trading case seeking a briefing schedule on a  
22 partial summary judgment motion. We have responded in  
23 writing to Your Honor on Friday.

24 THE COURT: I read that.

25 MR. LEE: And, you know, our general view is that

1       however Your Honor wishes to proceed we think that because  
2       of the related nature between this proceeding and the  
3       ConocoPhillips proceeding and the very, very strong overlap  
4       legal issues that they be, to the extent possible, scheduled  
5       at the same time and preferably we believe before Your  
6       Honor.

7               THE COURT: Well, obviously that -- obviously --  
8       the complication comes about because in both the Koch Supply  
9       and ConocoPhillips adversary proceedings motions to  
10      withdrawal the reference have been filed in each. Koch  
11      Supply is before Judge Buchwald, ConocoPhillips is before  
12      Judge Forest. Can you tell me whether they each know that  
13      there another case raising the same issues?

14             MR. LEE: I believe that -- that that has been  
15      mentioned in the papers to -- at least to Judge Buchwald in  
16      our action. I believe that is likely the case -- that's the  
17      case in the Conoco action as well.

18             THE COURT: Do you know whether -- I saw that  
19      there were -- in the Conoco Phillips there was a reply brief  
20      that was just filed before Judge Forest. Do you know, is  
21      all briefing done in both cases?

22             MR. LEE: Yes, Your Honor.

23             THE COURT: Has either court scheduled oral  
24      argument?

25             MR. LEE: Not to my knowledge.

1 THE COURT: And I know in this case, despite the  
2 motion to withdraw the reference, Koch Supply had requested  
3 a premotion conference to file a motion for partial summary  
4 judgment. I had initially denied the request until the SIPA  
5 trustee answered the complaint, which you've done, and you  
6 also responded with respect to the request for leave to file  
7 partial summary judgment.

8 (Pause)

9 THE COURT: I mean if the matters were left to  
10 this Court I would expect to have a pretrial conference in  
11 both cases together and certainly after listening to counsel  
12 in both cases probably try and coordinate briefing.

13 Tell me this, Mr. Lee, are there any disputed  
14 issues of fact that you believe are relevant? I know you --  
15 could you sit down, please.

16 MR. LEE: Thank you, Your Honor.

17 THE COURT: In the trustee's view are there any  
18 disputed issues of fact which need to be resolved?

19 MR. LEE: I don't believe so, Your Honor. I  
20 believe that this action could be resolved through briefing  
21 on the legal issues without the necessity for discovery or  
22 depositions.

23 THE COURT: Yeah, I've read most -- perhaps not --  
24 maybe all -- perhaps not all the briefing, both in the two  
25 District Court matters, the motions to withdraw the

1 reference so I've certainly seen the briefs, they don't  
2 purport to be fully briefing the merits, they focus on  
3 withdraw the reference. But I've certainly read -- they  
4 certainly address the merits and, I certainly think I have a  
5 grasp of the underlying merits of the issues in both cases.

6 MR. LEE: I mean certainly one option is to await  
7 rulings from the District Courts on those motions.

8 THE COURT: Yeah, it's ordinarily not by practice  
9 to await a decision by the District Court on motions to  
10 withdraw the reference. Unless the matter is stayed before  
11 this Court the matter proceeds.

12 Now, what that usually means is I enter a case  
13 management and scheduling order, if there's any discovery  
14 that needs to go forward, you know, it should go forward.

15 It does seem to me that -- well, I think from my  
16 knowledge both Judge Buchwald and Judge Forest are quite  
17 prompt in deciding matters before them.

18 Let me here from Koch's counsel, and then I'll --

19 MR. LEE: Thank you, Your Honor.

20 THE COURT: -- ask you again, Mr. Lee.

21 MR. GUY: Thank you, Your Honor. I -- Jonathan  
22 Guy, I --

23 THE COURT: I'm sorry, your name is?

24 MR. GUY: Yes, Jonathan Guy, Orrick, Herrington &  
25 Sutcliffe for Koch Supply & Trading.

1           Your Honor, I heard what you said earlier. We  
2 believe that the matter should proceed.

3           As counsel for MF Global conceded, there are no  
4 facts in dispute, this is a very simple issue, and but for  
5 the argument being raised by MF Global about the  
6 enforceability of the CFTC --

7           THE COURT: Well, if it's such a simple legal  
8 issue I thought that's what the trustee has basically argued  
9 in opposing your motion to withdraw the reference. It's a  
10 straightforward application of Commodities and Exchange Act  
11 and the CFTC regulations. And you're now saying it's not a  
12 straightforward application of those principals?

13           MR. GUY: Your Honor, but for their argument it  
14 would be a straightforward application of the Bankruptcy  
15 Code and we would be happy to be before you. But because of  
16 their argument they are asserting for the very first time a  
17 completely novel theory --

18           THE COURT: That isn't novel. You know, the CFTC  
19 rules specifically deal with that issue about letters of  
20 credit posted as margin collateral and what -- and how that  
21 should be treated.

22           So you -- you know, the fact that no one  
23 fortunately -- very fortunately until this case and now the  
24 Parigrin (ph) case, there haven't been instances to my  
25 knowledge of liquidation of CFMs where there was a shortfall

1 in customer property. So the fact that no court has decided  
2 the issue doesn't mean that it's -- it involves anything  
3 other than a straightforward application of applicable law.  
4 761 et seq. of the Bankruptcy Code that deals with  
5 liquidation of a commodity future merchant, the applicable  
6 provisions of the Commodity Exchange Act, and the CFTC  
7 regulations, they all specifically deal with bankruptcy and  
8 say that the Bankruptcy Court is the one that's supposed to  
9 do it, but, you know, Judges Buchwald and Forest will decide  
10 whatever they're going to decide.

11 But you know, I agree with the first statement you  
12 made, it's -- the issues seem to be pretty simple.

13 MR. GUY: Your Honor, the reason they're simple is  
14 because the language that they're relying upon in the reg  
15 talks about full proceeds. That letter of credit that has  
16 not been drawn does not constitute full proceeds.

17 The commentary that they rely upon that doesn't  
18 have the force of law, that does make this a non-vanilla  
19 application talks about requiring the trustee -- I quote --  
20 "requiring the trustee to draw on the letter of credit." In  
21 our case the letter of credit expired and was not drawn upon  
22 by the trustee.

23 THE COURT: And they say that that was the  
24 transfer, that that was a transfer to Koch allowing the --  
25 by the expiration of the letter of credit that was a

1 transfer that's avoidable and recoverable in the bankruptcy.

2 I mean, I understand what the issues are.

3 Look, the District Courts will decide whatever  
4 they're going to decide. How do you think the case should  
5 proceed?

6 MR. GUY: Your Honor, we would like to resolve  
7 this as quickly as possible. The trustee has made a demand  
8 of my client for \$20 million. Assuming that there's going  
9 to be interest accruing on that we would like to have a  
10 speedy conclusion.

11 We have filed our complaint, they have filed an  
12 answer, we have heard there are no facts in dispute. Your  
13 Honor has just said what the legal issue is and we agree.  
14 Did we receive a transfer when the letter of credit expired?  
15 Under the Bankruptcy Code the answer is no. Under  
16 applicable bankruptcy law is answer is no. The question is  
17 their theory under the regs and commentary changes that?

18 So we would like to file our motion to summary  
19 judgment --

20 THE COURT: May I ask you this, have you spoken  
21 with the Wachtell lawyers for Conoco Phillips as to -- to  
22 see whether -- how whether -- you've talked about how both  
23 cases should proceed?

24 MR. GUY: Your Honor, we have talked to them, and  
25 their case is in a very different procedural posture.

1 THE COURT: Well, their letter of credit hasn't  
2 expired yet.

3 MR. GUY: And not only that, Your Honor, the  
4 debtor is holding money of Conoco. We are owed no money --

5 THE COURT: Well, you filed a claim, and it was a  
6 late filed claim, and if I understand correctly -- am I  
7 right about that? You filed a claim as part of the claims  
8 resolution process, the trustee made his claim determination  
9 denying the claim as a late filed claim, and going on and  
10 determining the net equity claim that you owe the trustee  
11 \$20 million. Do I have that basically right?

12 MR. GUY: Your Honor, there is no net equity here  
13 because we have -- they're holding no property of ours.

14 THE COURT: Do I have the sequence of events  
15 correct? You filed a proof of claim with the trustee  
16 seeking a recovery from the estate, the trustee made his  
17 claim determination and rejected the claim. Is that part  
18 correct?

19 MR. GUY: No, Your Honor. We are not asserting a  
20 recovery against --

21 THE COURT: It's not correct that you filed a  
22 claim?

23 MR. GUY: That is correct, Your Honor.

24 THE COURT: Did you file a claim or not?

25 MR. GUY: We did, Your Honor.

1 THE COURT: Okay. And the trustee made his claim  
2 determination and rejected the claim, correct?

3 MR. GUY: Your Honor, the genesis --

4 THE COURT: Is that correct?

5 MR. GUY: Your Honor, may I finish?

6 THE COURT: Is that correct? Answer that yes or  
7 no and then I'll let you go on.

8 MR. GUY: Your Honor --

9 THE COURT: Did the trustee make a determination  
10 in your claim?

11 MR. GUY: Yes, he did, Your Honor.

12 THE COURT: And he rejected it, correct?

13 MR. GUY: He denied it as untimely, Your Honor.

14 THE COURT: That's -- okay. It would have been a  
15 lot simpler if you'd just answered by question.

16 MR. GUY: Your Honor, I'm trying to explain the  
17 background.

18 THE COURT: Well, I'll let you answer -- I'll let  
19 you explain the background. When I ask a direct question I  
20 expect a direct answer.

21 MR. GUY: I apologize, Your Honor.

22 THE COURT: Go ahead, what do you want to explain?

23 MR. GUY: Your Honor, the issue of the recovery on  
24 the letter of credit was not raised to Koch until after the  
25 bar date expired. The trustee contacted us and said, oh, by

1 the way, your letter of credit, which expired, is a transfer  
2 of property and we'd like \$20 million, please. We had no  
3 reason to file a proof of claim.

4 THE COURT: You did file a proof of claim though.

5 MR. GUY: Your Honor, our --

6 THE COURT: How much was the proof of claim?

7 MR. GUY: It's for -- if they're successful --

8 THE COURT: Could you answer my question? How  
9 much was the proof of claim for?

10 MR. GUY: It's the \$20 million letter of credit  
11 amount, Your Honor.

12 THE COURT: You filed a proof of claim for  
13 \$20 million.

14 MR. GUY: Correct, Your Honor. It's a contingent  
15 claim, it's a 502(h) concept. If they're correct in  
16 recovering money from us then that gives rise to a claim. I  
17 know your court -- the Court knows that, and we filed that  
18 claim under that rationale.

19 In the event that they are not successful in  
20 recovering money from us we have no claim against the estate  
21 and we're seeking no recovery from the estate and we want no  
22 distribution from the estate. That is entirely different  
23 from the Conoco situation.

24 Procedurally Conoco, the debtors are holding their  
25 money and the debtors have offset the letters of credit

1 which are unexpired, unexpired against it. So that's going  
2 forward in a claims process.

3 We don't have anything to adjudicate on our claim,  
4 Your Honor. In the event that --

5 THE COURT: You did file proof of claim.

6 MR. GUY: Correct, Your Honor, but we have nothing  
7 to adjudicate as to that claim. If we have no liability to  
8 the trustee there is no claim.

9 So we believe the most efficient way forward, Your  
10 Honor, is to file our motion for summary judgment, the  
11 debtors can respond, and the Court can rule. Whether it be  
12 Judge Buchwald or Your Honor.

13 In the event that the Court rules that we have no  
14 liability because there's no transfer by reference to the  
15 expiration of an LC then that's the end of all Koch's  
16 litigation, Your Honor.

17 The Conoco situation I believe is different.

18 There's also the simple matter of the fact that  
19 Levine Lee here appears as conflicts counsel. They were  
20 engaged because there was a conflict with our client. So we  
21 think it would be rather difficult for them to handle --  
22 Hughes Hubbard to handle the case against Conoco at the same  
23 time while it's --

24 THE COURT: I don't know what's to difficult about  
25 it, that happens, you know, with some regularity.

1 MR. GUY: Your Honor --

2 THE COURT: That's not for you to say.

3 MR. GUY: That's correct, Your Honor, that's not  
4 for me to say.

5 THE COURT: All right.

6 MR. GUY: Your Honor, but they are a different  
7 procedural posture, they're entirely different facts,  
8 they're entirely different parties, and they're -- the  
9 motions to withdraw are before entirely different judges.  
10 And the parties in the Conoco have already asked Judge  
11 Buchwald to treat them as related and she declined.

12 I believe they're not related, Your Honor.  
13 They're related because they're in the same case, yes, we  
14 concede that. But they're not related in that one, it's a  
15 claim objection, a legitimate claim objection. The other is  
16 an adversary proceeding.

17 THE COURT: ConocoPhillips filed an adversary  
18 proceeding as well, that's what they seek to withdraw the  
19 reference in.

20 MR. GUY: I don't believe they filed a complaint,  
21 Your Honor.

22 THE COURT: All right. Okay. I'll stand  
23 corrected.

24 Mr. Margolin, what's the --

25 MR. GUY: Do you have any further questions, Your

1 Honor?

2 THE COURT: Not at this point.

3 In ConocoPhillips there's a contested matter with  
4 respect to the claim determination; is that correct?

5 MR. MARGOLIN: That's correct, Your Honor.

6 THE COURT: All right. There's no adversary  
7 proceeding that was filed?

8 MR. MARGOLIN: There was no adversary proceeding  
9 commenced.

10 THE COURT: All right. So ConocoPhillips sought  
11 to withdraw the reference with respect to the claim  
12 objection?

13 MR. MARGOLIN: That's correct.

14 THE COURT: All right. Have you conferred with  
15 ConocoPhillips' counsel about trying to arrange a common  
16 briefing schedule in this court with respect to the  
17 ConocoPhillips matter and the Koch matter?

18 MR. MARGOLIN: Can I have a moment, Your Honor?

19 THE COURT: Yes, go ahead.

20 (Pause)

21 MR. GUY: Your Honor, if I may be heard briefly?

22 THE COURT: Not yet.

23 MR. GUY: Thank you.

24 (Pause)

25 MR. MARGOLIN: Your Honor, we've coordinated with

1 them and they are amenable. There's no agreement finalized  
2 regarding that, regarding taking these -- both cases down  
3 the same track.

4 THE COURT: All right. Because the Court -- I'll  
5 just tell you what my inclination is, and that is to adjourn  
6 this conference, schedule a conference in both matters at  
7 the same time very soon. Seek to agree -- get agreement or  
8 I'll order a briefing schedule for both cases.

9 I assume some time is going to be required for the  
10 merits briefing. It seems to me that that briefing would be  
11 applicable if Judge Buchwald or Judge Forest withdraw the  
12 reference. There's no reason to delay the proceedings  
13 moving forward. It's important from the standpoint of the  
14 SIPA estate to get these matters resolved promptly.

15 To the extent that there are common issues it's  
16 preferable that the common issues are resolved at one time  
17 so as to avoid potentially inconsistent results.

18 Yes, there are differences between ConocoPhillips  
19 and Koch Supply, the differences may ultimately be  
20 determined and they may not, but from my review of the  
21 pleadings in the District Court in both matters there are  
22 primarily similarities.

23 So I would like to get a conference -- I'd like --  
24 let's see if we can get a conference date in the next two  
25 weeks, Mr. Margolin. Get everybody's agreement, if possible

1 on the date and time. It does not have to be a regular MF  
2 Global hearing date. Let's get everybody in.

3 You ought to -- before coming in I urge all  
4 counsel -- and I don't know whether anybody from Wachtell or  
5 I think Cadwalader is -- is it Cadwalader that's also  
6 involved in the ConocoPhillips?

7 MR. MARGOLIN: Yes.

8 THE COURT: It's Cadwalader and Wachtell. I don't  
9 know whether anybody from the firm Cadwalader or Wachtell  
10 are here today.

11 I would encourage all counsel in advance of a  
12 conference to try and confer and agree upon a briefing  
13 schedule. It may be that in connection with Koch Supply  
14 it's on motion for partial summary judgment, in  
15 ConocoPhillips it may be with respect to the contested  
16 matter on the claim determination. I don't see that the  
17 different procedural posture as preventing -- to the extent  
18 that there are no disputed issues of fact in either matter,  
19 and certainly from the papers I read from the District Court  
20 it didn't seem like anybody was contending that there were  
21 disputed issues of fact -- to have common briefing.

22 Once the briefing is done I can then look at --  
23 we'll see what the status of the two motions to withdraw the  
24 reference are at that time. If the reference is withdrawn  
25 the briefs can be used -- unless the -- Judge Buchwald or

1 Judge Forest decides they want something different, I don't  
2 believe they'll be able to use the same briefing, but we can  
3 move the matter forward.

4 It's important to the administration of the SIPA  
5 estate that these issues be resolved promptly, so I would  
6 like to move forward in that fashion.

7 MR. MARGOLIN: Thank you, Your Honor, we'll --

8 THE COURT: Mr. Guy, you wanted to be heard again?

9 MR. MARGOLIN: We'll coordinate with the parties  
10 and --

11 THE COURT: Okay.

12 MR. MARGOLIN: -- contact chambers regarding a  
13 time that's convenient for the Court.

14 THE COURT: Okay. Mr. Guy?

15 MR. GUY: Yes, Your Honor. Thank you, Your Honor.

16 THE COURT: Why don't you go up to the microphone  
17 so we get a clear record.

18 MR. GUY: Thank you, Your Honor.

19 The only issue I wanted to raise is because we  
20 have commenced an adversary proceeding as governed by, as  
21 you know, the 7000 rules, the claimant objection is governed  
22 under 3000. So we're absolutely happy to move this forward  
23 as quickly as possible, and they can be on the same briefing  
24 schedule.

25 THE COURT: Well, they don't have to be

1 consolidated, but I can hear them together.

2 MR. GUY: Correct, Your Honor.

3 THE COURT: So I can hear the claim -- the  
4 contested matter on the claim objection at the same time  
5 that I'm hearing a cross -- a motion or cross motions, and  
6 you ought to talk about -- I don't know whether you and  
7 Mr. Lee have talked about that. It may be that what's  
8 really required in your case are cross motions for partial  
9 summary judgment.

10 I'm not going to get into that procedural thicket,  
11 but you ought to discuss with Mr. Lee how you can most  
12 efficiently -- you know, you're both agreeing that are no  
13 factual disputes. If it's a pure legal issue it sounds like  
14 cross motions for summary judgment are the way to proceed.

15 I'm not saying the matters are going to be  
16 consolidated. When I say the matters, the ConocoPhillips  
17 and the Koch, but they're be heard together. To the extent  
18 that there are common -- and you've got differences, you  
19 argue that your LC had expired and that's determinative,  
20 fine, you'll make those arguments -- those additional  
21 arguments.

22 MR. GUY: Thank you, Your Honor.

23 THE COURT: All right. Okay. So we'll expect to  
24 hear from counsel hopefully -- you ought to get a date  
25 before the end of next week. Not that we have the hearing

1 next week, I'll be out Monday and Tuesday of next week, but  
2 see if you can get a date. You talk to Deanna Anderson, my  
3 courtroom deputy, and she'll give you a date and make sure  
4 you -- Mr. Lee or Margolin, because I know that Hughes  
5 Hubbard is handling the matter with respect to  
6 ConocoPhillips, so you'll work it out. Okay?

7 MR. MARGOLIN: Yes, thank you.

8 THE COURT: Thank you very much.

9 MR. GUY: Thank you, Your Honor.

10 THE COURT: All right. Let's go on to the  
11 Thielmann adversary, it's adversary proceeding number  
12 11-02880. It's the defendants' motion to dismiss.

13 (Pause)

14 THE COURT: Okay.

15 MR. HERTZBERG: Good morning, Your Honor, Robert  
16 Hertzberg, Pepper Hamilton on behalf of the trustee Freeh in  
17 the MF Global matter. We're here today on the motion to  
18 dismiss. I'll be arguing on behalf of trustee Freeh and  
19 there'll be another counsel arguing on behalf of the other  
20 trustee.

21 Your Honor, I'm not going to go over in tremendous  
22 detail, we filed extensive briefs on our side and the other  
23 side have filed extensive briefs, and I think that the  
24 parties have covered the issues well.

25 What I'd like do is spend a couple minutes just

1 pointing out what I believe are the important issues that  
2 the Court needs to consider in our motion to dismiss.

3 THE COURT: Okay. Let me -- Let me -- the -- I'll  
4 allow you to make your argument, but the one issue that I'm  
5 particularly focused on is with respect to the MF Global  
6 Holdings Ltd. case.

7 Even if I apply the liquidating fiduciary doctrine  
8 whether there are disputed issues of fact with respect to  
9 the Holdings case --

10 MR. HERTZBERG: Holdings USA, Your Honor.

11 THE COURT: Well, I mean one of the things that  
12 does concern me is nobody has said who these people worked  
13 for, but we'll deal with that.

14 I mean the distinction I'm making is the SIPA case  
15 on the one hand and the Chapter 11 case on the other. The  
16 SIPA case starts when SIPC determines that the broker/dealer  
17 should be liquidated. That's clear from the moment the  
18 matter is filed in the District Court that it's being  
19 liquidated. That's not clear in the Chapter 11 case.

20 Even the DOL preamble that you rely on -- and  
21 obviously there's an argument as to whether -- what  
22 deference, if any, is required to be given to the preamble.  
23 But whatever deference it is entitled to receive it does  
24 acknowledge that not every bankruptcy case equals you're not  
25 an employer.

1           When I go back to the first day hearings in the  
2 Chapter 11 case, and while it was clear that MF Global,  
3 Inc., the broker/dealer, was being liquidated, I sort of  
4 remember being told that the Chapter 11 trustee -- there  
5 wasn't a trustee -- the debtor-in-possession was trying to  
6 salvage part of the business to continuing operating part of  
7 the business.

8           At some point, certainly when Mr. Freeh was  
9 appointed as the trustee by then it was I think -- well,  
10 let's say for sake of argument -- it was a liquidation. But  
11 that's a gap. Okay.

12           So focus on why there are not factual issues that  
13 have to be resolved with respect to the Chapter 11 case that  
14 don't exist with respect to the SIPA case.

15           MR. HERTZBERG: Well, I think if you look at the  
16 first day affidavit or declaration that was filed by Ferber  
17 (ph) it's discussed that they discontinued the operations,  
18 especially when we talk about the SIPA. There's really  
19 nothing --

20           THE COURT: There's no question in my mind about  
21 the SIPA case. That's what, you know, they're required to  
22 stop other than to sell off --

23           MR. HERTZBERG: Right, and wind down the business.

24           THE COURT: -- open positions. Yeah.

25           MR. HERTZBERG: I think with that occurring I

1 don't think it's disputed that the other entities had to  
2 wind down also because there was really nothing left at that  
3 point to reorganize.

4 THE COURT: There were a lot -- you know, I had  
5 this chart that was about this big that showed all of the  
6 entities in this family of companies, some regulated more  
7 than unregulated.

8 MR. HERTZBERG: I think it was probably this  
9 chart, Your Honor.

10 THE COURT: It probably was. It may have been a  
11 bigger version, but that was probably -- it was big enough.

12 MR. HERTZBERG: Yeah.

13 THE COURT: There are a lot of boxes on that  
14 chart.

15 MR. HERTZBERG: Yes, there are.

16 THE COURT: And -- I mean my recollection is,  
17 because I think I asked about this, you know, the debtor-in-  
18 possession was hoping to salvage some of those unregulated  
19 businesses.

20 MR. HERTZBERG: Hope, Your Honor, is different  
21 from actually being an ongoing or reorganizing business. I  
22 think it's clear from the facts that we've put in our  
23 pleadings, and plus accepting the facts as true that they've  
24 pled in their complaint, that the companies that are before  
25 the Court that I represent were not reorganizing at any

1 point, they were simply following along in the procedure to  
2 liquidate the business, that they couldn't be considered an  
3 employer under the liquidating fiduciary.

4 I -- I don't know what facts that they can point  
5 to really that could in any way show that these entities  
6 were actually in the stages of what we would normally see in  
7 a bankruptcy of reorganizing their business or even  
8 attempting to reorganize.

9 THE COURT: When did the layoffs occur?

10 MR. HERTZBERG: The layoffs occurred on  
11 November 11th, Your Honor. The bankruptcies were filed  
12 October 31st, and the layoffs occurred on November 11th  
13 through a period of time. And the WARN notices were served  
14 on -- let me get my chart out, Your Honor -- the WARN  
15 notices went out November 17th, Your Honor.

16 So it was a -- within an extremely short period of  
17 time that the bankruptcies were filed that the layoffs  
18 occurred. Well, they were really no employees left except  
19 for employees used for the wind down process of the entities  
20 that I represent.

21 So to attempt to come before the Court I don't  
22 know in the plaintiffs can do it with a straight face and  
23 tell this Court that these were actually entities that were  
24 going through a traditional reorganization that we see in  
25 many cases or even a 363 sale process.

1 This was a company that within milliseconds of  
2 filing was into a liquidation proceeding and a wind down of  
3 its business. One of the entities, as I'm sure the Court is  
4 aware, didn't file until --

5 THE COURT: March.

6 MR. HERTZBERG: -- period -- March 2nd, but that  
7 company, as we've indicated to the Court and I don't think  
8 that is disputed either, was a captive. All it did was in-  
9 house work for the other entities and acted as a holding  
10 company of the U.S. subsidiaries.

11 THE COURT: Did it have employees?

12 MR. HERTZBERG: It had some employees, but they  
13 were just winding down the business again.

14 THE COURT: Are any of the named plaintiffs in  
15 this case were they employees of that entity?

16 MR. HERTZBERG: I'm not sure, Your Honor, to be  
17 real frank.

18 THE COURT: That's one of the questions -- I'm  
19 dissatisfied all around because nobody has told me whether  
20 the four plaintiffs, I don't know who they work for. You  
21 point out they refer to them as plaintiffs, but they don't  
22 say what entities they --

23 MR. HERTZBERG: That's correct, Your Honor.

24 THE COURT: -- work for.

25 MR. HERTZBERG: So I don't know the answer to your

1 question, Your Honor, and I wouldn't want to speculate.

2 But I -- and I understand --

3 THE COURT: It wouldn't be hard for you to find  
4 out.

5 MR. HERTZBERG: That's true, we could look through  
6 the records and pull out the information, Your Honor.

7 THE COURT: And you're telling me you never -- you  
8 -- neither you nor anyone working with you looked to see  
9 which entities they were employed by? You can really tell  
10 me that with a straight face?

11 MR. HERTZBERG: Let me check, Your Honor. Excuse  
12 me one second.

13 (Pause)

14 THE COURT: I have to think you pulled the  
15 employment files of these four plaintiffs. I'd be very  
16 surprised if you didn't.

17 MR. HERTZBERG: Excuse me one second, Your Honor.

18 (Pause)

19 MR. HERTZBERG: Your Honor, I believe we looked at  
20 it at one point. I don't --

21 THE COURT: I'm sure about it.

22 MR. HERTZBERG: -- I don't know the answer off the  
23 top of my head and I wouldn't -- I could get the information  
24 for the Court easily --

25 THE COURT: Okay. I want a letter by close of

1 business on Friday --

2 MR. HERTZBERG: No problem, Your Honor.

3 THE COURT: -- indicating the entities by which  
4 each of the four named plaintiffs were employed.

5 MR. HERTZBERG: We'll get that to the Court, no  
6 problem.

7 But, Your Honor, getting back to the question, and  
8 I'm not going to walk through now the whole argument,  
9 because the Court has honed in really on the important issue  
10 of the argument, whether this liquidating fiduciary doctrine  
11 applies. I think it's clear it does.

12 Under the United Healthcare case, I think it's a  
13 third Circuit Court case, but I think it's a well-reasoned  
14 case that if the business is winding down they're not an  
15 employer under the WARN Act. It's been followed by other  
16 cases, the BAP filed it in the Ninth Circuit. I would ask  
17 the Court to file it. I understand that you're not bound by  
18 a decision out of the BAP in the Ninth Circuit or out of a  
19 decision that comes out of the Third Circuit, but I think  
20 it's a well-reasoned decision.

21 THE COURT: So here's what the Third Circuit says.  
22 This is what -- you know, they're quoting from the DOL. I  
23 just want at a make surety get the page. So it's 200 F.3d  
24 at 177. And I'm quoting from the Federal Register. Quote,  
25 "Further, DOL agrees that a fiduciary whose sole function in

1 the business" -- excuse me, I'll read it again.

2 "Further, DOL agrees that a fiduciary whose sole  
3 function in the bankruptcy process is to liquidate a failed  
4 business for the benefit of creditors does not succeed to  
5 the notice obligations of the former employer because the  
6 fiduciary is not operating a 'business enterprise' in the  
7 normal commercial sense.

8 In other situations where the fiduciary may  
9 continue to operate the business for the benefit of  
10 creditors the fiduciary would succeed to the WARN  
11 obligations of the employer precisely because the fiduciary  
12 continues the business in business." Close quote.

13 And that's from 54 Federal Register at 16045.  
14 That's really what gave rise to my question about is it  
15 clear with respect to the Chapter 11 case whether the sole  
16 function was to liquidate?

17 Clearer to me, and plaintiffs' counsel may  
18 disagree, but clearer to me that from the moment the SIPC  
19 proceeding was filed in the District Court it was a  
20 liquidation.

21 MR. HERTZBERG: Yes. I wouldn't disagree with the  
22 Court on that.

23 As to the three entities that I represent I think  
24 it's also clear, and they have not pointed out in their  
25 response to our motion to dismiss, any facts that show that

1 the company was actually doing anything but liquidating.

2 So I think that's -- that's critical. We allege  
3 it, they never dispute it. They -- their main argument,  
4 Your Honor, when you read their pleadings are -- and it's  
5 clear to me --

6 THE COURT: Well, they disagree with the Third  
7 Circuit.

8 MR. HERTZBERG: Right. And --

9 THE COURT: And they also argue about New York and  
10 Illinois law.

11 MR. HERTZBERG: Right. But --

12 THE COURT: So you'll have to address that. But  
13 go -- let's talk about the federal statute first.

14 MR. HERTZBERG: The federal statute, I think it's  
15 clear they never come up with any facts to say, look, you  
16 were running this business, you were doing X, Y, and Z, you  
17 were financing -- you had DIP financing in place to  
18 reorganize or you were attempting a 363 sale of an ongoing  
19 business. They never argue that.

20 What they argue, Your Honor, is simply, United  
21 Healthcare shouldn't be filed, it shouldn't be given -- the  
22 Department of Labor preamble shouldn't be given any  
23 deference, and therefore we -- you should deny our motion to  
24 dismiss.

25 But if you don't believe that then let us do

1 discovery because we can then come to you with some facts  
2 that would support our position that the motion to dismiss  
3 shouldn't be granted, and that's kind of their argument.  
4 They never raise any facts to say, okay, it's clear from X,  
5 Y, and Z that this business was a continuing business and  
6 wasn't simply liquidating.

7 So I think based upon what they filed, they  
8 haven't alleged anything, that you should grant the motion  
9 to dismiss on the federal statute.

10 THE COURT: Why shouldn't it be a dismissal with  
11 leave to amend to give them an opportunity to allege facts  
12 that it was a continuing business?

13 MR. HERTZBERG: I understand that courts are  
14 always pretty liberal on granting leave to amend complaints.  
15 They filed an amended complaint already. They didn't come  
16 forward with two things. One --

17 THE COURT: They filed a consolidated amendment.  
18 I mean it started out with what, four cases and --

19 MR. HERTZBERG: And they pulled them together.

20 THE COURT: -- one -- one got dismissed, three got  
21 pulled together, the typical consolidated amended complaint,  
22 but I don't really consider that the usual amendment  
23 process. That's before there was any response to anything.  
24 It was just --

25 MR. HERTZBERG: Well, to respond to the Court's

1 question, which is a fair question. Two things.

2 One, as I pointed out previously, they never filed  
3 anything in their existing papers showing the facts which  
4 support denial of the motion to dismiss. And based upon  
5 that I don't believe that they should now have the  
6 opportunity, since we pointed it -- pointed out that there  
7 are no facts and they didn't come forward with an affidavit  
8 or anything to support they're position, now be able to go  
9 out if the Court is leaning towards --

10 THE COURT: I'm going to ask them whether they  
11 believe in good faith they can allege any facts to support  
12 that the liquidating fiduciary doctrine, if the Court finds  
13 it applicable, shouldn't apply because this -- it was  
14 intended, expected to be an operating business. But I'm  
15 just alerting them to what I'm going to want to hear from  
16 them.

17 MR. HERTZBERG: I mean their goal is to try and  
18 flip it to a summary judgment. I understand that.

19 THE COURT: Well, look, you acknowledge yourself  
20 that if you're unsuccessful -- I think you acknowledge this  
21 in your brief -- that if you're unsuccessful on the  
22 liquidating fiduciary doctrine you then get into the  
23 affirmative defense, which would involve disputed issues of  
24 facts and -- well, would involve facts. Whether they wind  
25 up being disputed or not remains to be seen.

1 MR. HERTZBERG: Right.

2 THE COURT: But they would be an affirmative  
3 defense. You essentially acknowledge that.

4 MR. HERTZBERG: Correct, Your Honor.

5 THE COURT: You're trying to avoid having to go to  
6 the summary judgment route based on the defenses in the  
7 statute.

8 MR. HERTZBERG: Correct. I mean I'm asking the  
9 Court to take a bold step here. The Court has sat through  
10 -- and I haven't sat through, but I know the Court has sat  
11 through numerous hearings on MF Global on different issues.  
12 I think it's clear from what I understand, at least from  
13 what I --

14 THE COURT: It's only the second one on this. The  
15 first one was on the fight about lead plaintiff and counsel.

16 MR. HERTZBERG: But I -- but in the case itself,  
17 the bankruptcy case itself, I think it's clear that at no  
18 point were these reorganizing entities. There was no hope  
19 of reorganizing.

20 THE COURT: There was no hope of reorganizing the  
21 broker/dealer. I -- I'm not -- I don't know whether there  
22 was -- it may have been --

23 MR. HERTZBERG: That's where the majority of the  
24 party --

25 THE COURT: I'm not going to speak to the issue

1 about whether there was any hope of reorganizing any of the  
2 other entities. They were non-debtor entities.

3 Which -- what I never quite understood was who  
4 employed people, okay? You know, whether -- was everyone  
5 working at MF Global, Inc. an employee of MF Global, Inc.?  
6 Was MF Global Holdings USA essentially the employer of  
7 everyone with people -- you know, none of this is addressed  
8 really. I don't know where everybody worked.

9 MR. HERTZBERG: Let me try and explain it to you  
10 as I understand it, Your Honor.

11 When an employee would come for an interview they  
12 would go through the Holdings USA. If they were accepted  
13 for employment they would then be assigned to one of the  
14 other entities for employment. The majority, as I  
15 understand it of the employees, worked in the SIPA entity.

16 THE COURT: Were they -- and this -- look, I don't  
17 have evidence before me so I'm not -- but can you represent  
18 where the -- were the people who worked for the  
19 broker/dealer employees of the broker/dealer or were they  
20 employees of Holdings USA assigned to the broker/dealer?

21 MR. HERTZBERG: It's my understanding they were  
22 employees of the broker/dealer and were not assigned by the  
23 entity. They were interviewed and went through the process.

24 As I understand it, at least, Holdings USA was a  
25 captive in-house that did payroll functions, that did

1 interview functions, that did human resource functions, et  
2 cetera. When an employee was hired they were then put in  
3 the entity where they were employed. And as I understand  
4 the majority were employed by the SIPA entity. That's how I  
5 understand it at least, Your Honor.

6 I know the Court had a couple other questions.  
7 One as to the -- they allege the New York WARN Act.

8 THE COURT: Yes.

9 MR. HERTZBERG: We believe that the liquidating  
10 fiduciary doctrine also applies to that. We don't believe  
11 once again that it was an ongoing business or a business  
12 enterprise and therefore that the same basis exists if the  
13 Court accepts our fact under the federal statute --

14 THE COURT: What's -- I don't -- I didn't -- I  
15 don't think I -- I looked at it, but I didn't flag. The  
16 operative language that the plaintiffs rely on in the New  
17 York statute, I mean it's not the same definition as  
18 employer under the Federal WARN Act.

19 MR. HERTZBERG: The New York WARN statute, as I  
20 see it, Your Honor, talks about continuing separation.

21 Now, if this was a liquidating entity it's our  
22 position it couldn't then qualify as a continuing operation,  
23 and therefore the New York -- the claim under the New York  
24 WARN Act would also have to fall.

25 And then there's the other issue they raise, which

1 is under the New York and Illinois Wage Act.

2 THE COURT: Yes.

3 MR. HERTZBERG: They say they've entitled to  
4 vacation pay, liquidated damages and other claims. We think  
5 -- and they're saying that they're entitled to a priority  
6 for those claims.

7 It's our position that they might be entitled to  
8 them, they might not, but under 507(a094), which they  
9 request, these are a normal claims process. These aren't  
10 your WARN Act type issues. These -- if they have claims for  
11 vacation pay they'll be dealt with like any other claim  
12 under the claims process.

13 THE COURT: Why shouldn't I treat the complaint  
14 with respect to those wage claims as -- I mean they would  
15 have been timely filed claims, you agree with that?

16 MR. HERTZBERG: Yes.

17 THE COURT: Why don't we just -- whether it's an  
18 adversary proceeding or considered as a proof of claim I  
19 think I have the discretion to treat it either way. I mean  
20 there's still the issue about a class claim, that's not  
21 before me today. But I --

22 MR. HERTZBERG: I guess once you dismiss the WARN  
23 action we can just deal with that leftover piece in the  
24 litigation and deal with whether they're entitled to  
25 priority in the amount of -- I don't per se have a problem,

1 but it's clear that there are different cause of action --

2 THE COURT: Yeah.

3 MR. HERTZBERG: -- and it's clear it's a normal  
4 quote "claims process" as I view it at least. And if the  
5 Court wants to retain it as that I understand that also.

6 THE COURT: Okay. Anything else you want to add?

7 MR. HERTZBERG: No. Does the Court have any other  
8 questions?

9 THE COURT: Not at that point. Thank you very  
10 much.

11 MR. HERTZBERG: Thank you. And we'll get you that  
12 letter by Friday, Your Honor.

13 THE COURT: Okay.

14 MR. HERTZBERG: Thank you.

15 THE COURT: All right, thank you.

16 All right, who's going to argue for the Chapter 11  
17 case? I'm sorry, for the SIPA case. I apologize.

18 MR. BASSEN: Good morning, Your Honor, Ned Bassen  
19 of Hughes Hubbard & Reed, and I am here for the SIPA case.

20 In terms of the question Your Honor just raised,  
21 it is our position that the sole function with respect to  
22 the language you quoted from the Third Circuit case, that  
23 the sole function of the SIPA trustee is liquidation.

24 THE COURT: I can't do anything else can I?

25 MR. BASSEN: Well, by statute --

1 THE COURT: Right.

2 MR. BASSEN: -- by referral from the District  
3 Court cannot unless the SIPA trustee were violating the  
4 statute in the order, which I don't think there's any  
5 suggestion -- I certainly hope there's no such suggestion,  
6 and that's the first issue.

7 The second issue is the plaintiffs claim that  
8 discovery is needed. And I think that -- to see whether in  
9 fact there's a liquidation here I think that if you just  
10 look at -- take judicial notice of the docket in this case  
11 it is clear that everything that the SIPA trustee has done  
12 has --

13 THE COURT: I think -- and I'll listen to the --  
14 what I think probably on this point -- if you want to talk  
15 about the wages now or claims I'll let you do that -- but  
16 with respect to the WARN Act claims probably I'll let you  
17 respond, because on that it does seem to the Court as a  
18 matter of law the SIPA proceeding is a liquidation  
19 proceeding, it's the only thing it could be, and there'd be  
20 nothing to discover. It's by virtue of the Security  
21 Investor Protection Act. It is a liquidation. Once it gets  
22 filed in a District Court that same day Judge Engelmayer  
23 appointed Mr. Giddens as the SIPA trustee, and off we went  
24 from there. But it never could have been anything other  
25 than the liquidation.

1           So I'll let you respond -- I think with best --  
2           save your argument for now if you need to reply, but address  
3           the wage and hour claims.

4           First of all, can you tell whether -- who people  
5           worked for?

6           MR. BASSEN: I'm sorry, Your Honor, I cannot. I  
7           can tell you that the SIPA trustee terminated the employees,  
8           but I cannot --

9           THE COURT: Do you know how many employees he  
10          terminated?

11          MR. BASSEN: At least 1100 approximately both in  
12          New York and Chicago.

13          (Pause)

14          THE COURT: Okay.

15          MR. BASSEN: And if I may, Your Honor, that  
16          termination was pursuant to the liquidation. The reason the  
17          SIPA trustee terminated the employees was not that the SIPA  
18          trustee wanted to do this, but had to do it as part of the  
19          liquidation. And as pointed out, it occurred within 14 days  
20          of the filing.

21          So that's another reason why it doesn't make, at  
22          least in my mind, sense for the WARN Act notice provision to  
23          apply to a SIPA trustee as here because the requirement is  
24          to proceed with the liquidation, not to give 60 --  
25          unfortunately not to give 60-days notice because that could

1 interfere with the liquidation orderly process.

2 Now, in terms of the wage claims, vacation claims,  
3 lots of money has been set aside in the claims process for  
4 those claims, and it is the SIPA trustee's belief that those  
5 claims should and will be heard in the normal -- in the  
6 normal claims process. It's not as if anyone is arguing  
7 that the employees are not entitled to certain money. The  
8 sole question that we're here for is the WARN Act notice.

9 Now, with respect to the New York statute and the  
10 question Your Honor raised, the New York statute -- New York  
11 WARN Act is number one, modeled after the Federal Act. But  
12 more importantly --

13 THE COURT: Not exactly. Modeled after but with  
14 some additional regulation that goes further than the WARN  
15 Act.

16 MR. BASSEN: Correct, Your Honor. But I would  
17 submit that more importantly the definition of employer  
18 under the New York WARN Act relates to "continuing operation  
19 of the business entity as to trustees, debtors-in-  
20 possession, or other fiduciaries who are responsible for  
21 continuing operations of the business entity." Not exactly  
22 the same language as in the DOL --

23 THE COURT: Just the issues -- again, I want to  
24 hear the plaintiffs in this -- but the issue seems a lot  
25 clearer to me with respect to the SIPA trustee in the SIPA

1 proceeding because --

2 MR. BASSEN: Well --

3 THE COURT: -- that's the only thing it could have  
4 been is a liquidation.

5 MR. BASSEN: I understand, Your Honor, and that's  
6 all I'm speaking to.

7 THE COURT: Yeah, I know.

8 MR. BASSEN: And with respect to the Illinois WARN  
9 Act, first of all the complaint doesn't allege the Illinois  
10 WARN Act, and if it were amended -- if you gave permission  
11 to amend it -- I think that the Illinois WARN Act says that  
12 it is supposed to be interpreted consistently with the  
13 Federal WARN Act.

14 And that's really -- all I have to say. I think  
15 the -- as you pointed out -- the issues on the SIPA end are  
16 pretty limited and pretty clear.

17 THE COURT: Let me ask you further on the wage and  
18 vacation pay issue. I don't -- I should know this, but I  
19 don't. Was there a general bar date? I know the claims --  
20 the customer claims process, the secured -- the commodities  
21 claim process, the securities claim process, there were bar  
22 dates. Mr. Margolin, can you -- I don't mean to,  
23 Mr. Bassen, interrupt, but Mr. Margolin lives with this day-  
24 to-day.

25 MR. BASSEN: I was going to ask Mr. Margolin.

1 Thank you.

2 MR. MARGOLIN: Yes, Your Honor.

3 Pursuant to the claims processing order that the  
4 Court entered last November the trustee established June 2nd  
5 as the deadline to assert general creditor claims, including  
6 employee wage priority.

7 THE COURT: Do you have any idea how many employee  
8 wage claims were filed?

9 MR. MARGOLIN: Can I have a moment, Your Honor?

10 THE COURT: Yeah, go ahead.

11 (Pause)

12 MR. MARGOLIN: Your Honor, at this point I'm not  
13 in a position at this moment to tell you. I can say that  
14 the trustee is reviewing claims that were filed prior to the  
15 June 2nd bar date, and if Your Honor would like to know that  
16 we can provide you with a separate update.

17 THE COURT: Well, here's my concern. The bar date  
18 has passed. I don't know whether all employees filed -- or  
19 former employee who worked for MF Global, Inc. filed proofs  
20 of claims or not. This class action was filed before the  
21 bar date ran. It hasn't been certified. If it were to be  
22 certified as a class claim then it would be timely with  
23 respect to all employees of MF Global, Inc.

24 So I have a concern about -- because I -- and this  
25 has not been -- I didn't see this point specifically at

1 breast. Everybody says this ought to -- you, Mr. Bassen, in  
2 your papers say this ought to be part of the ordinary claims  
3 process. I understand that.

4 I think that I have the ability where it's filed  
5 as an adversary to treat it as part of the claims process,  
6 although I would allow parties to brief that if it becomes  
7 necessary. I'm just reluctant to dismiss a timely filed  
8 claim on a wage and hour law, for example, that could leave  
9 some employees who may not have filed a proof of claim  
10 because they knew about a class action that was filed.

11 I -- without further argument consideration I  
12 don't want to rule in such a way as to disadvantage -- and  
13 maybe that's the result at the end of the day, but that's my  
14 concern.

15 You know, there's -- I have not gone back to look  
16 at -- you know, there's law about what happens when -- if  
17 class certification is denied, and you know, what happens to  
18 statute of limitations issues. I haven't looked at that  
19 stuff in years. I used to know some of those rules, but --

20 MR. BASSEN: We would be happy to look into it and  
21 if you like, Your Honor --

22 THE COURT: Well, what I would like for you to do  
23 is -- I mean your colleagues ought to look see if they can  
24 figure out how many proofs of claims were filed by the  
25 employees. I'm not asking you to give -- what you ought to

1 do is confer with plaintiffs' counsel on this point, how  
2 many proofs of claim were filed by employees? If -- it's a  
3 big if, because I haven't decided what I'm going to --  
4 haven't finally decided what to do. Let's assume this  
5 complaint is dismissed against MF Global, Inc. with respect  
6 to the WARN -- all of the WARN Act claims, I think you ought  
7 to talk with the plaintiffs' counsel to see whether you can  
8 reach some understanding or agreement how to deal with wage  
9 and hour claims where, you know, if people file proofs of  
10 claim it's not a big issue at that point. Okay?

11 MR. BASSEN: Understood, thank you, Your Honor.

12 THE COURT: All right. Let me hear from the  
13 plaintiffs' counsel.

14 MR. RAISNER: Good morning, Your Honor, Jack  
15 Raisner on behalf of the WARN plaintiffs.

16 With respect to the last in and I'll take the  
17 first out, that's the wage claim.

18 THE COURT: Yes.

19 MR. RAISNER: We did file a class proofs of  
20 claim --

21 THE COURT: You did file a proof of claim.

22 MR. RAISNER: -- timely --

23 THE COURT: Okay.

24 MR. RAISNER: -- certainly in the Holdings case,  
25 and I believe in the SIPA case as well, so.

1 THE COURT: Okay. That may solve that problem.  
2 So in other words if this case -- if this complaint were  
3 dismissed it wouldn't alter -- if the complaint against MF  
4 Global, Inc. were dismissed in its entirety you would still  
5 have a class proof of claim, you'd have to deal with the  
6 class issues, but at least the people -- employees who had  
7 not filed their own proof of claim wouldn't be prejudiced.  
8 That would be your position, right?

9 MR. RAISNER: Precisely.

10 THE COURT: Okay. That -- go ahead.

11 MR. RAISNER: Your Honor, we think the motion to  
12 dismiss should be rejected for two basic reasons.

13 The first is that even if there were such a thing  
14 as a liquidating fiduciary this is not the time to decide it  
15 because of the factual issues which it entails.

16 THE COURT: What's the factual issue with respect  
17 to the SIPA case? I mean as a matter of law it couldn't do  
18 anything other than liquidate.

19 MR. RAISNER: Your Honor hit the nail on the head.  
20 We don't know that it had these people as their employees.  
21 We don't know who effectively was their employer --

22 THE COURT: Yes, but you sued MF Global, Inc. You  
23 can't -- if as a matter of law -- look, if they didn't work  
24 for MF Global, Inc. then dismissing the case against MF  
25 Global, Inc. really is of no consequence to you. If they

1 did work for MF Global, Inc. and as a matter of law it could  
2 do nothing other than liquidate you don't have a claim  
3 against them. What's wrong with that?

4 MR. RAISNER: We're construing the word liquidate  
5 to mean something which can take on a different meaning and  
6 different context. Liquidating is taking assets and turning  
7 it into money. And there may be in the course of a  
8 liquidating 11 or in a 7 or in this proceeding those who  
9 precisely do that and nothing like that, bring in Gordon  
10 Brothers or Hilco and an auctioneer and take on that  
11 function.

12 THE COURT: That's not a SIPC proceeding.

13 MR. RAISNER: In -- within the SIPA proceeding  
14 there are -- the operation can't be -- it can't be, but they  
15 are -- they are employees, they are employees of a business  
16 entity.

17 THE COURT: Well, yes, but it is -- there could be  
18 no factual issue, it can only as a matter of law liquidate,  
19 it can't continue to operate other than to close out  
20 positions, which you know, the first couple of weeks of the  
21 case were taken up with transferring accounts, you know,  
22 following the rules under the Commodities Exchange Act, the  
23 CFTC, 761 et seq. of the Bankruptcy Code trying to get  
24 customers as much of their money back as they could because  
25 they couldn't take orders, they couldn't, you know, they

1 just couldn't.

2           It's not -- it doesn't -- I understand your  
3 argument with respect to, you know -- I have Daffies (ph) --  
4 I have the Daffies case, okay, from day one it was, you  
5 know, they came in with a store closing motion and, you  
6 know, maybe you have an argument, they actually gave WARN  
7 notices before that kept everybody out. But you know, you  
8 could argue that the going out of business sale is  
9 continuing operation. I don't know, it is or it isn't. But  
10 that's not a SIPC case.

11           MR. RAISNER: There's a distinction to be made  
12 between the trustee and his mandate. And if we were to  
13 concede that his mandate is nothing other than to liquidate  
14 we still have the problem that there is an entity, an entity  
15 that still exists. And should we be looking solely at the  
16 characteristics or the activities of the person  
17 (indiscernible - 00:58:51) head whose the fiduciary or  
18 should we be looking at the fact that there is still a --

19           THE COURT: He's responsible, they can't be taking  
20 -- you know, the people who might have still been working  
21 there after the SIPC proceeding commenced and the trustee  
22 was appointed couldn't continue anything remotely like  
23 business as usual. They had a very strict legal mandate of  
24 what they could do and nothing more than that. You -- and  
25 you certainly have alleged no facts. You don't get

1 discovery just because you named somebody as a party, okay?

2 I mean do you have any facts -- can you stand  
3 there and tell me that you can allege facts with some  
4 particularity that MF Global, Inc., the broker/dealer  
5 continued to conduct business operations after the SIPA  
6 proceeding commenced?

7 MR. RAISNER: Business operations, it was doing  
8 the work as a business.

9 THE COURT: That's -- come on.

10 MR. RAISNER: If --

11 THE COURT: Is that the best you can do?

12 MR. RAISNER: Yes.

13 THE COURT: Okay. All right. Let's talk about  
14 the Chapter 11 case, because there I think you've got an  
15 argument, but I -- you know --

16 MR. RAISNER: The issues of fact that precludes  
17 this issue being raised in a motion to dismiss have to do  
18 with what Your Honor has alluded to, which is what we've  
19 cited in our brief, which were the first day motions as a  
20 start which say --

21 THE COURT: Point to me something specifically --

22 MR. RAISNER: -- specifically --

23 THE COURT: -- in a first day affidavit that  
24 indicated, putting aside the broker/dealer, that the non-  
25 regulated businesses, if you will, were attempting to

1 continue operations -- can you point to something specific?

2 MR. RAISNER: They -- without --

3 THE COURT: I didn't go back to look at the first  
4 day affidavit.

5 MR. RAISNER: The first --

6 THE COURT: There are things in the record. Can  
7 you point me anything --

8 MR. RAISNER: It -- the record says that we're  
9 looking for ways to spin off the business, to keep it  
10 running --

11 THE COURT: Show me -- I want you to point to  
12 specific -- you know, page, line number, read me the words  
13 that were said that you believe would support an allegation  
14 that there was continuing business, continuing business  
15 operations -- that it -- that the goal wasn't liquidation,  
16 it was continuing business operations.

17 Give me the document you're reading from, ECF  
18 docket number, if you can provide it, otherwise, you know, I  
19 want to know exactly where you're looking.

20 MR. RAISNER: Looking at the Ferber and Abelo (ph)  
21 affidavits that were --

22 THE COURT: Let's take them one at a time. What  
23 in the Ferber -- what's the date of the Ferber declaration?

24 (Pause)

25 MR. RAISNER: I know the Abelo were -- was the

1 first day motions of -- oh, October 31st.

2 All right. Thirty-three of -- paragraph 33 of  
3 Abelo -- that's the -- that's October 31st --

4 THE COURT: Okay.

5 MR. RAISNER: -- affidavit -- first --

6 THE COURT: And what does that say?

7 MR. RAISER: -- day motions. The -- paragraph  
8 37 --

9 THE COURT: What's in 33? Do you have 33 there?  
10 I don't have these documents opened up so --

11 MR. RAISNER: I don't have 33 in front of me. I'm  
12 looking at 37, which is on page 20 of our brief.

13 THE COURT: What does 37 say?

14 MR. RAISNER: "I believe that the relief sought in  
15 the first day motions is vital to enable the debtors to make  
16 the transition to and operate in Chapter 11 with a minimum  
17 interruption and disruption to their business or loss of  
18 productivity or value and constitutes a critical element in  
19 achieving debtors' successful reorganization."

20 Paragraph 43, "The use of cash collateral is  
21 necessary for the debtors to maintain sufficient liquidity  
22 so that the debtors may continue to operate their business  
23 in the ordinary course of business during these Chapter 11  
24 cases."

25 THE COURT: What page -- what paragraph is that?

1 MR. RAISNER: Forty-three. Paragraph 44, "I  
2 believe that immediate and ongoing use of cash collateral is  
3 required to fund the day-to-day activities of the debtors,  
4 including to make payments to employees and vendors in the  
5 ordinary course of business whose services and goods are  
6 integral to the debtors' operations."

7 THE COURT: All right. Now, let me ask you this.  
8 Look, let's assume that that would -- go ahead.

9 MR. RAISNER: And there are more.

10 THE COURT: I think one of your colleagues wants  
11 to give you some more information.

12 MR. RAISNER: Yeah. Paragraph 67, "The debtors'  
13 ultimate goal is to reorganize their financial affairs under  
14 the terms of a confirmed Chapter 11 plan." Next sentence,  
15 the highlight is "to maintain a business as usual atmosphere  
16 during the pendency of the Chapter 11 cases."

17 THE COURT: Okay. So that's on October 31.

18 MR. RAISNER: Correct.

19 THE COURT: And the layoffs occur on November  
20 what?

21 MR. RAISNER: Eleventh, ten days later.

22 THE COURT: Okay.

23 MR. RAISNER: Eleven days later.

24 THE COURT: You know, sometimes plans can change  
25 rather dramatically between October 31 and November 11.

1 Would that make a difference? Is the critical operative  
2 date November 11th, 2011 or October 31, 2011?

3 MR. RAISNER: Your Honor, I don't know. It's a  
4 mystery. Judge Garrity would say it would be when notice  
5 would have been due, which is 60 days before November 11th.

6 In this matter, I think we should be able to have  
7 -- we've alleged enough to be able to ask the questions and  
8 figure out what was going on, if there is such a thing as  
9 liquidating fiduciary doctrine.

10 THE COURT: Which you obviously disagree with.

11 MR. RAISNER: Correct. But it is very hard for --

12 THE COURT: I mean, your argument --

13 MR. RAISNER: -- employees to be able to divine  
14 what the intentions may be in the debtor-in-possession as to  
15 whether they've changed --

16 THE COURT: Well, there was no -- there --

17 MR. RAISNER: -- whether they've pivoted or not --

18 THE COURT: -- there was no misunderstanding for  
19 anybody who working with the broker/dealer. I mean, it just  
20 -- the Chapter 11 debtors may have been a different story  
21 but -- you really contend that anybody working with the  
22 broker/dealer could have had any understanding other than  
23 it's a liquidation?

24 MR. RAISNER: I don't want to be flippant and say  
25 things could change, but they could have changed.

1 THE COURT: They couldn't? Actually, they  
2 couldn't.

3 MR. RAISNER: They could have changed maybe --

4 THE COURT: They couldn't. They couldn't.

5 MR. RAISNER: They couldn't. Okay.

6 THE COURT: Once Judge Engelmayer entered his  
7 order, I suppose somebody could move to vacate it, but -- I  
8 mean, once Judge Engelmayer appointed Mr. Giddens as the  
9 SIPA trustee and by statute the case is removed to the  
10 Bankruptcy Court -- I understand your argument about the  
11 chapter -- can you tell me -- do you know who these four  
12 plaintiffs were employed by?

13 MR. RAISNER: Your Honor, I can't say that as a  
14 matter of law because the company itself did not --

15 THE COURT: Don't tell me --

16 MR. RAISNER: -- make that distinction.

17 THE COURT: Don't tell me as a matter of -- you  
18 have four clients, four named clients. Did you ever get,  
19 you know, a pay stub? Did you ever get, you know, their --  
20 any -- did they have contracts?

21 MR. RAISNER: They had conflicting signals. They  
22 were not -- they were never pigeonholed.

23 THE COURT: Did they -- did your four clients have  
24 written employment agreements?

25 MR. RAISNER: No.

1 THE COURT: Your -- you can affirmatively  
2 represent --

3 MR. RAISNER: To the best of my knowledge, they  
4 did not. Others have. Others who have -- clients of ours.  
5 It --

6 THE COURT: Where did they -- where -- what's your  
7 understanding about where they worked?

8 MR. RAISNER: They worked --

9 THE COURT: Whoever their legal -- whoever their  
10 employer might be for some legal purpose --

11 MR. RAISNER: Right.

12 THE COURT: -- where did they work?

13 MR. RAISNER: As was just represented, the central  
14 facility, which was under -- which is Holdings, Ltd., that  
15 is the parent overarching, that controlled the overall  
16 business enterprise that constituted --

17 THE COURT: That's fine, but would you answer my  
18 question? Can you tell me where these four people worked on  
19 a day-to-day basis?

20 MR. RAISNER: There was -- there wasn't a  
21 physical --

22 THE COURT: Come on. There's was the  
23 broker/dealer -- was in a separate facility -- two, at least  
24 two, maybe more than two -- did any of these four plaintiffs  
25 work at MF Global, Inc., the broker/dealer? Do you know?

1 MR. RAISNER: They were in --

2 THE COURT: Don't fence with me. Do you know?

3 MR. RAISNER: If you -- no, I don't think that  
4 they can themselves tell you that they were strictly  
5 broker/dealer --

6 THE COURT: Okay.

7 MR. RAISNER: -- clients --

8 THE COURT: Let me ask you this.

9 MR. RAISNER: -- were employees.

10 THE COURT: Did any of these four people -- were  
11 they - I'm more familiar with the securities side than the  
12 commodities side -- where they -- did they have Series 7  
13 licenses, 63 -- did -- were they licensed by -- did they  
14 have licenses from either the SEC or the CFTC?

15 MR. RAISNER: Some may have, some did not.

16 THE COURT: Tell me, of the four plaintiffs, who  
17 of them were licensed?

18 MR. RAISNER: One was a -- I believe just  
19 Thielmann, Ms. Savoviwitz (ph) was a computer operation.  
20 She was --

21 THE COURT: Thielmann was a registered -- with --  
22 do you know what license -- on the commodity -- well,  
23 probably have both commodities and --

24 MR. ERCOLE: Charles Ercole.

25 THE COURT: Yes.

1 MR. ERCOLE: I'm pretty sure Thielmann was on the  
2 Chicago or he's a broker on commodities.

3 THE COURT: Do you have any information on where  
4 the other three worked?

5 MR. RAISNER: Ms. Savova (ph) worked on computer  
6 systems for all the entities for Holdings, for programs that  
7 had to do with the broker/dealer. It was a centralized  
8 computer system, so she was --

9 THE COURT: It wasn't.

10 MR. RAISNER: -- a technician.

11 THE COURT: It wasn't.

12 MR. RAISNER: I believe that she -- her operations  
13 were not isolated to a division between the broker/dealer  
14 and the --

15 THE COURT: Okay.

16 MR. RAISNER: -- parent.

17 THE COURT: Okay. What about the other two?

18 MR. RAISNER: And --

19 MR. ERCOLE: Mr. Despowa (ph) worked as risk  
20 management.

21 THE COURT: Where?

22 MR. ERCOLE: In New York.

23 THE RAISNER: Do you know -- risk management would  
24 have been a Holdings position. It would have been  
25 centralized. It would have been in the uptown offices with

1 the corporate --

2 THE COURT: Which of the four?

3 MR. ERCOLE: Mr. Despowa.

4 THE COURT: Okay.

5 MR. RAISNER: And Ms. Bowles (ph) is in Chicago,  
6 and I believe that that operation was not corporate. It was  
7 a broker/dealer operation, but I'm not sure of her job.

8 THE COURT: What I -- when I asked the --  
9 Mr. Bassen to get for me by the end of the week --

10 MR. HERTZBERG: You asked me.

11 THE COURT: I'm sorry -- I asked --

12 MR. HERTZBERG: Mr. Hertzberg.

13 THE COURT: I'm sorry, Mr. Hertzberg, to get for  
14 me by the end of the week -- obviously share the information  
15 -- see if you can get an agreement that's that where they --  
16 well, give it to me. We'll see whether there's a dispute  
17 afterward. Okay? But, obviously, provide the information  
18 to the plaintiffs' counsel as well.

19 MR. HERTZBERG: Of course.

20 MR. RAISNER: Your Honor, even if they did work on  
21 broker/dealer activities, when you have an organization that  
22 is driven from the top by a company which is certainly not a  
23 broker/dealer but --

24 THE COURT: Are you --

25 MR. RAISNER: -- maintains that --

1 THE COURT: -- don't tell me. Wait a second.

2 MR. RAISNER: -- Holdings --

3 THE COURT: Holdings is not a --

4 MR. RAISNER: -- Holdings, Ltd.

5 THE COURT: -- broker/dealer.

6 MR. RAISNER: Correct. And Holdings, Ltd., as  
7 Mr. Hertzberg recited, was the ones who interviewed these  
8 people. They had the -- they had common personnel --

9 THE COURT: No, he didn't say Holdings.

10 MR. RAISNER: -- administration.

11 THE COURT: He didn't say Holdings interviewed  
12 them.

13 MR. RAISNER: Yes, he did.

14 THE COURT: I think he said USA --

15 MR. RAISNER: Well, that's --

16 THE COURT: -- or -- you know, Holdings, I think  
17 of Holdings, Ltd. He's saying Holdings USA interviewed  
18 them.

19 MR. RAISNER: We have to figure out who was  
20 controlling this overall organization, whether the policies  
21 were integrated. These employees may be designated in one  
22 department or another, but they are still employees of the  
23 parent under the single employer doctrine until -- and they  
24 have not moved to dismiss on that basis if --

25 THE COURT: Look, you're not --

1 MR. RAISNER: -- but we've not alleged that.

2 THE COURT: You're not going to get discovery  
3 until you have a complaint that can withstand a motion to  
4 dismiss. Okay?

5 So, at best, you're likely looking at a dismissal  
6 of the case against Global -- MF Global, Inc., the  
7 broker/dealer.

8 If I'm not satisfied with the complaint against  
9 Holdings and Finance, Holdings Ltd., Holdings USA,  
10 Finance USA, because, at a minimum -- I mean, I'm not saying  
11 you're even going to get this far. Okay? But you haven't  
12 alleged who people worked for.

13 Your clients -- you can certainly include facts  
14 about their employment, where the reported on a day-to-day  
15 basis. If it was more than one, fine. But you can't just  
16 throw out plaintiffs worked for the defendants. That's not  
17 going to cut it.

18 MR. RAISNER: Okay.

19 THE COURT: I need more -- if you get as far as an  
20 amended complaint you're going to have to provide many more  
21 specifics.

22 MR. RAISNER: Okay.

23 THE COURT: If I dismiss the case against MF  
24 Global, Inc. and any of the plaintiffs were employees of MF  
25 Global, Inc. -- it certainly sounds that Mr. Thielmann was

1 an employee of MF Global, Inc. -- you know, his claim is  
2 going to go along with the dismissal.

3 If the case survives against others and you can  
4 establish that they were employees of others, maybe it'll  
5 survive, but -- let's -- go ahead and address -- your  
6 argument is that the preamble is not entitled to Chevron  
7 deference, but you do acknowledge that it may still be  
8 entitled to some deference. The question is how much,  
9 agreed?

10 MR. RAISNER: Yes.

11 THE COURT: Okay. You just think the Third  
12 Circuit was flat out wrong, correct?

13 MR. RAISNER: Correct.

14 THE COURT: And are there any cases since the  
15 Third Circuit case that go the other way?

16 MR. RAISNER: The only case that's reported is Law  
17 versus American Capital. The facts there are slightly  
18 different, but the Court certainly did not find there was a  
19 liquidating fiduciary in that case. So, there is no other  
20 reported decisions.

21 The Century --

22 THE COURT: The Third Circuit was talking about  
23 United.

24 MR. RAISNER: -- Century City has been briefed.  
25 Doctors' Hospital, we've addressed that. There are --

1 that's the universe of case, Your Honor.

2 THE COURT: Okay. Any other points you want to  
3 make?

4 MR. RAISNER: Well, our point --

5 THE COURT: Wait. Let me ask you this.

6 MR. RAISNER: -- is that it -- the level of  
7 deference is zero because --

8 THE COURT: Look, a court could decide for itself  
9 that the term employer is not defined in the statute, and  
10 how it is a SIPA trustee, in a liquidation, an employer for  
11 purposes of the Warren Act?

12 MR. RAISNER: Because it's paying employees. It  
13 has an IEN number. It's paying employment taxes. It's  
14 following the law with respect to their employment in all  
15 other respects. That's why. And there's nothing in the  
16 statute that suggests that it shouldn't be considered for  
17 Warren purposes either. Only this sentence, had it not been  
18 an off-the-cuff statement, in this preamble --

19 THE COURT: You think it's an off-the-cuff?

20 MR. RAISNER: Yes.

21 THE COURT: It was more than an off-the-cuff  
22 statement.

23 MR. RAISNER: Your Honor, I think it was off-the-  
24 cuff in that the Department of Labor was responding to a  
25 commenter who said I think this -- these regulations should

1 address bankruptcy and liquidation and the answer was no, it  
2 should not. We're not going to address it in our  
3 regulations. It's not within the ambit of things that we  
4 find necessary to carry out the purpose of the statute to  
5 talk about it.

6 THE COURT: And we don't think a liquidating  
7 bankrupt is an employer and we think the regulations ought  
8 to cover people who get notice from an employer.

9 MR. RAISNER: It's not a liquidating bankrupt.  
10 It's the trustee. The trustee should not be held liable.  
11 That we can agree. There's no personal liability and that's  
12 the thrust of that comment, if I read it correctly --

13 THE COURT: Okay.

14 MR. RAISNER: -- and others could say, well, it's  
15 not talking about the fiduciary. It's not -- but it is  
16 because the comment is well, that fiduciary is taken care of  
17 under the adequate protections of the Bankruptcy Court --  
18 meaning that the fiduciary -- we're not suing Mr. Freeh,  
19 we're not suing Hughes Hubbard & Reed, we're not suing them.

20 THE COURT: I understand.

21 MR. RAISNER: We're suing the entity, and as far  
22 as you can tell from the comment, we're still right. The  
23 entity itself doesn't cease to be an employer. We're  
24 talking about not holding the trustee personally liable.

25 And there are other inscrutables, cryptic

1 questions. What is a failed business? You know, is a  
2 failed business that is failed by what standard.

3 Again, there's been a gloss given to this, and if  
4 you read the gloss from critically, it sounds like, okay,  
5 this has to be the law. But if you look at the sentences  
6 and what is being said, there was no intent by this person  
7 to be regulating to the extent that it is going to divest  
8 employees of federal rights based upon cryptic statements  
9 for which there should be some rationale, and none is given  
10 in the preamble and none is given in United Healthcare.

11 It's received wisdom but it's out of a mythic  
12 creature. I would say, Your Honor, the SIPA trustee  
13 presents the most serious situation.

14 We're not just talking about an 11. We're not  
15 just talking about a 7. We're talking about a hybrid, a  
16 special situation. Certainly that wasn't looked at or  
17 thought about, but I understand that, if there were a case  
18 of a sole function being liquidation, what we're looking at  
19 here poses a strong possibility. But if this comment is not  
20 the law, then we should hold the entity that's a business  
21 employer, that's filing IENs and waived W-2s and all that to  
22 Warren because the statute doesn't say otherwise. And the  
23 regulations don't say otherwise. And to do so is arbitrary  
24 and --

25 THE COURT: So, let me just -- I know you just

1 think the Third Circuit got it completely wrong --

2 MR. RAISNER: Well, it certainly did -- I mean, it  
3 didn't even stop at sole functions. It said it was the  
4 preponderance of the act. We're going to use a --

5 THE COURT: You think the Third Circuit's wrong?

6 MR. RAISNER: Correct.

7 THE COURT: But even if it's right, with respect  
8 to Holdings and Holdings, USA, Holdings Ltd., Global  
9 Finance, you think that you could amend the complaint to  
10 bring it within the DOL commentary, right? Because you --

11 MR. RAISNER: I say we have a -- certainly a  
12 chance, but I say this because I don't know that I  
13 understand the commentary. But I understand what Your Honor  
14 is suggesting and, yes, we would like to have the  
15 opportunity certainly to do that. And also to show that  
16 what are called the SIPA employees are not only SIPA  
17 employees, even if they worked at SIPA because of the single  
18 employer test for which there's been no motion to dismiss,  
19 which would allow them to essentially have the two employers  
20 merged together. Because that's the way business operated.

21 THE COURT: You -- well, I don't think so.

22 MR. RAISNER: Well --

23 THE COURT: Not a broker/dealer. Not a  
24 broker/dealer.

25 MR. RAISNER: With respect to handling customer's

1 money, correct, Your Honor. But the people who are asked to  
2 do that are not employees of a separate, isolated entity.  
3 They are controlled, hired by, and have the right, under  
4 Warren, to be able to sue the actual controlling employer  
5 specifically in a situation where their immediate employer  
6 is judgment-proof. And the reason why there's a single  
7 employer concept --

8 THE COURT: You've alleged --

9 MR. RAISNER: -- in employment law --

10 THE COURT: -- you've alleged none of that.

11 MR. RAISNER: Yes, we have. We have a detailed --  
12 we have detailed, in the complaint, 30 allegations as to why  
13 the --

14 THE COURT: Okay.

15 MR. RAISNER: -- Holdings was the actual employer  
16 and --

17 THE COURT: No, no, no.

18 MR. RAISNER: -- which is very consistent --

19 THE COURT: Wait -- time --

20 MR. RAISNER: -- with what we just heard here  
21 today.

22 THE COURT: Stop.

23 MR. RAISNER: Sorry.

24 THE COURT: Time out. I'm talking about your  
25 claim against MF Global, Inc.

1 MR. RAISNER: And Your Honor's --

2 THE COURT: I understand --

3 MR. RAISNER: -- a notion on this I would agree.

4 If we had to isolate --

5 THE COURT: I should have been clearer.

6 MR. RAISNER: -- ourselves to only the Inc. and  
7 we'd have to rise and fall right now on our allegations as  
8 to whether Inc. was liquidating or not, we would have a hard  
9 time. But we aren't.

10 We should be entitled to show that Inc. was not  
11 the sole employer. It was a single employer with the  
12 enterprise that it belonged to which is on that chart. And  
13 all of those little boxes are part of the enterprise and  
14 that's what the business enterprise and the statute's  
15 definition of employer is all about.

16 It's not a business. It's not a sole company.  
17 It's an enterprise which is that chart. And certainly they  
18 were employees of that enterprise.

19 THE COURT: Let me ask you this. With respect to  
20 the wage and hour claims, the wage and vacation pay, why  
21 should they proceed as an adversary proceeding as opposed to  
22 the claim that was filed?

23 MR. RAISNER: Basically administrative  
24 convenience, Your Honor. We agree with the analysis that,  
25 strictly speaking, under Section 7000, a wage claim and a

1 vacation claim is not equitable relief and, on its own, we  
2 would not bring it as an adversary ever.

3 We brought it sort of under the supplemental  
4 jurisdiction that if -- I know, if it was convenient to  
5 proceed that way. If there were contested issues, the  
6 employees are in place. If not, we would go the other  
7 route.

8 THE COURT: All right. Mr. Hertzberg?

9 MR. HERTZBERG: Yes, Your Honor.

10 THE COURT: I've been read paragraphs from  
11 Mr. Abelo's declaration of October 31st, 2001 (sic) that  
12 repeatedly refer to ordinary course of business, the  
13 ultimate goal to reorganize, business as usual. Isn't that  
14 sufficient to withstand -- I mean, I'm not sure what I would  
15 accomplish by requiring the plaintiff to amend the complaint  
16 to add what -- the language that's specifically in the  
17 Abelo declaration.

18 This is the point that I guess was bothering me.  
19 I didn't go back to look at those declarations. I  
20 remembered -- it seemed to me from day one of the case that  
21 Holdings seemed to think it could reorganize. Not the -- it  
22 couldn't reorganize the broker/dealer but it could  
23 reorganize its unregulated businesses.

24 So doesn't the statements by Mr. Abelo, even if I  
25 were to accept the Third Circuit's analysis and apply the

1 DOL preamble with this liquidating fiduciary doctrine, that  
2 as to the entities other than MF Global, Inc., they've  
3 stated a claim sufficient to get by a motion to dismiss?

4 MR. HERTZBERG: No, and let me tell the Court why.  
5 One, counsel didn't read the full sentence. To give you an  
6 example, in paragraph 67, he read to the Court the  
7 highlighted area of his paragraph which is -- he said to  
8 maintain a business as usual atmosphere.

9 What he didn't read to the Court is, is that the  
10 sentence begins with, "Debtors' immediate objective is to  
11 maintain a business atmosphere during the pendency of the  
12 Chapter." Doesn't say it's going to reorganize.

13 THE COURT: What about -- go back --

14 MR. HERTZBERG: And, also, one other thing, Your  
15 Honor --

16 THE COURT: Do you have -- well, wait, hang on a  
17 second.

18 MR. HERTZBERG: Okay.

19 THE COURT: Do you know the ECF number of the  
20 document?

21 MR. HERTZBERG: I don't, Your Honor. I know it  
22 would've been one of the first, because it's filed on  
23 October 31st, so it's got to be filed before the motions.  
24 Probably it goes in the affidavit.

25 (Pause)

1 MR. HERTZBERG: I think it's docket number 9, Your  
2 Honor.

3 (Pause)

4 THE COURT: I'll find out, excuse me for the  
5 delay.

6 (Pause)

7 THE COURT: Paragraph 43, quote, "The use of cash  
8 collateral is necessary for the debtors to maintain  
9 sufficient liquidity so that the debtors may continue to  
10 operate their businesses in the ordinary course of business  
11 during the Chapter 11 cases."

12 Why doesn't that support --

13 MR. HERTZBERG: That doesn't -- and, if you look  
14 at the paragraphs, all of them that they cite, and I'll  
15 address this one specifically also that the Court raised,  
16 these are all wishes. They haven't cited one single fact,  
17 and they still haven't before the Court today --

18 THE COURT: They have. The Abelo declaration --  
19 later, the last sentence in that paragraph. "Moreover, in  
20 the absence of the use of cash collateral, continued  
21 operation of the debtors' business, even for a limited  
22 period of time, would not be possible and serious and  
23 irreparable harm to the debtors and their estates would  
24 occur."

25 MR. HERTZBERG: But that doesn't say they're

1 operating the business for -- as what would be known as an  
2 employer under that. They could be operating the business,  
3 Your Honor, to liquidate the business. You need to use cash  
4 collateral in order to fund payroll to liquidate the  
5 business.

6 Just like the SIPA, as an entity, would need use  
7 of cash collateral in order to liquidate the business.  
8 There is no facts -- they never stood up before the Court  
9 today and said to the Judge, to you, Your Honor, look what  
10 they were doing as an ongoing business entity. They grab a  
11 few paragraphs out of the Abelo --

12 THE COURT: This is not an evidentiary hearing.  
13 The issue is whether the complaint is sufficient to  
14 withstand the motion to dismiss. The last sentence --

15 MR. HERTZBERG: But there's nothing in the  
16 complaint.

17 THE COURT: Well, okay. You want to force them to  
18 amend the complaint to parrot what Mr. Abelo said in  
19 paragraphs 43, 44 -- let me read 67. Hold on.

20 You may well have a good defense.

21 MR. HERTZBERG: And I understand what the Judge is  
22 -- what you're saying, Your Honor. What I had hoped they  
23 would have done when they stood up before you just now is  
24 said, let me point to specific facts and we can amend the  
25 complaint --

1 THE COURT: That's what I asked them to do --

2 MR. HERTZBERG: But --

3 THE COURT: -- and they pointed me to specific  
4 facts.

5 MR. HERTZBERG: But they didn't. If you read --

6 THE COURT: They did.

7 MR. HERTZBERG: -- if you read paragraph 67, the  
8 highlighted areas, it says the debtors' ultimate goal is to  
9 reorganize their financial affairs under the terms of a  
10 confirmed Chapter 11 plan. That doesn't mean they're  
11 operating. They have a goal. Everyone who files Chapter 11  
12 has a goal of operating their business --

13 THE COURT: Not -- no, you'd be surprised. I  
14 mean, I -- cases come in and they say immediately the goal  
15 is to keep us alive so we conduct a 363 sale as soon as  
16 possible. More often than not, that seems to be what we  
17 hear.

18 MR. HERTZBERG: But that's not what you're hearing  
19 here. There was no -- nothing in the affidavit that says we  
20 need to use cash collateral in order to operate in order to  
21 effectuate a 363 sale.

22 THE COURT: Rule 8 applies to this pleading. You  
23 agree?

24 MR. HERTZBERG: Yes.

25 THE COURT: Okay. Any additional points you want

1 to make?

2 MR. HERTZBERG: No, Your Honor.

3 THE COURT: Okay. Mr. Bassen, is there anything  
4 you want to --

5 MR. BASSEN: Nothing further, Your Honor.

6 THE COURT: Okay. Court is going to take the  
7 matter into submission. I do want to see information about  
8 -- let me be clear here. I want to know by whom the four  
9 plaintiffs were employed, and I also want to know where they  
10 were working. I mean, because there may be a difference. I  
11 mean, their legal -- their employer may have been different  
12 than -- if somebody was working at -- well, I want to know  
13 who their employer was.

14 MR. HERTZBERG: I understand. In other words,  
15 Your Honor, if they received a paycheck from one entity --

16 THE COURT: I do.

17 MR. RAISNER: -- and they were working at another,  
18 you want to know that.

19 THE COURT: I do. I want to know that.

20 MR. HERTZBERG: Understood.

21 THE COURT: Okay.

22 MR. RAISNER: That's just one fact, Your Honor.  
23 That's not conclusive.

24 THE COURT: I understand, but you didn't plead  
25 anything about it.

1 MR. RAISNER: Yes, we did. We said --

2 THE COURT: Where these people were -- who their  
3 employer was. Did you plead that? Did you plead that? Yes  
4 or no?

5 MR. RAISNER: We said that they are employed by  
6 both entities. They -- that's the single employer  
7 allegation. Their employer is this business enterprise.  
8 That's our allegation, Your Honor.

9 THE COURT: Okay. All right.

10 MR. RAISNER: And the distinctions are --

11 THE COURT: I'll see what's filed. I'm taking the  
12 matter under submission.

13 MR. HERTZBERG: Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Whereupon these proceedings were concluded at 11:35

16 AM)

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I N D E X

RULINGS

Page Line

Adversary proceeding: 11-02880-mg - Motion  
to Dismiss Adversary Proceeding/Memorandum  
of Law of James W. Giddens, SIPA Trustee for  
the Liquidation of MF Global Inc. in Support  
of Trustee's Motion to dismiss the Amended  
Class Action Adversary Proceeding Complaint  
filed by Christopher K. Kiplok on behalf of  
James W. Giddens, Trustee for the SIPA  
Liquidation of MF Global Inc.

75 7

Adversary proceeding: 11-02880 - Motion to  
Dismiss Adversary Proceeding, Memorandum of  
Law in Support, and Certificate of Service  
filed by Robert S. Hertzberg on behalf of  
Louis J. Freeh, MF Global Finance USA, Inc.,  
MF Global Holdings USA INC., MF Global  
Holdings, Ltd.

75 7

Adversary proceeding: 12-01754 - Pre-trial  
Conference

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

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

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South

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