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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case Nos. 11-15059 (MG) ; 11-02790 (MG)

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In the Matters of:

MF GLOBAL HOLDINGS LTD., et al.,

Debtors.

- - - - -x

MF GLOBAL, INC.

Debtor.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

April 2, 2012
2:01 PM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

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11-15059-mg MF Global Holdings Ltd. Ch. 11
(doc. no. 409) Hearing Regarding Objections to Notice of
Presentment of Stipulation and Order Between the Chapter 11
Trustee and MFG Assurance Company Limited Regarding Payment of
Loss and Reimbursement of Covered Costs and Expenses filed by
Brett H. Miller on behalf of Louis J. Freeh

11-02790-mg MF Global Inc. Ch. 11
Adversary proceeding: 1102790-mg MF Global Inc.
Doc# 1191 Notice of Hearing/Notice of Agenda of Matters
Scheduled for Hearing on April 2, 2012 at 2:00 p.m.

(CC: Doc# 1046) Motion to Approve/Trustee's Motion to Approve
Section 363 Purchase Agreement in Furtherance of Court-Ordered
Bulk Transfers

11-15059-mg MF Global Holdings Ltd. Ch. 11
Doc# 599 Notice of Agenda of Matters Scheduled to be Heard on
April 2, 2012 at 2:00 p.m. (EST)

Doc# 428 Motion for Relief from Stay

Transcribed by: Lisa Bar-Leib

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P R O C E E D I N G S

THE COURT: Please be seated. All right. We're here in MF Global, Inc., number 11-02790 and MF Global Holdings Ltd., number 11-145059. And we're going to take the MF Global Inc., the 363 motion, first.

MR. TRAGER: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Trager.

MR. TRAGER: Josiah Trager, Hughes Hubbard & Reed for the SIPA trustee, James W. Giddens. Your Honor, the SIPA trustee has moved for approval to liquidate the physical customer assets being held by MF Global for the purposes of completing the third bulk transfer that Your Honor authorized back in December.

As you'll no doubt recall, as part of that third bulk transfer motion, the trustee sought and received Your Honor's approval to transfer warehouse receipts and other documents of title provided that the transfer did not exceed their pro rata share of the bulk transfer which was seventy-two percent of the books and records value of their accounts.

In the instances where the warehouse receipts exceeded -- well, rather, in the instances where they did not exceed seventy-two percent, the receipts were transferred outright and the former customers received additional cash to top them up to seventy-two percent. It's in the case of those warehouse receipt holders that would exceed seventy-two percent

1 to receive them all that the customers could either post
2 additional collateral with the trustee in the difference above
3 seventy-two percent and receive their warehouse receipts
4 otherwise the former customers could identify which warehouse
5 receipts they would like to have liquidated to bring their
6 distribution below seventy-two percent. Which brings us to
7 today.

8 The requested approval is to sell approximately 106
9 warehouse receipts all of which are precious metals. You may
10 recall that the trustee started with over 1600 such receipts
11 and documents of title which were metals and agricultural
12 products of which approximately 600 or more were metals
13 receipts. And as I mentioned, we're down to approximately 106.

14 The trustee's professionals, working in concert with
15 the CME and other exchanges, spent the remainder of December,
16 into January and part of February facilitating those individual
17 transfers with the account holders of the warehouse receipts.
18 And then February, again, working with the CME, the trustee
19 sought to find a method to liquidate these receipts on behalf
20 of the customers.

21 MFGI is not a live entity and doesn't have trading
22 authority on the exchanges. And even if it were, precious
23 metals are not actively traded every month. And moreover, even
24 if it could sell them as a live entity, there are costs
25 associated with the sale. The trustee believes that the

1 proposed transaction with Jefferies, outlined in the trustees
2 moving papers, represents the best possible method for
3 liquidating these remaining receipts. Jefferies will purchase
4 all the receipts which is comprised of five different precious
5 metals; will purchase the receipts held on both clearing
6 exchanges; and will purchase them at nearly full-face value.

7 The trustee received two responses to this motion
8 which were addressed in our omnibus reply. One such response
9 sought clarification that no rights of any customers to object
10 to a trustee's determination of their claim on any basis
11 whatsoever is affected by this motion. The trustee agrees with
12 that and, together with the respondent --

13 THE COURT: That's the Coxe --

14 MR. TRAGER: That's correct.

15 THE COURT: -- objection.

16 MR. TRAGER: -- the trustee proposed additional
17 language in a revised proposed order which we've submitted to
18 the Court. The other was from Mr. Paul Hamann of Illinois who
19 objected on various grounds and is present here in the
20 courtroom if Your Honor would like to hear from him as well.

21 THE COURT: Let me hear from Mr. Hamann.

22 MR. HAMANN: Paul Hamann, pro se. I believe I have
23 title -- a valid title to the palladium listed in this motion
24 363. May I approach the bench and show you a --

25 THE COURT: Certainly. Have you shown it to Mr.

1 Trager first?

2 MR. HAMANN: No.

3 THE COURT: Show it to Mr. Trager and then I'll let
4 you come on up.

5 (Pause)

6 THE COURT: Okay. You can bring it up. Thank you.
7 Go ahead back. I'll give it back to you. Don't worry.

8 MR. HAMANN: Sure.

9 THE COURT: Go ahead back to the microphone so we get
10 a clear -- that's fine. Go ahead. Why don't you describe for
11 me what you've given me.

12 MR. HAMANN: Okay. I believe that if you were to
13 bring a car into a car dealership for an oil change and came
14 back a week later and during that period that dealership went
15 out of business, I believe that the auto dealer could put a
16 lien on the oil change but that the title wouldn't transfer to
17 the dealership just because it went into bankruptcy. And if
18 you can see by that document, it shows C, as far as customer,
19 and not the broker, as far as MF Global, owning it. And also
20 due to the fact that it says "No Liens", I interpret it to be a
21 valid title document just like a home. You have a title to a
22 home -- yes, a plumber might come in and do work and put a lien
23 against your property, but in no way do they have title to your
24 house.

25 THE COURT: I think the -- one issue, Mr. Hamann, is

1 whether in light of the regulatory structure, whether title is
2 determinative of the outcome with respect to these palladium
3 certificates. Do you have anything you want to say to that? I
4 mean, the trustee did address that in his papers.

5 MR. HAMANN: I guess I didn't understand that as far
6 as what the -- why you don't believe the --

7 THE COURT: Let me ask you this first.

8 MR. HAMANN: Sure.

9 THE COURT: You agree that this property was held --
10 you had a commodity account with MF Global Inc., correct?

11 MR. HAMANN: I am protesting that. I tried to file
12 something -- I have an interactive broker account that I'm
13 allowed to trade both stocks and commodities. And when I do
14 not have any open position, it is a SIPA-insured account
15 because it has cash and securities. So, yes --

16 THE COURT: I believe that these palladium
17 certificates were held in a securities account as opposed to a
18 commodities account.

19 MR. HAMANN: I'm saying that a title document, based
20 upon FINRA and the SEC, that -- and Black Law's Dictionary,
21 that a title document is a security whether or not SIPC defines
22 it that way or not.

23 THE COURT: Well, you agree that these palladium
24 certificates you were holding were commodities?

25 MR. HAMANN: I believe it is a security because it's a

1 title document.

2 THE COURT: Do you have something that you can point
3 to that says that any title document, even for commodities, is
4 transformed into securities for purposes of the Securities
5 Investor Protection Act?

6 MR. HAMANN: As far as when you buy a stock in GM or
7 something like that, they effectively own commodities so you
8 could basically say in that case, a stock is also a commodity.

9 THE COURT: Who owns commodities in that case?

10 MR. HAMANN: The corporation.

11 THE COURT: Okay. Go ahead.

12 MR. HAMANN: That's basically my only point or comment
13 on this. I mean, I had probably eighty-three other points, but
14 to me, that's the basic crux of the whole issue that I believe
15 that the general public, when they get an electronic warrant or
16 a print screen of an electronic warrant that they believe as
17 far as reasonable reliance that they are actually owning a
18 security --

19 THE COURT: Well, the print screen that you've handed
20 up to me and you showed to Mr. Trager, specifically says
21 "Commodity Palladium". It doesn't say "Security Palladium"; it
22 says "Commodity Palladium".

23 MR. HAMANN: But --

24 THE COURT: And this was --

25 MR. HAMANN: -- the foundation is --

1 THE COURT: This is a print screen from the New York
2 Mercantile Exchange.

3 MR. HAMANN: Exactly. Because in 2005, approximately,
4 I purchased ten of them. Since then, it's gone from the 200
5 dollars to 700 dollars and I sold half of them. So I only have
6 five left. And one of them is the one in dispute right now.

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

8 MR. HAMANN: No, thank you.

9 THE COURT: Mr. Trager?

10 MR. TRAGER: Josiah Trager. Your Honor, to the extent
11 that it is an issue, the CME's outside counsel, Vincent Lazar,
12 from Jenner & Block is --

13 THE COURT: No. I think you can address this
14 especially. Go ahead.

15 MR. TRAGER: Your Honor, title does not vest with the
16 ultimate consumer. The ultimate customer does not have
17 commodities -- active commodities trading rights on an
18 exchange. You have to be an exchange member which MF Global
19 Inc. was. MF Global held the receipts on behalf of many of its
20 customers. If Mr. Hamann wanted to sell them, he would make an
21 order with his broker who then had the right to execute and
22 deliver.

23 Title does not vest with the ultimate consumer. It is
24 customer property. Physical customer property is simply a
25 subset of all the customer property under the CFTC regulations.

1 That's, unfortunately, required to be decided pro rata
2 regarding of what manner it's held.

3 THE COURT: Was this account used for margin purposes?
4 We've already resolved one -- we had an earlier opinion in
5 connection with the settlement of the Thayne (ph.) case --
6 Jason Thayne. How is this distinguishable from the Thayne
7 matter?

8 MR. TRAGER: Well, in the case of the Thayne matter
9 and the HSBC interpleader, Mr. Thayne had actually requested
10 the physical possession of the bars that were being held by MF
11 Global in advance of liquidation and, in fact, had been
12 transferred. So the title, if you will, was no longer on the
13 books and records of MF Global and it was Mr. Thayne. As you
14 know, from the interpleader in the chaos that ensued, the
15 trustee instructed HSBC not to deliver those until it had an
16 opportunity to do an investigation. Upon investigation, it was
17 determined that MF Global did not have those in its --

18 THE COURT: So the determinative distinction was that
19 in the Thayne case, he had demanded or requested delivery
20 before the bankruptcy was filed.

21 MR. TRAGER: Correct. And in fact, it had been
22 executed before the bankruptcy was filed.

23 THE COURT: And here, that never occurred.

24 MR. TRAGER: That's correct, Your Honor.

25 THE COURT: Okay. I'm going to take the matter under

1 submission.

2 MR. TRAGER: Thank you, Your Honor.

3 THE COURT: Thank you very much.

4 MR. TRAGER: Your Honor, before we pass, if it's all
5 right, for those involved with this motion be excused.

6 THE COURT: Absolutely.

7 MR. TRAGER: Thank you, Your Honor.

8 THE COURT: Thank you very much. All right. We're
9 now going to move to the arguments on the insurance issues.
10 We're dealing with the motion of U.S. Specialty to lift the
11 automatic stay to permit it to advance or reimburse defense
12 costs in certain actions. And the second matter arose on the
13 notice of presentment of a stipulation between the MF Global
14 Holdings Chapter 11 trustee and MFG Assurance Co. to permit the
15 payment -- reimbursement or advancement of defense costs there.
16 Mr. Marinuzzi, are you going to begin?

17 MR. MARINUZZI: Yes, Your Honor. Good afternoon, Your
18 Honor. Lorenzo Marinuzzi of Morrison & Foerster, counsel to
19 the Chapter 11 trustee. With me in court today is my
20 associate, William Hildbold, along with special insurance
21 counsel -- proposed special insurance counsel for the Chapter
22 11 trustee, Dianne Coffino, Covington & Burling.

23 Your Honor, as the Court noted, we're here on two
24 related motions. The first is a motion filed by U.S. Specialty
25 Insurance for relief from the automatic stay to pay an advance

1 of defense costs under D&O policies to insured persons. U.S.
2 Specialty provides twenty-five million dollars, which is the
3 first layer of 225 million dollars of D&O coverage for the
4 2011/2012 policy period. And it provides that coverage to
5 officers and directors of MF Globing Holdings Ltd. and its
6 subsidiaries for losses arising out of wrongful acts. And I'm
7 using general terms; obviously, the policies control.

8 Under the same policy, MF Global Holdings and its
9 subsidiaries are insured for losses they incur in making
10 payments on behalf of the officers and directors. So it's for
11 indemnity. And the policy also insures MF Global Holdings and
12 its subsidiaries for securities claims that might be asserted
13 against them.

14 THE COURT: It's the part A, B and C?

15 MR. MARINUZZI: Correct. U.S. Specialty also provides
16 a ten million dollar policy, a fiduciary liability policy,
17 which generally provides coverage for MF Global Holdings, its
18 subsidiaries and their respective officers and directors
19 arising out of employee benefit plans.

20 THE COURT: Are there any issues before me with
21 respect to this fiduciary policy? I mean --

22 MR. MARINUZZI: Not --

23 THE COURT: -- there are no demands for payment on it?

24 MR. MARINUZZI: Not to my knowledge, Your Honor.

25 THE COURT: All right.

1 MR. MARINUZZI: The second related motion is the
2 motion that was filed by the Chapter 11 trustee seeking
3 approval of a stipulation with MFG Assurance Company lifting
4 the automatic stay to allow for payment of losses under the
5 policy.

6 We refer to MF Global Assurance, generally, as MFGA.
7 It is the debtors' captive insurance subsidiary and it provides
8 professional liability insurance for the MF Global entities and
9 their employees.

10 The particular policies that are administered by MFGA
11 here, Your Honor, for the 2011/2012 policy period -- I'm going
12 to focus on that policy period for the moment -- total 120
13 million dollars. That's the MFGA portion. On top of that,
14 there is an additional thirty million dollars of E&O coverage.
15 So total E&O is 150 million dollars. Total D&O is 225 million
16 dollars. So we're talking about 375 million dollars of total
17 coverage for the 2011/2012 policy period.

18 Objections to both motions were filed by Sapere Wealth
19 Managements and by a certain representative group of
20 commodities customers. The central theme of these objections
21 is that the insurance policy proceeds should be reserved to pay
22 for any customer shortfalls regardless of actual legal
23 entitlements to the proceeds.

24 THE COURT: Let me ask you this question, Mr.
25 Marinuzzi. In your initial papers that were filed, I think I'm

1 correct that the trustee took the position that the policies
2 were not property of the estate. And we'll distinguish between
3 policies and proceeds. And I read your later filings as
4 acknowledging that all of these policies that we're dealing
5 with are property of the estate. The issue -- a potential
6 issue -- I'm not sure I need to resolve it -- is whether the
7 proceeds from the policies are property of the estate.

8 MR. MARINUZZI: That's correct, Your Honor. That's
9 correct.

10 Now there are other reservations of rights that were
11 filed by customers and non-customers --

12 THE COURT: Can I ask you another question --

13 MR. MARINUZZI: Of course.

14 THE COURT: -- to sort of try to clear the underbrush?

15 MR. MARINUZZI: Sure.

16 THE COURT: Are all of the issues -- and the objectors
17 may tell me they disagree. But I've also read the papers as
18 indicating that the issue with respect to the 2010/2011 policy
19 year have been resolved.

20 MR. MARINUZZI: Your Honor, I believe that's the case
21 and I was actually going to say that. That's why I'm focused
22 on the 11/12 policy period. But if anybody disagrees with me,
23 I'm sure we'll hear from them.

24 THE COURT: Well, let me just ask at the outset. I
25 don't want to hear argument about it, but does anybody disagree

1 that the 2010/2011 policy years, that those issues have been
2 resolved?

3 MR. GRABOWSKI: Your Honor, Jon Grabowski and I
4 represent Sapere CTA Fund. I would just -- I would agree that
5 they've been resolved through the agreed order that I agreed
6 with the trustee with and --

7 THE COURT: Okay. Thank you, Mr. Grabowski.

8 MR. GRABOWSKI: Okay. But I think there's one other
9 point is that that agreed order only deals with certain claims.
10 So we'd agree that those claims listed in that order have been
11 resolved.

12 THE COURT: Okay.

13 MR. DOODY: May I, Your Honor?

14 THE COURT: Yeah. You have to identify yourself. I
15 mean, I got more than I bargained for here.

16 MR. DOODY: Apologies for our intrusion then. My name
17 is Stephen Doody from Allen & Overy on behalf of MFGA. And I
18 would like to make two points. One is that -- I know you've
19 asked, Your Honor, about the 10/11 policy whereas we've been
20 talking about the 11/12 policy. But there's also the '09/10
21 policy. I think you can probably group the '09/10 and the
22 10/11 policy --

23 THE COURT: But these are all claims -- all of these
24 policies are claims-made policies.

25 MR. DOODY: That's correct.

1 THE COURT: And the focus of the objectors are the
2 events that essentially occur in late 2011 and thereafter. No
3 claims having been made on the earlier policies relating to the
4 events that have given rise to these cases. Is that a fair
5 statement?

6 MR. DOODY: I think that's fair, Your Honor.

7 THE COURT: Okay.

8 MR. DOODY: And the second point I would like to bring
9 out is that the consent order that Mr. Grabowski just referred
10 to was, at Your Honor's suggestion, a way of dealing with more
11 immediate problems but it only deals with defense costs. Those
12 two prior policy years, '09/10 and 10/11 also have, within the
13 definition of "loss" -- that definition includes not only
14 defense costs but indemnification so that as you defend a claim
15 and get to the conclusion of that claim, if there's an adverse
16 ruling or whatever, settlement, whatever, they're going to need
17 to indemnify.

18 THE COURT: Okay.

19 MR. DOODY: That's -- we need to pick up that point as
20 well.

21 THE COURT: And -- but that hasn't arisen so far. At
22 least I haven't been told that there are proposed settlements
23 or judgments with respect to claims made under the prior
24 policies. Is that a fair statement?

25 MR. DOODY: We have not brought before Your Honor any

1 request to settle because we thought we -- as we worked our way
2 through this, we have come to conclusion that dealt with all of
3 it. As a practical matter, there are cases that continue to
4 advance. And discussion of settlement has had to be put aside
5 because of where we are here.

6 THE COURT: Okay.

7 MR. DOODY: Thank you.

8 THE COURT: Thank you.

9 MR. MARINUZZI: Your Honor, in addition, James
10 Giddens, the SIPA trustee for Inc. filed a statement concerning
11 Assurance matters which is applicable to both motions.
12 Obviously, counsel is here in court and can correct anything
13 that I say that's not correct. But what the SIPA trustee says
14 is that he, too, as we have said, would like some more
15 disclosure on the payments that are proposed to be made. And
16 he also indicated, as is the case with the Chapter 11 trustee,
17 the investigations are continuing. The SIPA trustee does not
18 know what claims he may assert under the policies and when.
19 I'm not sure, Your Honor, if Your Honor is aware of this but
20 there was a filing made by the SIPA trustee late last week
21 regarding a motion filed in the SIPA case where the SIPA
22 trustee indicated that he had written a letter to MFGA advising
23 it of the assertions made by customers of Inc. where the
24 customers have asserted that they believe they have claims --
25 they have claims under the MFGA policies and that the insurer

1 should tender the 120 million dollar policy limits to pay the
2 claims of customers.

3 Now, even the SIPA trustee in making that filing
4 indicated and disagreed with the legal position of Sapere that
5 the fact that you think you have a claim doesn't mean you have
6 a claim under a policy.

7 So where are we? I think the central argument today,
8 Your Honor, is the respective rights of the estates and the
9 insureds and customers in the proceeds of policies covering the
10 2011 and 2012 period. And I know we just had a discourse about
11 the 2010 period but I think this is really the main show. It
12 does not appear to me, other than Sapere, that anyone is
13 contesting payments being made under prior policy periods.
14 Now, like the SIPA trustee, the Chapter 11 trustee is still
15 conducting his investigation into what happened. What claims
16 may exist against third parties that may or may not be covered
17 by policies, what claims may be brought against the Chapter 11
18 estates that may or may not be covered under policies. But as
19 we stand here, we don't know what that investigation is going
20 to show. As we stand here, we know that there are additional
21 insureds right now that are the subject of proceedings. They
22 are incurring expenses for defending these actions. They are
23 participating in congressional hearings, litigation, all of the
24 things that the insurance policies are there to protect them
25 for.

1 THE COURT: May be there to protect them for.

2 MR. MARINUZZI: Maybe. Very -- sure point, Your
3 Honor. Maybe. And we're not talking exclusively about Jon
4 Corzine. I know people like to mention Jon Corzine because
5 it's an easy target, obviously. But we're talking about
6 others.

7 THE COURT: Let me ask you this, Mr. Marinuzzi.

8 MR. MARINUZZI: Yes.

9 THE COURT: In the cases that have been filed in the
10 state and federal courts, how many officers and directors have
11 been named? How many non-officer and director employees have
12 been named as defendants? Because the D&O policies, as I
13 understand it, apply to officers and directors.

14 MR. MARINUZZI: Correct.

15 THE COURT: And the professional liability policies
16 have potentially a broader class of insureds including past,
17 present employees.

18 MR. MARINUZZI: Your Honor, I don't know the answer to
19 that. But one observation is that even as among the policies,
20 or between the two types of policies, I don't believe there's
21 quite an agreement as to what policy is covering what
22 particular fees.

23 THE COURT: Well, I noticed that the policies -- each
24 of the policies has so-called "other insurance" clauses --

25 MR. MARINUZZI: Right.

1 THE COURT: -- and which say you go first.

2 MR. MARINUZZI: Right.

3 THE COURT: Has that issue -- I'm not sure that's an
4 issue for the bankruptcy court. Has that issue been addressed?
5 Because one of the things that -- I'm not sure it's ultimately
6 relevant to a distinction. One of the things that I read in
7 the papers was that at least for those parties who agree or
8 don't object to the payment of defense costs, they generally
9 stick the word "reasonable" in front of it. And there are
10 these several pots of insurance: D&O, professional liability.
11 And among the arguments made by the objectors is that proceeds
12 are policies (sic) of the estate and these are wasting policies
13 and the amounts available are diminished by every dollar paid
14 out. Has there been any -- is there any agreement as to how
15 advancement or reimbursement of defense costs would be split as
16 between D&O, on the one hand, and professional liability
17 insurance on the other?

18 MR. MARINUZZI: Your Honor, to my knowledge, there is
19 no agreement. And I think when we hear from counsel for U.S.
20 Specialty, she can shed some more light on the process that the
21 insurers are going through themselves.

22 THE COURT: Okay.

23 MR. MARINUZZI: Okay? So, Your Honor, we have these
24 investigations with officers, directors and employees whether
25 it's the E&O or the D&O. They are required to defend

1 themselves and they have the contractual right to seek that
2 defense -- the payment of those defense costs under the
3 policies. Our concern as Chapter 11 trustee, is that if --
4 folks are forced to defend themselves in litigations. Whether
5 they're culpable or not, they're forced to defend themselves in
6 litigations. If they're not able to pay those costs, we may be
7 saddled with claims that arise out of those proceedings simply
8 because they weren't well advised or able to defend themselves
9 appropriately. And what could be a small issue in a case
10 involving individuals could turn out to be a giant claim in the
11 Chapter 11 case that we now need to defend against.

12 So let me be clear on something so there's no
13 misunderstanding, Your Honor. If the Chapter 11 trustee today
14 could write a letter and get all of those insurance proceeds
15 into the Chapter 11 estate to satisfy claims, we would do that.
16 It's not that we don't want the policies. But we have to look
17 at where we are and what our rights are in the policy proceeds
18 versus the rights of the additional insureds. U.S. Specialty
19 made the motion. The motion was, in fact, made by the
20 insurance company really for the benefit of the additional
21 insureds who want to receive those payments. They were
22 approached by MFGA about request for reimbursement and that's
23 how this issue got teed up.

24 THE COURT: Are you able to tell me a dollar amount of
25 requests that have been made for reimbursement of defense costs

1 to date?

2 MR. MARINUZZI: Your Honor, the information I have --
3 and it came from one of the insurers, is that the total
4 request, which I believe includes actual invoices representing
5 past services rendered where payment is due and advances, is in
6 excess of eight million dollars. I think the amount was 8.2
7 million dollars. Now this is for the 2011 and 2012 policy
8 period. And if I'm wrong, somebody will correct me on that
9 information.

10 THE COURT: Mr. Doody?

11 MR. DOODY: Again, Stephen Doody from Allen & Overy on
12 behalf of MFGA. I'm not sure that it's necessarily wrong but
13 there is some question about what those numbers are. My
14 understanding of the numbers that are actually teed up for
15 reimbursement of defense costs right now is 775,000 dollars of
16 which 450 had been paid previously by one of the debtors
17 before -- just to be clear, before the October 26th filing.
18 But the eight million is a number which is not entirely clear.
19 It may be more projection with respect to the current policy
20 year.

21 THE COURT: Can you tell me how many individuals are
22 defendants in the pending state and federal court actions who
23 potentially have claims against one or both pots of insurance?

24 MR. DOODY: No, Your Honor. I can't. And I think
25 we'll get into this a little bit more. I'm happy to talk about

1 it now. But the issue is that you really can't determine
2 coverage now especially --

3 THE COURT: I understand that. I just really have a
4 factual question at this point whether you're able to tell me
5 how many individuals -- and I understand there's also the issue
6 about covering for investigation. People are called before the
7 SEC or the CFTC or grand jury or whatever. But just in terms
8 of the pending civil actions, if you're able to tell me, how
9 many individuals who potentially have claims against these
10 policies have been named so far.

11 MR. DOODY: I don't have an answer to that. I don't
12 have a --

13 THE COURT: Okay.

14 MR. DOODY: -- good knowledge of who's an E&O and
15 who's a D&O.

16 THE COURT: Okay. All right. Go ahead, Mr.
17 Marinuzzi.

18 MS. AHARI: Your Honor, I can help you if you'd like
19 me to.

20 THE COURT: All right.

21 MR. MARINUZZI: Counsel for U.S. Specialty.

22 THE COURT: Okay. Come on up.

23 MS. AHARI: Your Honor, Leslie Ahari, Troutman
24 Sanders, for U.S. Specialty. And I also represent Houston
25 Casualty Company and XL Specialty. XL Specialty is on the D&O

1 tower and Houston Casualty and Excel Specialty together are
2 reinsurers on the E&O tower.

3 THE COURT: Okay.

4 MS. AHARI: With respect to the total defense costs
5 received to date, I, in my capacity as counsel for U.S.
6 Specialty, have been receiving all of the bills from all of the
7 defense firms in this case. And as of 5:00 on Friday, we had
8 approximately 8.3 million dollars in bills. None of that has
9 been paid so far obviously pending the relief that U.S.
10 Specialty has sought in this court.

11 With respect to the number of insureds who have sought
12 or provided notice under these policies, we have a total of
13 thirty-three insureds who have sought coverage under both
14 policies or both towers of policies as well as the fiduciary
15 policy. I believe that at least twenty-six of those insureds
16 are defendants in the various suits and that's without
17 differentiating between the securities claims and the customer
18 claims.

19 THE COURT: Okay. That's helpful. Thank you very
20 much.

21 MS. AHARI: Thank you.

22 MR. MARINUZZI: Okay, Your Honor. So where are we?
23 We have -- we heard twenty-six plus defendants defending
24 litigations, investigations, having real bills that need to be
25 paid. We have 375 million dollars of available insurance

1 proceeds. And we're trying to figure out how to protect their
2 interests, make sure that they're defended, make sure that the
3 lack of the ability to pay for a defense doesn't give rise to
4 giant claims against us.

5 THE COURT: Well, Sapere would much rather sue all of
6 these people but not allow them to pay for a defense.

7 MR. MARINUZZI: Correct. Correct, Your Honor. That's
8 exactly the point. And so, when I look at this objectively --
9 and you read the cases and you try to determine what your
10 interest in the proceeds are and you look at the policies. If
11 you look at the D&O policy, what coverage is available --

12 THE COURT: Well, let me ask you this just to focus it
13 a little further. Assume for purposes of our conversation now
14 that proceeds of both pots to some extent are property of the
15 estates, either MF Global Inc. or MF Global Holdings or others,
16 is -- I take it from the papers that it's your position that
17 even if the policy proceeds are property of the estate,
18 nevertheless, the stay should be lifted to permit the
19 reimbursement or advancement of defense costs. Am I right
20 about that?

21 MR. MARINUZZI: That's correct, Your Honor.

22 THE COURT: So address that. And somebody may be able
23 to convince me otherwise, but it didn't seem to me -- and I
24 know the SIPA trustee says don't decide whether it's -- the
25 proceeds are property of the estate. I want to decide what I

1 need to decide. I don't want to decide issues I don't need to
2 decide. It seemed to me that if you're correct that even if
3 the proceeds or policy are property of the estate, reasonable
4 defense costs should be advanced or reimbursed, that I don't
5 have to reach the issue now whether it turns out -- whether the
6 proceeds are property of the estate. Do you agree with that?

7 MR. MARINUZZI: I agree, Your Honor.

8 THE COURT: Okay. So tell me why the stay should be
9 lifted -- assuming that the proceeds are property of the
10 estate, why the stay, the automatic stay, should be lifted and
11 the insurers permitted to pay reasonable defense costs.

12 MR. MARINUZZI: Your Honor, I think, really, the
13 central focus here is the balance of the harms. So what is the
14 harm to the estate if the stay is lifted? We know what the run
15 rate is. It's 8.3 million dollars of fees. We've got 375
16 million dollars of coverage. Even if you assume the 8 comes
17 off the top and some amount above that, there's still a lot of
18 insurance coverage.

19 THE COURT: I bet those insurers are not going to
20 agree that all of these are claims that have to be paid. But
21 that's --

22 MR. MARINUZZI: Fair point, Your Honor, and I wouldn't
23 bet against you on that. And so, what we know today is that if
24 these parties are not able to defend themselves in litigation,
25 whether it's litigation brought by Sapere or whether it's other

1 litigation, we may find ourselves, as a Chapter 11 estate --
2 the trustee may find himself trying to defend against large
3 claims that are going to significantly dilute whatever recovery
4 might be available to what I'll call the "actual" creditors of
5 the Chapter 11 estates, those that did business with the
6 Chapter 11 debtors, those that loaned money to the Chapter 11
7 debtors. And that would be unfortunate because we go through
8 the cost of trying to object to claims and demonstrate why an
9 admission that might have been made in a litigation should be
10 binding on the trustee or the Chapter 11 debtors. And I don't
11 know how you quantify that risk but it certainly exists. And
12 we can't deny that that risk is there. And so, balancing those
13 harms -- now these -- in Jon Corzine -- we like to pick at Jon
14 Corzine. Sure, he has a lot of money to probably pay his own
15 defense costs. But it's not just Jon Corzine. And so, if you
16 are a former officer, not a high paid individual, and you are
17 brought in because you just happened to be somebody who was
18 named at the company and named in a litigation and now you have
19 defense costs that you have to pay for. You don't have the
20 money. You have to get it.

21 THE COURT: Look, in -- and maybe it's U.S.
22 Specialty's counsel that should carry this argument. But what
23 I read in their papers with respect to the D&O policies that
24 have a priority payment provision, it didn't appear to be a
25 balance of hardships. It appeared to be their position that as

1 a matter of contract language and of applicable state law,
2 which they say applies, the priority of payment provision is
3 valid and enforceable and it entitles the individual
4 insureds -- even if there's entity coverage for some things, it
5 entitles the individual insureds to payment of defense costs.

6 MR. MARINUZZI: That's what it says and that's what
7 the cases interpreting those provisions say. And --

8 THE COURT: So that's not a balancing of hardships, is
9 it?

10 MR. MARINUZZI: Well, I think from a high level, it
11 is, in my -- the extent to which I would fight that argument,
12 Your Honor, as a matter of law, I think goes down to the
13 hardships and the balancing of the hardships. If I really
14 thought that we were suffering hardship by allowing some
15 fractional amount of cash to be used to pay these defense
16 costs, I might disagree with that position, Your Honor. I
17 might at least make an argument notwithstanding the case law
18 and notwithstanding what the documents say. But I don't think
19 that our position is such that we should try to prevent them
20 from getting those costs reimbursed. So it is, in some
21 respects, a balance of harm argument, but also, Your Honor, and
22 you hit it on the head, it's also a contractual interpretation
23 of the policies that I'm sure U.S. Specialty's attorney will
24 argue about.

25 THE COURT: Okay. But the MFG --

1 MR. MARINUZZI: GA --

2 THE COURT: -- Assurance, there's no priority of
3 payment.

4 MR. MARINUZZI: There is no priority of payment, no.
5 And, Your Honor, so back -- let me just finish with the D&O
6 since that's where Your Honor started. When we look at the
7 available coverage, we've got two types available to the
8 company. There's the coverage for indemnity. And we have no
9 present intention of indemnifying anybody for any of these
10 suits. So I don't see that being an issue here. I don't see
11 us making a claim under that part of the policy.

12 Securities.

13 THE COURT: I understand your argument --

14 MR. MARINUZZI: Okay.

15 THE COURT: -- on securities, that basically, because
16 of 510 --

17 MR. MARINUZZI: We're going to subordinate them or
18 seek to subordinate them.

19 THE COURT: -- you're going to subordinate and
20 therefore, while the plaintiffs -- the class plaintiffs and
21 securities actually may have claims against the individual
22 officers and directors, they can't -- your position is they
23 can't recover against MF Global Holdings because of 510.

24 MR. MARINUZZI: Correct. Correct. Now the E&O
25 analysis is slightly different, as Your Honor mentioned. We

1 don't have the priority of payment issue. But the coverage
2 that is afforded to the Chapter 11 debtors is the same coverage
3 that's afforded to the employees that might have committed a
4 malfeasance under the policies.

5 THE COURT: But what do the individual insureds or MF
6 Global Holdings have to show in order to recover on the E&O
7 policies?

8 MR. MARINUZZI: Your Honor, we would have to suffer a
9 loss that was based on some action or inaction by a covered
10 employee that was covered under the policy. So if we had a
11 broker that was churning someone's account -- bad example
12 because we didn't have any brokers. But let me just be Inc.
13 for a second. If we had a broker that was churning an account
14 and we paid a settlement of 200,000 dollars to that customer,
15 that client, we would then make a claim under the E&O policy
16 and say we suffered the loss, we paid the claim, we should get
17 paid for it.

18 I, frankly, have a little bit of a difficult time
19 trying to create the argument in my head for how we would have
20 coverage given the operations at the Chapter 11 debtor
21 entities, but --

22 THE COURT: Well --

23 MR. MARINUZZI: -- we're not done yet.

24 THE COURT: -- MF Global Inc. is an insured. And
25 let's assume, hypothetically, that knowingly, intentionally,

1 unknowingly, whatever, officers or employees of MF Global Inc.
2 directed the transfer of customer funds, what had been
3 segregated customer funds. Is it your view that that would
4 give rise to a recoverable claim by MF Global Inc.?

5 MR. MARINUZZI: Your Honor, I think that's a bit of a
6 loaded question because it depends on -- what I might think
7 would apply, I'm sure the insurance company would disagree
8 with.

9 THE COURT: Well, I know; they might. But I'm asking
10 you now. And --

11 MR. MARINUZZI: Your Honor --

12 THE COURT: -- I asked Mr. Kobak as well.

13 MR. MARINUZZI: I don't know. I think it would
14 probably be excluded under the policy, under one of the policy
15 exclusions. It was probably illegal.

16 THE COURT: Well, let's assume they did it without
17 knowing that it was customer funds. They thought there were
18 sufficient customer funds remaining in an account and it turned
19 out there wasn't. I mean, I'm trying to get a better
20 understanding of what, in your view, would be a coverable claim
21 under the E&O policy. You know, it's your wholly owned
22 subsidiary that wrote these policies.

23 MR. MARINUZZI: Your Honor, let me answer your
24 question. And I think if it was an unintentional act, one
25 could make a claim under the policy. Whether it would be

1 accepted, I don't know. I don't know.

2 So we don't know where the investigation is going to
3 take us and what we're going to find. And we don't want to
4 find ourselves in a position where we do find that there is
5 some claim that we think we can assert but there's no money
6 left. Fortunately, the current run rate is such that I don't
7 know that we're going to get anywhere close to being in a
8 position where there's not going to be available insurance
9 coverage.

10 THE COURT: Tell me why Mr. Grabowski's client doesn't
11 have an invested right in the 120 million dollars.

12 MR. MARINUZZI: They just don't have one as a matter
13 of state insurance law, Your Honor.

14 THE COURT: Because --

15 MR. MARINUZZI: Because they have to demonstrate that
16 there was a covered loss that --

17 THE COURT: Do they have to have a judgment?

18 MR. MARINUZZI: Yes. They have to have a judgment,
19 yes.

20 THE COURT: If they file a claim in the SIPA
21 proceeding or -- I still can't figure out. Have any of the
22 commodity customers actually filed a proof of claim in the
23 Chapter 11 case?

24 MR. MARINUZZI: Your Honor, there was one -- to my
25 knowledge, one proof of claim --

1 THE COURT: Because they talked about a tort claim.
2 You challenged their standing.

3 MR. MARINUZZI: Correct.

4 THE COURT: So who filed a --

5 MR. MARINUZZI: The --

6 THE COURT: -- proof of claim?

7 MR. MARINUZZI: -- class of commodities customers
8 that's one of the objecting parties filed a 1.6 billion dollar
9 claim citing information that's been put out there by the SIPA
10 trustee as the amount of the loss that somehow the Chapter 11
11 debtors are liable for. And they did that, Your Honor, to
12 demonstrate or argue in front of this judge that they have
13 standing in our case.

14 THE COURT: Well, do you believe that gives them
15 standing?

16 MR. MARINUZZI: I think it gives them standing as a
17 creditor but I think they need to show a more direct pecuniary
18 loss by what's going on with the motion. I don't think
19 these --

20 THE COURT: But you don't have any doubt that they
21 really lost money, do you?

22 MR. MARINUZZI: Well, Your Honor, I don't have the --
23 the investigations aren't complete. Yes. Based --

24 THE COURT: You know that they lost money.

25 MR. MARINUZZI: Based on what -- well, based on what

1 we know, it appears that they will lose money.

2 THE COURT: And if a tort claim -- and I realize you
3 haven't, one, filed; you haven't objected to it yet. You may
4 well have objections to it. But don't you at least think they
5 have a colorable tort claim based on at least what's been
6 publicly reported at this point?

7 MR. MARINUZZI: I'm not so sure, Your Honor.

8 THE COURT: All right. Let me ask you this. If they
9 have a valid tort claim, would that give them standing to
10 object on the issue that's currently before the Court?

11 MR. MARINUZZI: Your Honor, if they have a valid tort
12 claim, I don't know that they would have standing to object to
13 this motion. And here's why, Your Honor. I think if you look
14 at the cases we cite in our briefs, like Refco, it isn't simply
15 a question of you're a creditor, you can be heard.

16 THE COURT: This isn't a derivative. You cited Refco.
17 You argued that you don't get derivative standing. Okay. I
18 accept that proposition. But when they filed a tort claim, if
19 they have an aiding and abetting claim against MF Global
20 Holdings because of what happened at MF Global Inc., that's not
21 derivative standing. That would be a direct cause of action
22 for a direct claim against the estate of MF Global Holdings
23 Ltd. Wouldn't that give them standing under 1109 under all
24 issues? It's not -- it wouldn't be arguing derivative
25 standing.

1 MR. MARINUZZI: Well --

2 THE COURT: They'd be arguing direct -- they have a
3 direct claim.

4 MR. MARINUZZI: Well, Your Honor, yes, they have a
5 direct claim. But does anything that, from the Chapter 11
6 estate perspective, whatever conduct they claim gave rise to a
7 claim against the Chapter 11 debtors, how is that affected by
8 the motion to lift the stay to allow some of these defense
9 costs to be paid?

10 THE COURT: Because every dollar that's paid out of
11 the policies is one dollar less that's available to satisfy any
12 claims of MF Global Holdings Inc. (sic.)

13 MR. MARINUZZI: Inc.?

14 THE COURT: Corre -- no. MF Global Holdings Ltd.
15 Every dollar that's -- if you -- you're not saying you don't
16 have potential coverage under the policies.

17 MR. MARINUZZI: I'm not.

18 THE COURT: Okay. Every dollar -- it's a wasting
19 policy -- policies. Every dollar that's paid out is one dollar
20 less that's available to satisfy claims of each of the
21 debtors -- against each of the debtors. If the commodity
22 customers have tort claims against the parent company, the pot
23 is reduced by a dollar for every dollar paid out. Why doesn't
24 that give them standing on this issue? It doesn't give them
25 standing for everything that happens in this case. But why

1 doesn't it give them standing on this issue which deals with
2 whether the insurance proceeds will be reduced by -- available
3 insurance proceeds will be reduced by amounts paid to the
4 individual insureds?

5 MR. MARINUZZI: Your Honor, in theory, yes. Every
6 dollar that's reduced, assuming we have a valid claim under the
7 policy at the end of the day that gives rise to some amount of
8 cash coming in to the estate and they have a valid allowed tort
9 claim in the Chapter 11 proceedings, yes, a dollar less from
10 the policy is a dollar less for that.

11 THE COURT: So I don't adjudicate now whether their
12 claim is good or bad. You say one group has filed a claim.
13 The others keep saber-rattling but haven't done it. There's no
14 bar date that's come and gone.

15 MR. MARINUZZI: No, there's not.

16 THE COURT: Do I have to have a trial on whether they
17 have valid claims against the holding company before I can
18 decide this issue? I mean, haven't they asserted a colorable
19 claim that's pecuniary in nature because every dollar paid out
20 from the insurance will be one dollar less that's available to
21 satisfy the creditors of Holdings? Do you agree with that?

22 MR. MARINUZZI: Agree.

23 THE COURT: Okay.

24 MR. MARINUZZI: And, no, you don't need to have a
25 trial on the issue, Your Honor.

1 THE COURT: Okay. All right.

2 MR. MARINUZZI: You're going to decide -- Your Honor's
3 going to decide the issues regardless of whether they have
4 standing.

5 THE COURT: Okay.

6 MR. MARINUZZI: Right.

7 THE COURT: Well, I'm -- okay. Go ahead.

8 MR. MARINUZZI: 'Cause, Your Honor --

9 THE COURT: I'm going to decide -- you've argued they
10 don't have standing. I think I need to decide the issue. You
11 don't want me to listen to their objections.

12 MR. MARINUZZI: Your Honor -- Your Honor, we accept
13 Your Honor's position that they are affected by this given
14 those hypotheticals and series of hypotheticals.

15 THE COURT: Okay. Go ahead.

16 MR. MARINUZZI: Okay. So -- but let's then look at
17 their objections. Let's look at their objections. What
18 they're effectively saying is that no money should be paid out
19 to anybody -- and Your Honor made this point before -- except
20 for them because they believe that they have claims under the
21 policies. The fact that they believe they have claims under
22 the policies doesn't give them the ability to claim the policy
23 proceeds for themselves. And, really, what they're saying is
24 notwithstanding the fact that there are two trustees,
25 congressional panels, the CME and others who are still trying

1 to figure out who's responsible for what happened here, they
2 figured it out. And it's everybody they've named in their
3 complaint that's liable for this and therefore they should get
4 all the insurance proceeds. It's presumed guilty. It
5 shouldn't work that way, Your Honor. That can't be the right
6 result here.

7 Now so what do we do? In our stipulation, Your Honor,
8 we didn't ask for a cap. We didn't propose a cap but in our
9 papers that we ultimately filed. Your Honor, to the extent
10 that the Court felt it was appropriate to build into, how ever
11 Your Honor resolve this, a reporting mechanism, which is
12 something that I know the SIPA trustee had asked for -- and how
13 it would work, I would imagine, is that whenever dollars were
14 paid, periodically, there'd be reports given to the two
15 trustees so we would understand how much was paid and to whom.

16 THE COURT: Have you -- putting aside the objectors
17 for a minute, okay, but as between the SIPA trustee, the
18 Chapter 11 trustee, the insurers -- the insurers probably raise
19 the issue about attorney/client privilege -- but I didn't see
20 anything concrete. Did you try and -- do you have an agreed
21 form of order assuming that I were to lift the stay?

22 MR. MARINUZZI: Your --

23 THE COURT: What I read, your papers, the SIPA
24 trustee's papers, the insurer's papers are saying they seemed
25 amenable to an appropriate reporting mechanism. It didn't say

1 to whom the reports would go, et cetera. It seems to me that
2 no one has cited -- it seems perfectly -- if I were to lift the
3 stay then it seems perfectly appropriate. As I said earlier,
4 people have stuck the word "reasonable" on fees, not quantified
5 but reasonable. And it is a facts and circumstances issue.
6 But it's not as if I can look to three cases that say here's
7 the appropriate reporting mechanism. Have you endeavored to
8 work out an agreement with the insurers and the SIPA trustee
9 and your client as to what would be an appropriate reporting
10 mechanism in the circumstances?

11 MR. MARINUZZI: We've endeavored, Your Honor. We
12 haven't gotten there. But I'm pleased to say that at least
13 with respect to the SIPA trustee, I think this is an easy
14 solution for us to find. We expect reports from the insurance
15 company about how much is being spent periodically, whether
16 it's forty-five days or sixty days. We could live with that.
17 We don't want to micromanage but we want to know how much money
18 is being paid out under the policies.

19 And as far as a cap, I know the insurance companies
20 are going to resist this and that's fine. They'll make their
21 arguments for it. But as I look at the totality of the
22 insurance and I look at the amount of claims that have already
23 been made for reimbursement of expenses, a number that I think
24 I can justify to the Court when you have eight plus million
25 dollars of requests already made --

1 THE COURT: They're just getting started, though.

2 MR. MARINUZZI: Well, Your Honor, they're getting
3 started. That's a fair point; they're getting started. And we
4 have 375 million dollars of coverage. The amount that I
5 believe is appropriate here is twenty-five million dollars as a
6 soft cap which won't require us to come back to court in two
7 months and have the same argument again. It allows us to
8 continue our investigation to see whether we have more tangible
9 interests in the policy proceeds as we learn more facts.

10 Now, Your Honor, the motion that was filed, the first
11 motion, was filed by U.S. Specialty -- they're here in court.
12 Their counsel is here; it's their motion. So if Your Honor
13 doesn't have any questions of me --

14 THE COURT: Okay. Let me hear from them.

15 MR. MARINUZZI: Okay. Great. Thank you.

16 MS. AHARI: Good afternoon, Your Honor. I --

17 THE COURT: Just identify yourself for the record.

18 MS. AHARI: Sure. Leslie Ahari for U.S. Specialty.
19 Your Honor, I'd like to just revisit a couple of points that
20 came up during Mr. Marinuzzi's presentation, questions that the
21 Court had that hopefully I can clarify.

22 The first, the Court had asked whether there had been
23 any demands for payment under the fiduciary policy. The answer
24 to that is yes. The insurers have received notice of certain
25 claims under the fiduciary policy. So we're still very much in

1 the position of needing stay relief with respect to that policy
2 as well.

3 THE COURT: Okay.

4 MS. AHARI: Another issue that the Court raised
5 concerned the other insurance clauses of the policy. And this
6 has been addressed. It's a complicated issue. The fiduciary
7 policy and the directors and officers insurance policy have
8 essentially the same form of other insurance clause. And it
9 says, generally, that if there's other insurance out there then
10 this policy is excess --

11 THE COURT: It's --

12 MS. AHARI: -- to that other insurance.

13 THE COURT: -- everybody (indiscernible).

14 MS. AHARI: Correct. And then for the E&O policies,
15 for the first and second excess E&O policies, they have
16 essentially that exact same form. So, in other words, if
17 there's other insurance, then this insurance is excess. And
18 the result of those competing other insurance clauses when the
19 wording is identical is that they cancel each other out. The
20 difference, however, is that the primary E&O insurance clause
21 has a different other insurance clause. And it's what we call
22 an excess clause. And that clause says, generally, it's an
23 endorsement number 3 to the policy, that if there's other
24 insurance then this policy doesn't apply at all. Now, under
25 New York law which applies to all of these policies, there is a

1 long line of cases that say specifically that when you have an
2 excess clause, the Courts do not give effect to that so that
3 policy then becomes primary. So it actually accomplishes the
4 opposite of the wording of the endorsement. Only an insurance
5 lawyer could love this.

6 THE COURT: My experience in practice was this
7 generally got worked out. And --

8 MS. AHARI: Correct.

9 THE COURT: -- there was an allocation that was agreed
10 upon reserving all rights to the end of the day but not leaving
11 officers, directors, employees hanging because they need to be
12 defended.

13 MS. AHARI: Correct. And what we have proposed given
14 that I have clients on all three of these towers --

15 THE COURT: You don't have a conflict or anything, do
16 you?

17 MS. AHARI: Not at all. When they're the same client.

18 THE COURT: Okay.

19 MS. AHARI: -- is that we have proposed a sharing
20 between the various towers based on, essentially -- a sharing
21 based on the percentage of limits that each tower provides.
22 And to make it more complicated, some of the policies respond
23 to certain of claims and then other policies don't. So we've
24 been sorting through the different types of claims saying this
25 one's covered under this policy; this is covered under that

1 policy. For those that are potentially covered under both,
2 we've proposed a sharing arrangement between the various
3 policies. So that's -- we have addressed this issue and we're
4 trying to work through it. Mathematically, it's going to be
5 complicated but we think we can address it.

6 Another issue that the Court raised was with respect
7 to the reasonableness of defense costs. Given the position
8 that my clients are in, we obviously have a very heightened
9 interest in making sure that the defense costs are reasonable.
10 We've been working diligently with defense counsel since
11 November to -- we've asked every single firm and have gotten
12 the firms to provide discounts on their billable rates. We
13 have imposed billing guidelines on all of the firms that limit
14 -- they can't send five people to a hearing. We are monitoring
15 the defense costs very, very carefully. We have also asked
16 defense counsel to set up a leadership structure among them so
17 that -- you know, obviously, there -- a lot of things that can
18 be done by one law firm as opposed to twenty-five law firms and
19 we are making sure that that happens. In reviewing the bills,
20 we have kind of a worked-in enforcement mechanism there and
21 we're not going to pay fees that are unreasonable or
22 duplicative or excessive.

23 THE COURT: Were you at the MDL hearing?

24 MS. AHARI: No.

25 THE COURT: Any report on what happened?

1 MS. AHARI: I'll have to defer to defense counsel on
2 that, Your Honor.

3 THE COURT: Okay.

4 MS. AHARI: So the insurers have a very strong
5 interest in monitoring the fees. And given that I have clients
6 on the E&O tower as well, that extends over to the E&O side.
7 And we have proposed to review the bills on behalf of all of
8 the towers because, obviously, we're in a position to do so
9 since that we participate on all. This is not a situation
10 where the Captive and the Global Assurance is simply on its own
11 reviewing the defense bills --

12 THE COURT: They only kept the first seven and a half
13 million dollars.

14 MS. AHARI: Correct. And the reinsurers have claims
15 control after that. So I think that's important for the Court
16 to keep in mind.

17 Apart from that, U.S. Specialty's motion is
18 essentially -- we've only sought relief for the first D&O
19 policy which is a twenty-five million dollar policy. We can
20 either come back when the next layer comes up or depending on
21 how the Court wants to handle this -- I represent XL Specialty
22 which is the next layer on that tower as well. We're happy to
23 come back to the Court for relief --

24 THE COURT: I'm actually more interested -- not more
25 interested. I'm interested in all of this and it's all

1 important. But the focus so far has been on defense costs
2 although the papers address -- a number of them, whether
3 they're yours -- I read all these papers -- that address that
4 you don't want to lose the opportunity for early settlements
5 although, I think, that probably isn't going to apply to the
6 events that give rise to these cases. But what are you seeking
7 authority for now? Are you satisfied if you get authority for
8 advancing or reimbursement defense costs without addressing the
9 issue of payment of settlements or judgments?

10 MS. AHARI: Yes, Your Honor. At this time, that's all
11 I'm moving for. I think what we had planned on doing is that
12 in the event a settlement opportunity arises and we're able to
13 negotiate a settlement, that settlement will be contingent on
14 obtaining bankruptcy court relief. That would allow the
15 insurers to pay the settlement.

16 THE COURT: Okay.

17 MS. AHARI: And that's typically how we've done this.

18 THE COURT: All right.

19 MS. AHARI: So -- with respect to the cap that Mr.
20 Marinuzzi proposed, this obviously wasn't in the papers. It
21 first was circulated as an idea on Friday afternoon.
22 Generally -- you know, I'm not exactly sure what Mr. Marinuzzi
23 means by a soft cap. He did say they wouldn't require the
24 insurers to come back when they cap is reached. But he didn't
25 say exactly what it is that he's proposing. So we probably

1 need to work that out a little bit more.

2 THE COURT: I guess the soft cap could give any of a
3 number of parties the right to come back to the court before
4 you go above the cap. That's what I sort of interpret the soft
5 cap to be. It's the trigger that if somebody objects, you've
6 got to come back to court to go above it if whoever the
7 identified parties are agree that you don't have to come
8 running back to court. But I guess I ought to let Mr.
9 Marinuzzi articulate it, though. Have you done this in other
10 cases?

11 MS. AHARI: With respect to a cap?

12 THE COURT: Yeah.

13 MS. AHARI: In Adelpia, Judge Gerber did impose a
14 cap. But the circumstances there were very different. In
15 Adelpia, what he was trying to do was to protect the officers
16 of the subsidiary who had no other insurance, couldn't get any
17 other insurance given their bankruptcy status. So he imposed a
18 cap in order to make sure that there would be certain funds
19 available for those other insureds who hadn't been sued in
20 anything just to get them through the Chapter 11 proceeding
21 that they were going through.

22 So that, obviously, is not the situation here.
23 Generally, we've had the circumstance where the Court will ask
24 the insurers to disclose the burn rate. And we're happy to do
25 that. And I have been talking to the SIPA trustee's counsel to

1 work out a proposed order. We have further discussions on
2 Friday. I'm optimistic that we can reach an agreement.
3 Generally, the insurers are willing to disclose the burn rate
4 and the remaining amounts of the limits. As Your Honor noted,
5 we have concerns about disclosure of privileged and --

6 THE COURT: Right.

7 MS. AHARI: -- confidential information. And we don't
8 think that that's appropriate. So we don't think that
9 significant and more details should be required of the
10 insurers. I don't see a reason for disclosing how much is
11 going to each insured. I think that's unnecessary. I think
12 that discloses confidential information and should not be
13 required by the Court. But certainly, we can disclose what the
14 burn rate is.

15 And then, further, with respect to the cap, I
16 understood Mr. Marinuzzi as suggesting a twenty-five million
17 dollar cap that would apply across the three towers of
18 policies. The difficulty I have with that is that under the
19 other insurance and the interaction between policies, we don't
20 want to get into a situation where the contract rights between
21 the policies are altered as a result of the cap that's imposed
22 by the Court. That's actually fairly arbitrary. We're at 8.4.
23 As Your Honor noted, the litigation hasn't entirely heated up
24 yet.

25 THE COURT: Yeah. What's the MDL -- assuming they

1 send it -- if, for example, the federal cases all go to Judge
2 Marrero, there's going to be plaintiffs' liaison, defendants'
3 liaison. The work's really going to start to -- the burn rate
4 till now doesn't necessarily reflect what it's going to be
5 after these cases really get going.

6 MS. AHARI: I think that's accurate, Your Honor. And
7 so, the concern that we have is that we don't want the sharing
8 arrangement between the E&O and the D&O impacted because that
9 alters the parties' respective contractual rights. So I think
10 the insurers should be free to payout the defense costs
11 according to the allocation with respect to the different
12 towers of insurance.

13 THE COURT: But that -- that may be so but how does
14 the cap affect it? Within the cap, they payout according to
15 whatever agreement the insurers have reached, what percentage
16 comes from each tower, but without prejudice to any of the
17 insurer's rights or the insureds' rights. What the cap does is
18 say, okay, we don't -- and it's not that I don't want anybody
19 coming back to court on this. I mean, I would hope it doesn't
20 happen but it may well. The issue is if the aggregate amount
21 paid out for defense costs exceeds -- reaches a cap, it gives
22 some parties the right to come back to court. I mean, that's
23 what I -- is that what you had in mind, Mr. Marinuzzi?

24 MR. MARINUZZI: Your Honor, that's exactly what I had
25 in mind.

1 THE COURT: And I don't know whether you've done that.
2 And you've described Judge Gerber's case as obviously somewhat
3 different.

4 MS. AHARI: Your Honor, I've not had that in any of my
5 other cases. And I did Enron, I did Refco --

6 THE COURT: Yeah.

7 MS. AHARI: -- I did Adelpia and lots of other lesser
8 known cases. And that has not been suggested in any of those
9 cases.

10 THE COURT: I would be -- I want to make clear,
11 assuming that I lift the stay, it seems to me that that's got
12 to be a subject of negotiation between the insurers, the
13 insureds' counsel and the two trustees. It's not like there's
14 a set of legal principles. I can pick an arbitrary -- you can
15 say, an arbitrary number and maybe it doesn't prejudice
16 anybody's rights 'cause it just says at the point where payment
17 of defense costs arise to this level, whether it's twenty-five
18 million or some different number, if you can't work it out,
19 come back to court. And it's without prejudice to anybody's
20 rights. But I can't -- it's not like I can open up a case book
21 and say cases say in this circumstance, here's the formula that
22 the Court ought to apply if looking for a practical solution.
23 It probably won't satisfy the objectors because they want all
24 the money now but at least provide some assurance that
25 everybody has an avenue they can come back to the court.

1 MS. AHARI: So, I mean, it sounds to me as a practical
2 matter then every time the cap is reached, we'll be back in
3 front of Your Honor.

4 THE COURT: That's the least appealing part of it.
5 The cap better be high enough. I'm not sure if the twenty-five
6 million is the right figure. I -- Mr. Marinuzzi?

7 MR. MARINUZZI: Your Honor, just -- we don't want to
8 come back here either. Just so it's clear, on this issue, we'd
9 like to be done. But we're trying to build a mechanism that
10 protects both estates from a situation where we've uncovered
11 something that says we have claims that we need to protect
12 ourselves.

13 What I envision in a soft cap -- maybe twenty-five's
14 not the right number. Maybe we'll have a discussion and
15 realize that it needs to be a higher number based on the multi-
16 district litigation -- is because we're trying to protect our
17 respective estates, if Mr. Giddens is fine and Mr. Freeh is
18 fine with increasing the amount based on what is going on, the
19 status of our investigation, what we think our rights are under
20 the policies at that given point in time when we get to the cap
21 then I think we should have the ability to consent to an
22 increase to a reasonable amount that we agree to without having
23 to come back.

24 THE COURT: I can guarantee you I know some of the
25 parties who will object to it. But that's --

1 MR. MARINUZZI: That's fine, Your Honor. And Your
2 Honor could rule that this an appropriate mechanism or not, but
3 that's what I envision. Your Honor asked and I wanted to be
4 clear on what I envisioned.

5 THE COURT: Okay.

6 MR. MARINUZZI: Thanks.

7 THE COURT: All right.

8 MS. AHARI: Your Honor, and I guess a related issue is
9 with respect to the disclosures to whom should that information
10 be disclosed. And I think it's our position that the
11 information should not be publicly disclosed. I think we can
12 disclose it to the Chapter 7 -- I'm sorry -- Chapter 11 trustee
13 and the SIPA trustee. I'm not sure it should go beyond that.

14 THE COURT: What about the creditors' committee?

15 MS. AHARI: Creditors' committee. We haven't heard
16 from them so that's why I didn't include them.

17 THE COURT: I mean, they have -- I already entered an
18 order about information sharing. I think that there's a
19 mechanism in place to protect the confidentiality of the
20 information that at least assures that a creditor body, a
21 representative of a creditor body, has information and if they
22 feel it necessary to act on it, they can. So I don't hear you
23 -- are you objecting to a creditors' committee being included
24 in any disclosure group?

25 MS. AHARI: Well, I guess it's not clear to me to what

1 extent that creditors' committee would be free to disseminate
2 the information beyond counsel.

3 MS. GOLDSTEIN: Irene Goldstein, Dewey & LeBoeuf, for
4 the creditors' committee. We would not be able to share it
5 beyond counsel according to that stipulation unless we had to
6 come to court and request permission to --

7 THE COURT: You can look at -- I already entered an
8 order that dealt with --

9 MS. AHARI: Okay.

10 THE COURT: -- information. I don't -- you ought to
11 look at it before -- I'm not -- I haven't ruled yet. But
12 that's putting that aside.

13 Let me shift gears while you're up. Address the
14 priority payment issue because you've raised that in your brief
15 and in the reply that the -- Mr. Grabowski's client says that's
16 invalid in bankruptcy. You want to just address that briefly?

17 MS. AHARI: Certainly, Your Honor. Priority of
18 payments provisions have arisen frequently. They arose in the
19 Enron case and various others. And the Courts have, to my
20 knowledge, have uniformly enforced them according to their
21 wording. Essentially, it says that non-indemnifiable loss
22 under insuring agreement A is paid out by the insurers before
23 either the indemnification coverage under side B or securities
24 claim coverage under side C. As I --

25 THE COURT: That's a typical provision in D&O

1 policies.

2 MS. AHARI: It's typical. It's not in all policies.
3 But it is fairly common. And so, the bankruptcy courts --
4 there are a number of rulings out there which we cited in our
5 reply brief where Courts have enforced them according to their
6 wording. As I understand, Sapere's objection argues that that
7 provision violates, I believe, Section --

8 THE COURT: 365 --

9 MS. AHARI: -- 365 --

10 THE COURT: -- (b).

11 MS. AHARI: -- which applies to executory contracts.

12 And just to paraphrase the statute, it essentially says that a
13 provision in a contract cannot alter the parties' rights as a
14 result of the bankruptcy filing.

15 THE COURT: This isn't altering. This was a provision
16 that was there before but not triggered by bankruptcy per se.

17 MS. AHARI: Correct. It also can be triggered in
18 situations where there is no bankruptcy. For example, in a
19 derivative suit under Delaware law, a company is not permitted
20 to indemnify its directors and officers for a settlement or a
21 judgment in a derivative suit. And so, the priority of
22 payments would apply in that circumstance as well. So it
23 applies both in bankruptcy and out of bankruptcy. So for that
24 reason, I don't think that Section 365 applies to nullify it.

25 THE COURT: Okay.

1 MS. AHARI: And, I'm sorry --

2 THE COURT: Go ahead.

3 MS. AHARI: -- just one last housekeeping issue, Your
4 Honor. In his papers, the SIPA trustee, I think, had raised
5 the issue about or raised the question as to whether it was
6 necessary for us to file for stay relief --

7 THE COURT: Yeah.

8 MS. AHARI: -- also in the SIPA proceeding. I didn't
9 want to file a duplicative motion. I'm happy to take the
10 Court's guidance on how you want us to handle that.

11 THE COURT: I'll hear what Mr. Kobak has to say about
12 that. But -- okay. Thank you. Anything else --

13 MS. AHARI: Thank you.

14 THE COURT: -- you want to add?

15 MS. AHARI: Not right now, Your Honor.

16 THE COURT: Okay. Thank you.

17 MS. AHARI: Thank you.

18 THE COURT: Mr. Doody, you want to argue?

19 MR. DOODY: Thank you, Your Honor. Stephen Doody from
20 Allen & Overy on behalf of MFG Assurance.

21 THE COURT: So you don't have a priority of payment
22 provision but you say it doesn't matter anyway.

23 MR. DOODY: I don't need -- I can sit down now.

24 THE COURT: Well, you can reiterate to me why that's
25 so.

1 MR. DOODY: Well, backing up a couple --

2 THE COURT: New York and -- you say New York insurance
3 law requires you make the payments.

4 MR. DOODY: That's right, Your Honor. And backing up
5 a bit, we're coming at it from the perspective of an insurance
6 company. We've got the BMA who's telling us that we should not
7 alter our policies. Our policies call for payments out. That
8 dovetails with the New York insurance law which requires, under
9 3420, that in the event of the insured's bankruptcy that the
10 policy still flows as proceeds into -- for the benefit of
11 claimants. I caution, however, that we have a whole process to
12 go through. And this is -- Your Honor was trying to come on to
13 this before. What does it mean to be covered? What we've
14 tried to say in our papers, and hopefully we have to some
15 degree, is indicate that when you receive a claim, you've got
16 to determine whether notice is proper. You've got to determine
17 where there's coverage. You've got to look at it in terms of
18 what the claim might be -- the underlying claim might be.
19 You've got to investigate or determine whether -- there's
20 defense costs.

21 THE COURT: But I'm -- from when I was in practice, I
22 was very used to getting reservation of rights letters from the
23 insurers. They never agree they have to pay anything. But
24 then --

25 MR. DOODY: That's right, Your Honor.

1 THE COURT: But then they generally pay the defense
2 costs.

3 MR. DOODY: Right. So, you're right, that reservation
4 of rights go out because it's not a push button operation. You
5 can't show up and say I've got a claim and everyone says,
6 that's great, you're right.

7 THE COURT: Tell me this. What do, in your view
8 representing the insured -- insurers on the E&O policies, what
9 does a claimant have to show to be entitled to recover under
10 the E&O policies whether it's Mr. Kobak's client, MF Global
11 Inc. or whether individual insureds? What do they have to show
12 in order to recover on the E&O policies?

13 MR. DOODY: I think, Your Honor, you're going to see
14 me struggle in the same way that prior counsel struggled.
15 There are a number of issues under the policy. Like, first of
16 all, you have to determine that it's a wrongful act in respect
17 to services. One of the things that you had mentioned in
18 your --

19 THE COURT: Wrongful but not intentional?

20 MR. DOODY: Well, you came out -- that intentional act
21 may be an exclusion under the policy. We also have a split in
22 terms of you have a D&O -- a director and officer who is acting
23 as director and officer, is probably covered under a D&O policy
24 but a D or O acting not as a D&O might be covered under the E&O
25 policy. So there are a number of questions like this that need

1 to be determined. And, as we all know, we don't have to read
2 too deeply into the news to see that nobody really knows
3 exactly what did happen by whom. All of that has to be
4 determined in order to get to a coverage determination in
5 respect of a claim.

6 THE COURT: So let me ask. If Mr. Kobak, on behalf of
7 MF Global Inc., files a claim with the insurers on the E&O
8 policies, what happens with that claim?

9 MR. DOODY: What should happen is --

10 THE COURT: They don't need to have a judgment, I take
11 it.

12 MR. DOODY: To have a determining claim? No. You
13 could have a settlement. So there could be a negotiated
14 settlement. But if it is defended and rebutted, until you get
15 a tribunal, some tribunal, to determine it, there is no --
16 there isn't an adjudicated or crystallized claim subject --

17 THE COURT: Well, let's assume that MF Global Inc.
18 submits a claim to the insurer for 120 million dollars of
19 policies that are covered by MFG Assurance. What happens to
20 that claim? How is it dealt with?

21 MR. DOODY: Well, that did happen. And the first
22 thing Your Honor would have seen, as you would guess, is a
23 reservation of rights letter, acknowledging receipt of the
24 piece of paper and reserving rights.

25 THE COURT: So you've acknowledged that they timely

1 submitted the claim within the period covered by -- or haven't
2 you done that?

3 MR. DOODY: I think the reservation of rights would
4 not -- would even accept that. It wouldn't say that it is
5 timely submitted. It's simply an acknowledgment that they have
6 a piece of paper.

7 THE COURT: Okay.

8 MR. DOODY: And then you go into the process. And
9 that's when we keep saying is that there is a process to
10 determine what coverage is. And then there is investigation,
11 defense, valuation of the claim. For example, Your Honor said
12 earlier that -- did something happen at MF Global. And I think
13 we all could say maybe something did happen. But if the number
14 was 1.6 billion dollars, how do we know that it's the full 1.6?
15 Could it be that there was a shift in the market so maybe if
16 the thing that happened only relates to 1.4? These are the
17 types of questions that are sorted out in the process of
18 adjudicating a claim. And unfortunately, that often involves a
19 dispute and having that dispute resolved before a tribunal
20 court.

21 THE COURT: Is there an arbitration clause in the
22 policies?

23 MR. DOODY: In the policies themselves? No, I don't
24 think there is, Your Honor. You can excuse me for a second --
25 'cause there are arbitration clauses in respect of insured --

1 claimant v. the insured which is why we have NFA --
2 arbitrations that move along pretty quickly.

3 THE COURT: All right. And do you do anything
4 differently if Sapere files a claim? Well, your position is
5 they can't, right?

6 MR. DOODY: Well, at this point, there's no privity.
7 We go back to the insurance law. If they pursue and prosecute
8 a claim to the point where there is a judgment against an
9 insured --

10 THE COURT: Then they can go directly against --

11 MR. DOODY: They can go direct --

12 THE COURT: If it's not paid, they can go directly.

13 MR. DOODY: Yes, Your Honor.

14 THE COURT: That's a matter of New York insurance law.

15 MR. DOODY: Exactly, Your Honor. And, of course,
16 you've seen that in our papers. The New York insurance law, we
17 submit, applies here because in McCarran-Ferguson requires that
18 the insurance law trumps the federal law. And therefore, with
19 all due respect, trumps the Bankruptcy Code in this situation.

20 THE COURT: And MF Global Inc. can file a claim
21 because there is privity?

22 MR. DOODY: It's an insured and therefore it should be
23 able to file the claim. Again, we'll go through the whole
24 process to determine what that claim -- how that claim comes
25 out but it can submit a claim.

1 THE COURT: All right. Anything else you want to add?

2 MR. DOODY: I think I have a couple points.

3 THE COURT: Go ahead.

4 MR. DOODY: I've been trying to take notes as we went
5 along here. And I wanted to come back to a couple points, I
6 believe, if Your Honor would give me just a moment to go back
7 and see what we've got here.

8 THE COURT: Sure.

9 MR. DOODY: With respect to the cap, Your Honor. The
10 first I heard about that was about an hour before I came here.
11 So we're not prepared on that. And quite frankly, we feel that
12 cuts against the whole notion of 3424 -- I'm sorry -- 3420 and
13 the McCarran-Ferguson in respect to how the policies can't be
14 disturbed if that's a statutory required section. And if you
15 start to limit the policies -- the insurance law clearly says
16 that the policy proceeds have to continue to flow -- we think
17 that will be a problem.

18 THE COURT: Well, but you've asked me to lift the
19 automatic stay. You acknowledge that these policies are
20 property of the estates, correct?

21 MR. DOODY: We did, Your Honor.

22 THE COURT: Okay. I can condition an order lifting
23 the stay on whatever conditions I think are appropriate. Do
24 you agree with that?

25 MR. DOODY: Your Honor --

1 THE COURT: That's in the Code.

2 MR. DOODY: Your Honor, when we asked for the lift to
3 the stay, we did that as a precautionary measure. We weren't
4 certain that it was necessary because we have --

5 THE COURT: You want to withdraw your request that I
6 lift the stay?

7 MR. DOODY: Well, Your Honor, we would be back to the
8 question of whether 3420 and the McCarran-Ferguson would take
9 the Bankruptcy Code -- would trump the Bankruptcy Code so that
10 any stay that's under the Bankruptcy Code would have to yield
11 to the McCarran-Ferg --

12 THE COURT: So as I understand it, then you're
13 opposing any cap?

14 MR. DOODY: Yes, Your Honor. I have no instructions
15 to accept a cap at this point.

16 THE COURT: Anything else?

17 MR. DOODY: Let me just see again if --

18 (Pause)

19 MR. DOODY: With respect to the other insurance,
20 Specialty Insurance did raise that there was some discussion
21 about it with respect to the E&O coverage. I just wanted to
22 reinforce the point I believe Your Honor said is that you
23 reserve all rights till the end. You can come up with an
24 allocation --

25 THE COURT: I'm not getting into a fight between -- I

1 mean, it --

2 MR. DOODY: Fair enough.

3 THE COURT: -- usually is -- every case I was involved
4 in as a litigator, everybody reserved their rights and they
5 worked out some arrangement as to what the sharing would be.

6 MR. DOODY: And, Your Honor, I believe that it can be
7 worked out. I just wanted to reinforce the point that you said
8 that you then go back -- once you determine -- maybe through
9 special findings or whatever, what the claims were and how they
10 get allocated through the various policies, you go back and
11 look at it again.

12 THE COURT: So point to me some authority that says
13 that I can't condition lifting the automatic stay on imposing,
14 to use Mr. Marinuzzi's term, a "soft cap" without prejudice to
15 the rights of any parties later on. You may not want to come
16 back here but that's --

17 MR. DOODY: Well, Your Honor --

18 THE COURT: Do you have any authority that supports
19 you?

20 MR. DOODY: Pardon me?

21 THE COURT: You have any authority that supports you?

22 MR. DOODY: No. Your Honor, again, that's not the
23 approach we've taken in terms of not trying to limit your
24 authority or suggest that it's limited in respect to lifting a
25 stay. Our approach as the insurance company, again, being

1 overseen by the Bermuda Monetary Authority and respecting the
2 insurance law, is that the insurance law trumps the Code here.

3 THE COURT: You certainly have -- this isn't really a
4 legal point so much, but I think you can certainly understand
5 some skepticism on the part of the creditor body since MFG
6 Assurance was a wholly owned Captive insurer that wrote a 120
7 million dollars of insurance. Reinsured laid off most of it.
8 But that gives rise to a certain amount of skepticism on the
9 part of creditors as to leaving MFG Assurance with a free reign
10 to pay what it wants to.

11 MR. DOODY: Your Honor, I certainly registered that
12 objectors have raised that point. I don't see that they've
13 substantiated that in any way. And my response would be is
14 that BMA has made clear --

15 THE COURT: In what? 'Cause I haven't seen anything
16 from the BMA that -- you've told me that. It was in your
17 papers. But I didn't see the issuance of any order or anything
18 of that nature.

19 MR. DOODY: There's an attachment to our original
20 brief. It's a letter from BMA instructing MFG Assurance not to
21 alter the terms of the policies.

22 THE COURT: Okay. I didn't -- all right. Anything
23 else?

24 MR. DOODY: I'm sorry. Let me just flip through a
25 couple more pages.

1 THE COURT: Sure. Go ahead.

2 (Pause)

3 MR. DOODY: Your Honor, I don't think I have anything
4 else in terms of direct points in the conversation. But I
5 guess I would want to say this one thing that was a bit of a
6 thread through the conversation. And that is that the
7 insurance proceeds only exist to the extent that there are
8 valid claims. One of the things the objectors have been trying
9 to suggest is that the money is there and can simply be shifted
10 over. And that we want to make sure it's very clear that there
11 has to be an adjudicated crystallized claim in order for that
12 to work.

13 THE COURT: But it doesn't have to be adjudicated
14 because you've acknowledged that it doesn't have to be
15 adjudicated. The SIPA trustee has submitted a claim. And your
16 internal claims review process has been triggered as underway.
17 I specifically asked you before does there have to be a
18 judgment. You said no.

19 MR. DOODY: That's fair, Your Honor. I come from the
20 insurance department. And we've always use "adjudicated" as in
21 that's a resolved claim. I don't mean to -- I take your point
22 that it doesn't have to be an entered judgment. It can be how
23 ever you get to the resolution of that claim. If you prefer
24 to use crystallized -- a crystallized claim.

25 THE COURT: Okay. All right. Thank you. Let me hear

1 from Mr. Kobak next and then I'll hear -- because you're kind
2 of --

3 MR. DOODY: Thank you, Your Honor.

4 THE COURT: -- straddling. Thank you, Mr. Doody.

5 MR. KOBAK: Thank you, Your Honor. James Kobak,
6 Hughes Hubbard & Reed for the SIPA trustee. Your Honor, I'll
7 be brief. I think most of the points have been covered. The
8 trustee does feel that we may have an interest in these
9 policies and proceeds some day either on the company's behalf
10 or on behalf of customers. We're very anxious that as much of
11 these policies as possible be preserved and not be spent on
12 defense costs. We recognize reluctantly that those costs are
13 provided for. But we do support the idea of a cap, a soft cap.
14 We actually think it should be somewhat lower. I was going to
15 suggest something like five percent of the total amount which
16 works out to between fifteen and twenty million dollars but
17 would guarantee at least a remaining amount of 300 or more. I
18 realize --

19 THE COURT: You'll be back here in two months.

20 MR. KOBAK: Yes, Your Honor. I realize that. But in
21 any event, it is our interest in preserving as much as possible
22 to satisfy the customer claims one way or the other. We do
23 think monitoring is appropriate. I think we're the ones who
24 suggested that. I think the monitoring should go a little
25 beyond just knowing what the burn rate is every forty-five or

1 sixty days. That kind of schedule is fine but we think there
2 ought to be an indication of who is getting the funds, who the
3 recipients are and at least by category, what kind of
4 activities. I don't think we -- I was very happy to hear the
5 insurance company's counsel talk about their procedures for
6 doing what they can to make sure the defense costs are
7 reasonable. But I think we and the Chapter 11 trustee should
8 have some ability to know who's actually receiving those
9 payments and what activities are being covered.

10 THE COURT: Well, let me ask you this. In most big
11 cases, I assume if the MDL sends the cases to one judge,
12 whether it's Judge Marrero or someone else, there's going to be
13 a plaintiffs' liaison committee and one or more lead counsel.
14 And work is going to be allocated among a group of firms. And
15 various firms are going to be given or take responsibility for
16 different issues, factual or legal, experts, et cetera. Their
17 burn rates may vary within the case. Why are you entitled to
18 know that XYZ firm is handling factual development on such and
19 such issue --

20 MR. KOBAK: No. No. All I'm --

21 THE COURT: -- or legal development and so their work
22 is frontloaded versus some whose work is backloaded.

23 MR. KOBAK: All I'm suggesting is that we know that
24 claims are made -- are being paid on behalf of Mr. Corzine, Mr.
25 Abelow and so --

1 THE COURT: Why?

2 MR. KOBAK: -- and for what activity. So we know if
3 it's in conjunction with the MDL. We know if it's in
4 conjunction with investigations.

5 THE COURT: Why are you --

6 MR. KOBAK: Because I think that would give us some
7 assurance that the funds are being spent appropriately. And I
8 don't see that that's really intruding on anybody's
9 attorney/client privilege. I'm not asking for detail about
10 which specific activities were covered in a particular period
11 in the MDL if that's the form that the action's taken, just
12 that so and so received so much or is asking for so much in
13 this period because of activities -- services on his behalf or
14 her behalf in the MDL as opposed to other investigations that
15 are underway and other lawsuits that may be underway.

16 THE COURT: Why are you entitled to know how much
17 counsel for Joe Smith is putting in for in defending Joe Smith
18 in SEC, CFTC, grand jury investigations.

19 MR. KOBAK: Because I think if we think that's
20 unreasonable, if we don't understand it, it gives us an
21 opportunity at least to talk to the insurer about it, maybe to
22 talk to some of the attorneys about it.

23 THE COURT: You know, when I approved --

24 MR. KOBAK: If we need to seek some relief, to be able
25 to do it.

1 THE COURT: When I approved in one of the earlier
2 opinions in this case, I said that the trustee was entitled to
3 conduct its investigation without having to reveal or disclose
4 its investigatory methodology. Why doesn't the same hold true
5 for the defense of representation of any of the individual
6 insureds?

7 MR. KOBAK: I'm not really asking for the methodology,
8 I don't think. I'm just asking to know what the dollar amounts
9 are. Certainly, we will submit fee applications and we'll
10 indicate how much we're spending on investigatory activities.

11 THE COURT: That's the difference. You want to get
12 paid.

13 MR. KOBAK: And that will be open to people.

14 THE COURT: You have to do that by statute. You have
15 to get my approval within -- you submit it --

16 MR. KOBAK: That's correct.

17 THE COURT: -- to SIPC and --

18 MR. KOBAK: That's correct, Your Honor. I just think
19 that --

20 THE COURT: Okay. All right.

21 MR. KOBAK: -- our having that transparency would be
22 helpful to us. We do have a concern that there be proceeds,
23 maximum proceeds, available to satisfy customer claims one way
24 or the other, if possible if appropriate, at the end of the
25 day.

1 THE COURT: Let me ask you this. Do you draw a
2 distinction between the U.S. Specialty D&O policy and the E&O
3 policy of MFG Assurance? One has a priority payment provision;
4 the other does not. It's been argued that makes no difference.
5 Do you see a difference?

6 MR. KOBAK: I don't necessarily see a difference, Your
7 Honor.

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

9 MR. KOBAK: No, Your Honor. Thank you.

10 THE COURT: All right. Let me hear from the
11 objectors. I don't know whether you've all worked out an order
12 in which you're going to go?

13 MR. MOIRANO: Good afternoon, Your Honor. Michael
14 Moirano. And I'm behalf of the commodity customers that have
15 filed class actions, at least some of them.

16 THE COURT: Right.

17 MR. MOIRANO: Just to update you on what's happening
18 in those cases, Your Honor. A number of cases were filed
19 primarily in New York but I filed a case in Chicago. There's
20 been another in Chicago. There's one in Montana. The
21 commodity customer cases are the subject of an MDL hearing that
22 occurred last Thursday. There's been no ruling on that yet.
23 And then, as Your Honor is probably aware, there's a number of
24 Securities Investor cases that have been filed on behalf of
25 bondholders and shareholders of MF Global.

1 THE COURT: So you have multiple cases in several
2 jurisdictions.

3 MR. MOIRANO: Right.

4 THE COURT: That usually gets resolved without an MDL
5 where the parties agree to file a consolidated amended
6 complaint and go forward in one court. That hasn't happened?

7 MR. MOIRANO: That didn't happen, Your Honor. But it
8 will happen because the MDL, as I'm fairly convinced, is going
9 to consolidate the cases. No one's really objecting to
10 consolidation. And they're going to assign them to one judge.
11 Whether it's the judge in Montana, Chicago or New York, we
12 don't know. But it will happen. And then as in the Securities
13 cases, there will be a consolidated complaint filed. So the
14 number of litigations going on is going to be reduced. And
15 we're all interested in it. And I can assure you, the only
16 reason I'm here is to try to protect the assets that are going
17 to be available to pay these customer claims.

18 THE COURT: You aren't taking quite as hard a position
19 about no defense for the individuals who you've sued.

20 MR. MOIRANO: Well, we are, certainly with respect to
21 the MFG policy, Your Honor. We're taking a position that the
22 MFG policy is a different policy. It's not only a policy
23 that's being administered by a subsidiary of the debtor, but
24 the coverage under that policy. And we believe under New York
25 law, that coverage should be made available exclusively to pay

1 damages to -

2 THE COURT: Why do you say that? It doesn't -- I
3 mean, it defines insurance to include the individuals.

4 MR. MOIRANO: That's correct.

5 THE COURT: And it includes -- expressly includes
6 defense costs. How do you write that out of the policy?

7 MR. MOIRANO: We're not writing it out of the policy
8 at all, Your Honor. Our position on the MFG policy is really
9 very simple. We have now filed class claims in both the
10 Holdings bankruptcy proceeding and in the SIPA proceeding where
11 we're asserting, in effect, tort claims against both of those
12 entities --

13 THE COURT: Yes. But that's always the case where
14 defense costs -- usually the case where defense costs arise.
15 Somebody files a complaint and the people want representation.
16 And there was insurance that they thought was there. They're
17 specifically defined as insureds.

18 MR. MOIRANO: Correct.

19 THE COURT: And their defense is supposed to be paid
20 for.

21 MR. MOIRANO: Correct, Your Honor. But in the
22 situation where we have a claim directly against either an
23 insolvent entity or a bankrupt entity, we say that --

24 THE COURT: No. You filed claims against the
25 individuals.

1 MR. MOIRANO: And against the entities, Your Honor.
2 We have filed class claims.

3 THE COURT: Okay.

4 MR. MOIRANO: So --

5 THE COURT: How does that change the fact that these
6 insurance policies provide for defense costs for the individual
7 insureds?

8 MR. MOIRANO: Okay. Under --

9 THE COURT: You have any law that supports you?

10 MR. MOIRANO: Yes.

11 THE COURT: Tell me what it is.

12 MR. MOIRANO: Our position is if you look at the New
13 York insurance law, Section 3420(a)(1) specifically says that
14 when an insured is either insolvent or the subject of a
15 bankruptcy proceeding --

16 THE COURT: Okay. The individuals that you've sued
17 are not insolvent. They're insureds. They're not -- I've read
18 your argument. I've read the statute. The insureds are the
19 entities, two of them who are in either a SIPA proceeding or a
20 Chapter 11 proceeding. Statute 3420 clearly applies in that
21 circumstance. But the individuals who you've sued are not
22 debtors in bankruptcy. If they were, the cases would be stayed
23 as to them. They're insureds. I don't see anything in 3420
24 that says that you trump their rights to have defense costs
25 paid.

1 MR. MOIRANO: Our position is, Your Honor, that now
2 that we've got claims pending against these two estates that
3 the estates have an interest in preserving those policies and
4 that under the law, the proceeds of that policies (sic) --

5 THE COURT: Okay. Let me ask again.

6 MR. MOIRANO: Sure.

7 THE COURT: Do you have any case that supports the
8 position you've just articulated?

9 MR. MOIRANO: There is no case that I've seen that
10 deals with this per se situation where you have --

11 THE COURT: I can tell you for sure there are plenty -
12 - and that's why I'm expressing such surprise. There are many
13 cases where the corporate entity has gone into a Chapter
14 proceeding -- into a bankruptcy proceeding, the securities
15 litigation or yours is a commodity customer class action
16 proceeds against the individuals. They were covered by
17 insurance, D&O or E&O insurance. And the debtor may be just as
18 desirous of preserving the fullest amount of the proceeds. But
19 the individuals' defense costs get paid.

20 MR. MOIRANO: I don't know that there's been a case
21 where the specific provision of the New York insurance law has
22 been applied in that context.

23 THE COURT: Do you have any cases that say that 3420
24 should be interpreted such that individual insureds who are not
25 in a bankruptcy proceeding, it somehow trumps their rights to

1 have coverage paid?

2 MR. MOIRANO: We are actually making that argument,
3 Your Honor.

4 THE COURT: I know you're making the argument.

5 MR. MOIRANO: No, no. We're not --

6 THE COURT: But I'm asking you whether you've got a
7 case that says it.

8 MR. MOIRANO: We're making the argument in a
9 declaratory judgment action that we filed. We believe this is
10 a state law issue.

11 THE COURT: Where did you file a declaratory judgment
12 action?

13 MR. MOIRANO: In front of Judge Marrero. We're going
14 to ask him, because it's a class claim, we filed it in front of
15 him -- this Court doesn't have to decide that issue, Your
16 Honor.

17 THE COURT: Really?

18 MR. MOIRANO: I don't believe you need to decide that
19 issue.

20 THE COURT: Well, I'm being asked to decide should
21 these insurers pay the defense costs for the individual
22 insureds. You say no, that the entire amount of the policy
23 proceeds should be preserved for the claimant, the creditors in
24 this case -- in these cases.

25 MR. MOIRANO: The issue before the Court is whether

1 the stay should be lifted to allow them -- and now, I believe
2 I've heard --

3 THE COURT: When did you file the case before Judge
4 Marrero?

5 MR. MOIRANO: Today.

6 THE COURT: Oh.

7 MR. MOIRANO: We just did. I'm not even -- I
8 didn't --

9 THE COURT: Just by happenstance you filed it today?

10 MR. MOIRANO: I didn't file it but I'm told it was
11 filed today.

12 THE COURT: Okay.

13 MR. MOIRANO: The --

14 THE COURT: Who are the defendants?

15 MR. MOIRANO: The insurance company.

16 THE COURT: Which companies?

17 MR. MOIRANO: The case today was just against MFG
18 Insurance (sic). That's the only -- to my knowledge, that's
19 the only one that's been filed. I think --

20 THE COURT: Okay. Let me come back. Do you have
21 case, any decided case, that supports your position that the
22 individual insureds that their rights to have their defense
23 paid is trumped by New York insurance law 3420?

24 MR. MOIRANO: I do not, Your Honor.

25 THE COURT: Okay.

1 MR. MOIRANO: And I don't believe there's been a
2 case --

3 THE COURT: All right. Do you have another point you
4 want to make?

5 MR. MOIRANO: Yes, Your Honor. The issue before the
6 Court is whether to lift the stay. That's the only issue
7 before the Court. You don't have to decide whether we're right
8 about trumping the policy proceeds.

9 THE COURT: Then why did you make the argument?

10 MR. MOIRANO: The argument is that we --

11 THE COURT: You made the argument here.

12 MR. MOIRANO: We made the argument because we were
13 told we didn't have an interest in this policy.

14 THE COURT: You made an argument before me and you're
15 saying I shouldn't decide the issue that you raised with me?

16 MR. MOIRANO: We're saying that the issue --

17 THE COURT: Yes or no? You raised it in your brief --

18 MR. MOIRANO: Yes, we did.

19 THE COURT: -- the 3420. And now you're telling me I
20 shouldn't decide it?

21 MR. MOIRANO: We don't believe you need to decide that
22 issue, Your Honor.

23 THE COURT: Are you telling me not to decide it?

24 MR. MOIRANO: You can decide what you like. We don't
25 think -- and I don't -- and I think that the issue before Your

1 Honor is whether the stay should be lifted. And if I may
2 address that.

3 The question here is, you have an estate -- you have
4 two estates pending before you which have substantial claims
5 now pending against them both of which are insure -- those
6 types of claims, whether the insurance companies are ultimately
7 going to agree, appear to be the types of claims that would be
8 covered by these policies.

9 THE COURT: Do you agree that the types of claims that
10 have been asserted also would provide for payment of defense
11 costs of the individual insureds who have been sued?

12 MR. MOIRANO: I believe they would. I do believe
13 that, Your Honor. But the question for Your Honor is, because
14 you're dealing with the estates, the individual insurers are
15 not parties here. They're not parties to this proceeding.
16 None of them have come in before this Court and asked for your
17 assistance. These are claims being made by the insurance
18 companies and being made specifically by the MFG Holding
19 estate. That's the only people that are before Your Honor
20 asking for any kind of relief. So the question now is, the
21 estate, the MF Holdings estate, has a substantial claim pending
22 against it. Is there an interest in preserving those policies,
23 particularly the E&O policies --

24 THE COURT: That's an issue for me to decide, correct?

25 MR. MOIRANO: On the stay issue. Whether -- I

1 believe, on the stay issue is whether you should lift that to
2 allow that policy to be eroded. And I'm talking specifically
3 about the MFG Insurance E&O policy, which, by the way, Your
4 Honor, just so you're clear, that policy only covers so far the
5 customer claims. That's the -- if you look at the claims that
6 they're saying are covered --

7 THE COURT: I'm aware of what you --

8 MR. MOIRANO: Okay.

9 THE COURT: I understand that.

10 MR. MOIRANO: So we're not dealing with the securities
11 claims. That's under the D&O policy. So we have a claim
12 against this estate for a substantial amount of money. There's
13 insurance available to the estate. The estate is an insured
14 under that policy. We are asserting that claim. And we
15 believe that's in the interest of the estate and all the
16 creditors, not just our clients, but all the creditors to
17 preserve --

18 THE COURT: Why shouldn't I just stay all of the
19 actions that are in the district courts against the individuals
20 because that will preserve the assets of the estate?

21 MR. MOIRANO: I'm not sure you can do that, Your
22 Honor.

23 THE COURT: Oh, really? Under 105 I can't do that?
24 Would you like to -- you have any authority that says I can't
25 do that?

1 MR. MOIRANO: You mean, you're going to file a -- ask
2 for an injunction against -- actions against individuals?

3 THE COURT: Well, you say that if I permit policy
4 proceeds to be paid out from the defense of individuals, that
5 will reduce the assets available to the estate.

6 MR. MOIRANO: True.

7 THE COURT: And my question to you -- there's a line
8 of authority applying Section 105 that would say I can't
9 permanently enjoin them but I could issue a stay in order to --
10 of all that litigation to preserve the assets of the estate.

11 MR. MOIRANO: Your Honor, if that gets us to get those
12 policy proceeds into the estate without diminution --

13 THE COURT: Not if you have to have judgment against
14 it.

15 MR. MOIRANO: -- I might be in favor of that, Your
16 Honor --

17 THE COURT: I doubt it.

18 MR. MOIRANO: -- because what we're trying to do is
19 we're trying to get that 120 million -- or now it's 150
20 million -- in coverage --

21 THE COURT: Okay. Any other --

22 MR. MOIRANO: -- as quickly as possible.

23 THE COURT: Any other arguments? I guess more people
24 will want to argue.

25 MR. MOIRANO: No, Your Honor.

1 THE COURT: Okay. Mr. Grabowski, you're next?

2 MR. MOIRANO: Just -- oh, one thing, Your Honor. If
3 you're going to enter or lift the stay, we believe it should be
4 narrowly drawn, limited to defense costs. The proposed order
5 submitted by MFG Insurance wasn't limited to defense costs. It
6 should be limited to defense costs. And we believe we have --
7 we as the customers under New York law -- we have an interest
8 in those proceeds. And we should be advised --

9 THE COURT: Where's your interest in the proceeds?
10 You don't have a direct claim against the insurers. If you get
11 a judgment against the individuals, under 3420, you may be able
12 to go directly against the insurer. But right now, you can't.
13 You acknowledge that?

14 MR. MOIRANO: No.

15 THE COURT: Although you say you filed an action today
16 before Judge Marrero. But I'm not sure what gives you the
17 right to go directly against the insurers.

18 MR. MOIRANO: 3020 -- no. We're not saying we have a
19 right to directly -- until we get a judgment --

20 THE COURT: Okay.

21 MR. MOIRANO: -- under 3020(a)(2) (sic), we can then
22 go against the insurance. But under 30 --

23 THE COURT: Now you can't.

24 MR. MOIRANO: What's that?

25 THE COURT: Now you can't. You acknowledge that you

1 cannot go directly against the insurers.

2 MR. MOIRANO: But under -- when the -- under
3 3020(a)(1), when there's an insolvency or a bankruptcy, the
4 proceeds of policy that are available to pay damages -- if you
5 read the statute, that's what it says. Those damages -- those
6 proceeds available to pay damages are preserved for the benefit
7 of the persons who are injured --

8 THE COURT: Where there's a bankruptcy of the insured.
9 But here, you've got a situation where the individuals that
10 you're suing are also insureds.

11 MR. MOIRANO: We have --

12 THE COURT: And they're not insolvent.

13 THE COURT: We have two situations.

14 THE COURT: Okay. I have your argument. Thank you.
15 Mr. Grabowski?

16 MR. MOIRANO: Thank you.

17 MR. GRABOWSKI: Good afternoon, Your Honor. My name
18 is Jon Grabowski from Ford Marrin Esposito Witmeyer & Gleser.
19 And I represent Sapere CTA Fund L.P. I just want to begin by
20 clarifying that I would agree with Mr. Moirano that we're
21 dealing with two separate sets of insurance policies, the MFGA
22 policy and the U.S. Specialty policy. And I think the
23 considerations under each are fundamentally different. And I
24 want to begin with talking about the MFGA policy and the
25 discussion we've had so far.

1 First, I'd just like to make a couple clarifications
2 concerning our position on the application of New York law and
3 the Bankruptcy Code and how that position was mischaracterized
4 in the papers of MFGA.

5 Second, I want to address the specific language in the
6 policies -- in the MFGA policies and why commodities customers
7 are due the full limits under those policies now.

8 And third, this issue has been raised so I want to
9 address the standing of MFGI customers in this proceeding,
10 generally.

11 THE COURT: Mr. Marinuzzi, I think, basically gave up
12 on that issue. Is that a fair statement, Mr. Marinuzzi?

13 MR. MARINUZZI: Your Honor, for the purposes of this
14 motion --

15 THE COURT: Yes.

16 MR. MARINUZZI: -- yes.

17 MR. GRABOWSKI: Okay. If Your Honor's not going to --
18 if we're not going to get there today, that's fine.

19 So I'd just like to first talk about the application
20 of New York law and bankruptcy law in this setting. MFGA says
21 we basically agree with their McCarran reverse preemption
22 analysis. We do not. In a sense, the McCarran-Ferguson Act
23 does not reverse the preempt -- reverse preempt the Bankruptcy
24 Code such that the policy proceeds are taken out of the estate.
25 Rather, the Code operates in conjunction with New York law to

1 keep the policy proceeds in MFGI's estate and to allocate them
2 to the injured commodities customers. MFGA's argument that
3 McCarran-Ferguson operated to reverse preempt the Bankruptcy
4 Code is just plain wrong because if you look at all the case
5 law cited by us and by them, if McCarran-Ferguson actually
6 preempted the Code in all those cases that looked at whether
7 policy proceeds were in fact part of the estate would have been
8 wrongly decided. This goes for cases that held that policy
9 proceeds were part of the estate and as well as cases that --

10 THE COURT: Mr. Grabowski, I asked this of Mr.
11 Marinuzzi early on. For purposes of this argument, I'm
12 prepared to assume that the proceeds are property of the
13 estate. The problem you have is they're also proceeds of those
14 individual insureds who are not insolvent.

15 MR. GRABOWSKI: Right.

16 THE COURT: That's the circumstance --

17 MR. GRABOWSKI: The --

18 THE COURT: -- we have presented here.

19 MR. GRABOWSKI: And that's where the New York statute
20 comes in under 3420. And that says the rights vest in the
21 injured party at the time of the filing of insolvency. So
22 commodities customers were injured at the latest on October
23 26th, 2011. Upon filing of insolvency of MFGI on October 31st,
24 2011, our rights vested in those proceeds. The defense costs
25 did not vest at that point. Even MFGI in their brief talks

1 about when these rights vest. And it's clear that --

2 THE COURT: So you don't have to get a judgment or an
3 adjudication or the claims resolution process in this case or
4 as part of the actions against the individuals. Just the fact
5 that MF Global Inc. commenced the SIPA proceeding and MF Global
6 Holdings Ltd. commenced the Chapter 11 proceeding, all you had
7 to do is say I have a claim that exceeds 120 million dollars.
8 Therefore, all of the policy rights have vested in us. That's
9 your position.

10 MR. GRABOWSKI: Yes, Your Honor. And if you look
11 at --

12 THE COURT: You have any case that supports that?

13 MR. GRABOWSKI: Yes, Your Honor. If you look at the
14 Second Circuit and the Baroff case, they talk about Section 167
15 which is the predecessor to Section 3042. And they said "The
16 legislative history of Section 167 makes clear that it was not
17 intended to establish any difference in the substantive rights
18 of one who has procured a judgment against his injury before
19 bankruptcy and one who has not. To hold otherwise would force
20 an injured claimant" --

21 THE COURT: Yes. But the issue here, Mr. Grabowski is
22 why that trumps the rights of the individual insureds who are
23 not in an insolvency proceeding.

24 MR. GRABOWSKI: Because their rights are extinguished
25 by our vested rights.

1 THE COURT: Oh, really?

2 MR. GRABOWSKI: Our rights vested --

3 THE COURT: You have any case that says that the
4 rights of the individual insureds is extinguished by your piece
5 of paper that said you have a claim?

6 MR. GRABOWSKI: It's extinguished in that it's part of
7 the

8 THE COURT: Answer my question.

9 MR. GRABOWSKI: -- bankruptcy proceeding. Yes. Yes.

10 THE COURT: Do you have any case --

11 MR. GRABOWSKI: Yes, Your Honor.

12 THE COURT: -- that says the rights of the individual
13 insureds who are not in insolvency, their rights were
14 extinguished by your filing a piece of paper that says you've
15 got a claim?

16 MR. GRABOWSKI: If you look at the Sacred Heart case
17 which deals with whether or not proceeds of an insurance policy
18 are part of the estate, it says "Faced with a typical situation
19 in which a debtor corporation's liability policies provide the
20 debtor and thus the estate with direct coverage against third
21 party claims, virtually every Court to have considered the
22 issue has concluded that the policy, and clearly the proceeds
23 of those policies, are part of the debtor's bankruptcy estate
24 irrespective of whether those policies also provide liability
25 coverage for debtor's directors and officers."

1 So what I'm saying is --

2 THE COURT: But that doesn't answer the issue of
3 whether -- I think that's why I said for purposes of this
4 argument, I'll assume these proceeds are property of the
5 estate. But that doesn't answer the question whether --

6 MR. GRABOWSKI: Well --

7 THE COURT: -- other insureds have rights as well.

8 And --

9 MR. GRABOWSKI: Your Honor --

10 THE COURT: -- I don't see how --

11 MR. GRABOWSKI: -- our rights vested on October
12 31st --

13 THE COURT: Okay.

14 MR. TRAGER: -- 2011, far in excess of the 120 million
15 dollars worth of proceeds available. I mean, it's not really
16 disputed that there's at least a billion dollars of missing
17 customer segregated funds. And I -- that's why I think --

18 THE COURT: But you haven't established liability --

19 MR. GRABOWSKI: -- it's important --

20 THE COURT: -- on anybody's part. All you've done is
21 you say 1,600,000,000 dollars is missing. We're out money.
22 We're entitled to this -- all of the money from these policies
23 without any additional showing, without a judgment. We filed a
24 piece of paper. We have a claim. Therefore, we've
25 extinguished everybody else's rights. That's your position,

1 correct?

2 MR. GRABOWSKI: Your Honor, I think it's --

3 THE COURT: Is that your position?

4 MR. GRABOWSKI: -- critical that we --

5 THE COURT: Is that your position?

6 MR. GRABOWSKI: I don't think that's entirely our
7 position. We're talking about the operation of New York law
8 with bankruptcy law and how they're operating together. And we
9 have to look at the plain language of the policies. There's no
10 requirement for an award. In fact, an award of damages is a
11 separate provision than damages. A judgment is a separate
12 provision. As I've said, New York law -- the intent of that
13 statute is to make it clear that you do not need a judgment to
14 collect. You know, if you look at the Baroff case again, the
15 Second Circuit has said that specifically that a claim in a
16 SIPA liquidation counts. So, I mean, if you look at the
17 policies, if you look at who's the insured, which is MFGI, if
18 you look at claim, whether we've made a claim --

19 THE COURT: Who are the insureds plural?

20 MR. GRABOWSKI: Insureds. But the insureds who are
21 injured, their rights vested on October 31st, 2011 and far in
22 excess of the policies.

23 Now we're talking about the requirement for
24 adjudication. And I think people are confusing the issue of
25 what a wrongful act or not. There's no requirement of mens rea

1 or anything like that. If you look to what a wrongful act is
2 in the policies, it includes breach of duty, it includes error,
3 it includes breach of statute, includes breach of rules and
4 regulations. There are numerous wrongful acts here. It cannot
5 be disputed that the one billion dollars --

6 THE COURT: Has there been any adjudication or
7 determination that there's been a wrongful act here?

8 MR. GRABOWSKI: Your Honor, the SIPA trustee has put
9 in his own papers that --

10 THE COURT: Has there been an adjudication that
11 there's been a wrongful act here? Yes or no?

12 MR. GRABOWSKI: As far as I know, not. But that's not
13 a requirement. The SIPA trustee has already admitted that the
14 commodities funds should have been segregated by MFGI's former
15 management for the benefit of MFGI's U.S.-based customers. And
16 the Court's own records show that there was a breach of duty.
17 The SIPA trustee has acknowledged this. What we're faced with
18 a situation is we can sit around and wait till someone makes an
19 adjudication, whether this Court makes an adjudication. In the
20 meantime --

21 THE COURT: Has your client --

22 MR. GRABOWSKI: -- what we're hearing is that the
23 insurance --

24 THE COURT: Let me ask you.

25 MR. GRABOWSKI: They want to let --

1 THE COURT: Mr. Grabowski --

2 MR. GRABOWSKI: -- eight million dollars --

3 THE COURT: Mr. Grabowski, is your client a plaintiff
4 in any of the actions pending in federal or state court?

5 MR. GRABOWSKI: Yes, Your Honor.

6 THE COURT: Have you sued any of the individual
7 officers, directors or employees of any of the MF Global
8 companies?

9 MR. GRABOWSKI: Yes, Your Honor.

10 THE COURT: And you don't believe to have their
11 defense paid --

12 MR. GRABOWSKI: Your Honor, that's not what we're
13 saying. At least --

14 THE COURT: That is what you're saying, isn't it?

15 MR. GRABOWSKI: Well, that's not what we're saying.
16 You know, one of the --

17 THE COURT: Let's take that one step at a time.

18 MR. GRABOWSKI: Okay.

19 THE COURT: There was insurance for which they were
20 insureds that provided for defense costs. You sued them. You
21 want to continue suing them but you don't want them to have
22 their defense costs covered by the insurance policies.

23 MR. GRABOWSKI: By the MF --

24 THE COURT: Yes or no?

25 MR. GRABOWSKI: By the MFGA policy, no.

1 THE COURT: Okay.

2 MR. GRABOWSKI: It's clear that they are not entitled
3 to those proceeds. On the U.S. Specialty policy, it's a
4 completely different consideration. You know, that policy is a
5 true D&O policy if you want to compare and contrast that with
6 the MFGA policy. The reason why we objected to that policy is
7 because their order, the proposed order put in by U.S.
8 Specialty, took the entire policy out of the estate.

9 THE COURT: Well, it's already acknowledged that that
10 is property of the estate.

11 MR. GRABOWSKI: Okay. I mean --

12 THE COURT: The question is whether there are proceeds
13 but I don't think I have to decide that.

14 MR. GRABOWSKI: So I'm comparing and contrasting. I
15 mean, we're not going to sit here and say that no defense costs
16 should be paid ever. You know --

17 THE COURT: That's what you're saying.

18 MR. GRABOWSKI: No. That's not what we're saying.
19 We're saying we have rights under the MFGA policy, vested
20 rights.

21 THE COURT: And the insureds, individual insureds,
22 have their rights under the MFGA --

23 MR. GRABOWSKI: They don't have rights. The rights
24 belong to us.

25 THE COURT: Okay. That's your position. Okay. Any

1 other arguments?

2 (Pause)

3 MR. GRABOWSKI: No, Your Honor. Briefly, I would just
4 like to talk about the U.S. Specialty policy, our objection
5 on --

6 THE COURT: Go ahead.

7 MR. GRABOWSKI: And our concern there was basically
8 depletion of the estate by the former officers and directors,
9 namely, unfettered depletion because as initially written, it
10 took the policy completely out of the estate. So --

11 THE COURT: They've acknowledged it's property --

12 MR. GRABOWSKI: -- there would be no protection --

13 THE COURT: -- of the estate.

14 MR. GRABOWSKI: What's that?

15 THE COURT: They've now acknowledged it's property of
16 the estate.

17 MR. GRABOWSKI: Okay. And we look forward to hearing
18 what controls will be in place under that policy. I would just
19 say that when this Court decides, it should look at the MFGA
20 policy in a completely different light than it does the U.S.
21 Specialty policy.

22 THE COURT: All right. Anybody else? Any of the
23 other objectors? Mr. Moirano, you've already argued. Any
24 other objectors who want to be heard? Reply? Mr. Marinuzzi,
25 anything you want to say?

1 MR. MARINUZZI: Your Honor, unless the Court has any
2 questions, nothing from me.

3 THE COURT: No. Mr. Doody?

4 MR. DOODY: It's a long way to go -- no, thank you,
5 Your Honor.

6 THE COURT: Okay. Ms. Ahari, is there anything you
7 want to add?

8 MS. AHARI: Your Honor, just one point. I believe Mr.
9 Moirano had made a statement that for the E&O policy that the
10 policy was administered by a subsidiary of the debtor. That's
11 not entirely accurate. The reinsurers have claims control
12 under the excess policies. And essentially, that primary
13 policy, it's treated as a deductible. After that, the
14 reinsurers have claims control which means that they make all
15 decisions with respect to all monies that are paid out of those
16 policies. So this is not a situation where MF Global Assurance
17 is going to be making the decisions with respect to defense
18 costs and settlements.

19 THE COURT: All right.

20 MS. AHARI: Thank you, Your Honor.

21 THE COURT: Ms. Goldstein, does the committee have
22 any view on this?

23 MS. GOLDSTEIN: No. Well, this is the first I heard
24 about the cap. So I cannot speak for the committee as to
25 whether twenty-five million would be sufficient or not

1 sufficient. But we like the idea of there being some controls.
2 But we don't need to get into the nitty gritty of how the money
3 is being spent.

4 THE COURT: All right. I'm going to take the matter
5 under submission. Anything else for today, Mr. Marinuzzi?

6 MR. MARINUZZI: No, Your Honor. Thank you very much
7 for your patience.

8 THE COURT: Mr. Kobak?

9 MR. KOBAK: No, Your Honor.

10 THE COURT: Thank you very much. We're adjourned.

11 (Whereupon these proceedings were concluded at 3:56 p.m.)
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

**Lisa Bar-
Leib**

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