

1 UNITED STATES BANKRUPTCY COURT
2 FOR THE SOUTHERN DISTRICT OF NEW YORK
3 Case No. 11-15059-mg

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5 In the Matter of:

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7 MF GLOBAL HOLDINGS LTD., et al.,

8 Debtors.

9 - - - - -x

10 MF GLOBAL INC., et al.,

11 Debtors.

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13 Adv. Pro. 11-02790-mg

14 - - - - -x

15 United States Bankruptcy Court

16 One Bowling Green

17 Courtroom 501

18 New York, NY 10004-1408

19

20 April 12, 2012

21 10:12 AM

22

23 B E F O R E:

24 HON. MARTIN GLENN

25 U.S. BANKRUPTCY JUDGE

1 (CC: doc no. 597) Application of the Chapter 11 Trustee for
2 Entry of an Order Authorizing the Trustee to Retain and Employ
3 Covington & Burling LLP as Special Insurance Counsel Nunc Pro
4 Tunc to the Appointment Date filed by Brett H. Miller on behalf
5 of Louis J. Freeh, Chapter 11 Trustee.

6 Marked Up Documents: 597, 614

7

8 Doc# 587 Motion to Approve/Chapter 11 Trustees Motion Pursuant
9 to 11 U.S.C. 105, 363 and 365 to (A) Establish Procedures for
10 the Sale or Disposal of De Minimus Assets; and (B) Authorize
11 the Trustee to (I) Pay Related Fees, and (II) Assume, Assume
12 and Assign, or Reject Related Executory Contracts or Unexpired
13 Leases - Document #: 587

14 Marked Up Documents: 587, 622

15

16 (Doc# 551, 511) Final Hearing RE: (I) Authorizing, But Not
17 Requiring, the Trustee to Pay Prepetition Employee Compensation
18 and Benefits Obligations; and (II) Confirming That the Trustee
19 Is Able to Continue Certain Ordinary-Course Benefits Programs
20 signed on 3/9/2012 (related document(s) 511). - Document #:551

21 Marked Up Documents: 511, 512, 551, 576

22

23 (Doc no. 510) Motion for Interim and Final Orders Under 11
24 U.S.C. Sections 105, 363, 364, 503(b)(1), 553 and 1108 and Fed.
25 R. Bankr. P. 6003 (I) Authorizing Continued Use of Existing (A)

1 Bank Accounts, (B) Cash Management System, and (C) Business
2 Forms and Checks; and (II) Authorizing the Continuation of
3 Intercompany Transactions Among the Debtors and Non-Debtor
4 Affiliates and According Superpriority Status to All
5 Postpetition Intercompany Claims filed by Brett H. Miller on
6 behalf of Louis J. Freeh, Chapter 11 Trustee.

7 Marked Up Documents: 510, 529

8

9 (CC: Doc no. 1113) Motion by Sapere CTA Fund, L.P. for Entry of
10 Order, Judgment and Decree that the Trustee make Restitution to
11 Commodities Customers of \$120,000,000 To Be Paid From The
12 Proceeds of Professional Liability Policies Insuring MF Global,
13 Inc. Issued by MFG Assurance Co. Ltd. filed by Jon R. Grabowski
14 on behalf of Sapere.

15 Marked Up Documents: 1113, 1117, 1122, 1186, 1221, 1273, 1301,
16 1302, 1305

17

18 (CC: Doc no. 1050, 1111, 1112) Hearing RE: Objections to Joint
19 Notice of Presentment of Stipulation and Order Resolving
20 Objection Relating to Assignment and Release of Claims from
21 Futures Customers filed by Christopher K. Kiplok on behalf of
22 James W. Giddens, Trustee for the SIPA Liquidation of MF
23 Global, Inc.

24 Marked Up Documents: 1050, 1111, 1112, 1190, 1206, 1208, 1215,
25 1216, 1217, 1274, 1277, 1295, 1296, 1307

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(CC: Doc no. 1086) Motion of James W. Giddens, SIPA Trustee for
Liquidation of MF Global, Inc., to Approve First Interim
Distribution for Allowed Commodity Futures Claims.

Document #: 1086

Marked Up Documents: 1086, 1098, 1190, 1206, 1208, 1215, 1216,
1277, 1297, 1300

Transcribed by: Anna Maria Leon

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P R O C E E D I N G S

THE COURT: All right. Please be seated.

All right. We are here in MF Global Holdings Ltd,
No. 11-15059 and MF Global Inc., 11-02790. We're going to take
the MF Global Holdings matters first.

Mr. Marinuzzi?

MR. MARINUZZI: Good morning, Your Honor. For the
record, Lorenzo Marinuzzi, Morrison & Foerster, counsel for the
Chapter 11 Trustee, Louis Freeh.

We're here this morning on four uncontested motions,
Your Honor, the first of which is a motion for interim and
final order authorizing the new debtors' continued use of
existing cash management system and forms. Your Honor, there
have been no objections. There was a revision to the final
order made in the past couple of days a reservation of rights
that was requested by the SIPA Trustee which is acceptable to
the Chapter 11 Trustee as well as the U.S. Trustee in JPMorgan
Chase. Mr. Fournier of Pepper Hamilton is on the telephone if
Your Honor has any specific questions. I have a copy of the
marked order with me if I --

THE COURT: I want it, just want to hand it up.

All right. Does anybody else wish to be heard with
respect to the debtors' application for final order on
continued use of existing bank accounts, cash management, et

1 cetera?

2 All right. Hearing none, that's granted.

3 MR. MARINUZZI: Thank you, Your Honor.

4 Your Honor, the next motion on the agenda is the
5 Chapter 11 Trustee's motion for interim and final orders
6 authorizing but not requiring the Trustee to pay prepetition
7 employee compensation and benefit obligations. For that, Your
8 Honor, I will turn the podium over to my colleague, Melissa
9 Hager.

10 THE COURT: Okay. Thank you.

11 MS. HAGER: Good morning, Your Honor. Melissa Hager
12 of Morrison & Foerster on behalf of the Chapter 11 Trustee,
13 Louis J. Freeh.

14 Your Honor, as my colleague, Mr. Marinuzzi,
15 indicated, there have been no objections filed to this motion.
16 It was originally filed in connection with the first day
17 hearings of Holdings USA on March 2. There was a hearing held
18 on March 6 with regard to the interim relief sought therein.
19 An order was granted on March 9 with regard to that. There was
20 one issue that remained outstanding with the U.S. Trustee after
21 the March 6 hearing on the 401K issue. There's a supplemental
22 order entered on March 20 on that issue. Pursuant to the terms
23 of the interim order, of paragraph 19 of the interim order, if
24 no objections were filed, the interim order would become final

25

1 automatically. There was three remaining issues that at the
2 request of the U.S. Trustee's office, we tabled to the final
3 hearing, and that's with regard to the payment of the Health
4 Plan Administrator for the employee benefits, the return of the
5 refunds under the employee stock purchase plan, and the ability
6 to terminate the long-term incentive plan for the employees of
7 MF Global.

8 We have not received any objections to any of those
9 motions from anyone. I can certainly go through those in more
10 detail with Your Honor if you would like, but we are seeking
11 the final relief with regard to those three issues that were
12 not part of the interim order, and I do have a marked up order
13 of the final order.

14 THE COURT: Right. Let me see that. Thank you.

15 MS. HAGER: If I may approach?

16 THE COURT: Yes.

17 MS. HAGER: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MS. HAGER: Thank you.

20 THE COURT: Mr. Masumoto, we deferred some of these
21 items to give you and your office an opportunity to review the
22 matter further with the debtor. Do you have -- what is your
23 position?

24 MR. MASUMOTO: We have no further objections at this
25

1 time, Your Honor.

2 THE COURT: Thank you. Does anybody else wish to be
3 heard with respect to the application for a final order
4 authorizing the payment of prepetition employee compensation,
5 benefits, et cetera?

6 All right. Hearing none, that's granted as well.
7 Thank you very much.

8 MS. HAGER: Thank you, Your Honor.

9 MR. MARINUZZI: Your Honor, that brings us to the
10 third item on the agenda, which is the Chapter 11 Trustee's
11 motion for approval of procedures for the sale of de minimis
12 assets and assumption of related contracts and rejection of
13 related contracts. For that I'll turn the podium over to my
14 colleague, William Hildbold.

15 THE COURT: Thank you.

16 MR. HILDBOLD: Good morning, Your Honor. Billy
17 Hildbold on behalf of the Trustee.

18 I'm here to represent the Trustee's motion for an
19 order to establish procedures for the sale or disposal of de
20 minimis assets. We received comments from the U.S. Trustee,
21 the SIPA Trustee, and the U.S. Attorney's office, and also made
22 some further changes to comply with your opinion in Borders. I
23 have a marked up order.

24 THE COURT: All right. Why don't you bring it up?

25

1 Thank you. Just give me a chance to look at the mark
2 up.

3 The question I have is, and you can tell me where it
4 is in here, is the issue of whether you have to file an
5 application for retention of the auctioneers since there really
6 is -- it's not ordinary-course of business, and ordinarily you
7 would have to -- have you discussed that with the U.S.
8 Trustees?

9 MR. HILDBOLD: Yes, and we altered the order to
10 include that in there. I believe it's toward the end of the
11 order.

12 THE COURT: Yes, I see it in paragraph 22.

13 MR. HILDBOLD: Yes.

14 THE COURT: Okay.

15 MR. HILDBOLD: We also submitted a declaration of
16 Sean Gumbs of FTI.

17 THE COURT: Okay. All right. Mr. Masumoto, are you
18 satisfied with this?

19 MR. MASUMOTO: Based upon the changes, Your Honor,
20 we're satisfied.

21 THE COURT: All right. Does anybody else wish to be
22 heard with respect to the motion to establish procedures for
23 the sale of de minimis assets?

24 All right. The Court has reviewed the motion and
25

1 reviewed the proposed order, in particular raised this question
2 about the retention of broker's auctioneers, and I see the
3 change that's been made on that. That motion is granted as
4 well. Thank you very much.

5 MR. HILDBOLD: Thank you, Your Honor.

6 MR. MARINUZZI: Your Honor, that brings us to the
7 final application on the calendar for the Chapter 11 case, and
8 that's the Chapter 11 Trustee's application to retain Covington
9 & Burling as Special Insurance Counsel under 327(a). Submitted
10 along with that application is the supplemental declaration of
11 Louis J. Freeh. Mr. Ben Duke of Covington is in the courtroom,
12 should the Court have any questions specific to the firm.
13 There have been no objections filed to the application. There
14 were some questions asked by the U.S. Trustee's office and
15 we've conveyed the answers either indirectly or directly.

16 If Your Honor has any questions, we're happy to
17 answer them. Otherwise we respectfully request that the
18 application be granted.

19 THE COURT: Mr. Masumoto?

20 MR. MASUMOTO: Your Honor, we have no further
21 objections.

22 THE COURT: All right. Does anybody else wish to be
23 heard with respect to the application to retain Covington &
24 Burling LLP as Special Insurance Counsel?
25

1 All right. That motion is granted as well.

2 MR. MARINUZZI: Thank you, Your Honor.

3 THE COURT: Thank you very much.

4 MR. MARINUZZI: That concludes the calendar.

5 THE COURT: Okay.

6 MR. BIENENSTOCK: Your Honor, the committee --

7 THE COURT: Just identify yourself for the record.

8 Mr. Bienenstock.

9 MR. BIENENSTOCK: Martin Bienenstock of Dewey &
10 LeBoeuf for the statutory creditors committee.

11 Your Honor, we have filed a status report because we
12 thought it would be instructive both for our constituency as
13 pursuant to the statute and to the Court.

14 THE COURT: I read it.

15 MR. BIENENSTOCK: I appreciate it, Your Honor. If
16 the Court feels it might be useful, I'd like to highlight a few
17 things about the status report just a few minutes. I assured
18 Mr. Kobak this is not an effort to ask the Court to call balls
19 and strikes as between, you know, the information request --

20 THE COURT: You filed that separately in the MF
21 Global Inc. proceeding, but go ahead.

22 MR. BIENENSTOCK: We did, but that was in a joinder.
23 So the purpose of this as I mentioned is to educate our
24 constituency and also the Court, but for the Court -- the

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1 reason we thought it was important for the Court to see it, is
2 for the Court to see what the administration of the Chapter 11
3 debtor's estates requires to get to an end point. And there's
4 been very little detail about that. So very briefly, Your
5 Honor, the first four pages of the status report really go to
6 explaining the liability structure that may or may not give
7 rise to equity for creditors of the holding company. There's
8 the 1.6 billion of missing funds, according to the SIPA
9 Trustee's report at MFGI. Now --

10 THE COURT: And you question whether it's 1.6 or 600
11 or whatever it is.

12 MR. BIENENSTOCK: We do, and the reason that's
13 relevant is for two main reasons. The first is we do own the
14 equity in that, and just days before the bankruptcy, creditors
15 of the holding company provided \$875 million that went down
16 into MFGI. So there may or may not be equity there. In
17 addition, MF -- the holding company, MF Global Holdings Ltd,
18 has customer accounts at MFGI, its affiliates have customer
19 accounts, and we have intercompany claims. So to determine the
20 potential values, the creditors of the holding company may get
21 from MFGI, it's obviously very relevant whether there is really
22 a billion-six of missing funds, and I think more of the
23 question about this issue really relates to the definition of
24 missing funds as opposed to where they are, because most people

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1 in the case I believe think they know generally where most of
2 the funds are. It's -- I -- we think that the SIPA Trustee is
3 saying, he doesn't have them, not necessarily that people don't
4 know where they are.

5 But in any event, for creditors of the holding
6 company to assess the holding company's recovery from MFGI and
7 its affiliates, that's obviously something that needs
8 clarification as to how they are computing it, what will be
9 recovered, and what not.

10 I -- the global close, the absence of a global close
11 is obviously troubling and that's occasioning efforts,
12 substitute efforts that take longer and more expense.

13 THE COURT: You're not laying that at the feet of
14 the SIPA Trustee, are you?

15 MR. BIENENSTOCK: Well, I'm -- the SIPA Trustee says
16 that he didn't agree because the UK Administrator didn't agree,
17 so we're not pointing one finger. We're just saying it's very
18 regrettable that all of these fiduciaries and all of these
19 debtors could not have agreed to the shortest and least
20 expensive method of reconciling the books. But we -- that's --
21 as I said, I'm not asking --

22 THE COURT: I wish it were so easy as to reconcile
23 the books, but let's accept your statement at face value.

24 MR. BIENENSTOCK: Now there aren't \$290 million of
25

1 non-customer estate assets that the SIPA Trustee reports --

2 THE COURT: Let me interrupt for this purpose --

3 MR. BIENENSTOCK: Yeah.

4 THE COURT: -- because I have given some thought to
5 the filing that Mr. Miller filed in the SIPA case with respect
6 to -- it's filed in response to a motion that really has
7 nothing to do with it, but the request for additional
8 information, and you filed a brief joinder in it, and that's
9 the issue you raise in here. And when I read the omnibus reply
10 that Mr. Kobak filed, he indicated that the six month of report
11 I believe is due June 4. And so when I pondered whether -- it
12 is important, Mr. Bienenstock, that not only the creditors of
13 the holding company, but of all constituencies have as much
14 information as possible -- as to whether that June 4 date is a
15 reasonable date to adhere to, and my conclusion is that it is.
16 But that I do expect that in the June 4 report which has long
17 been -- the SIPA Trustee has known for a long time that the six
18 month report, that's when it's due -- there was an earlier 60-
19 day report, and there's been status reports along the way, but
20 it does seem to me that the six month report should be quite
21 fulsome. It should deal with -- because people have gotten to
22 shorthand whether there's 1.6 billion or a different amount
23 that's quote-unquote "missing" or whether people know where it
24 is, and the issue is can it be recovered or not. The SIPA

25

1 Trustee has statutory obligations under the Securities Investor
2 Protection Act to investigate possible causes of action, and
3 there had been -- you know, the fact that that's been going on,
4 continues to go on, is well known.

5 So I agree with you that there needs to be a full
6 report and I think that Mr. Freeh likewise as the Chapter 11
7 Trustee should be delivering a report on the status of the
8 Chapter 11 cases. And I think that June 4 date is a reasonable
9 date to require that as well. I would encourage the two
10 trustees or their many counsel to confer as far in advance of
11 that date as possible, to coordinate to the fullest extent
12 possible the information that each is going to provide so that
13 there are as few inconsistencies -- I mean, one of the things
14 I've stressed from the start, there needs to be cooperation
15 between the two trustees in sharing of information. And I
16 think that that's existed. I don't want to get into a debate
17 today whether every request by one side or the other has been
18 responded to. I don't view that as worthy of time today. I've
19 emphasized that cooperation is important and I will take it
20 that it has occurred. And I view the June 4 reports, again,
21 from both trustees as important for all constituencies
22 involved. Now, if there is equity -- it should only happen if
23 there's equity available in MF Global Inc., wonderful. Okay?
24 If there's not, that ought to become clear as well. I don't

25

1 know, and when we get to the next portion of the calendar, you
2 know, I'm going to ask Mr. Kobak where the trustee stands in
3 terms of the investigation of potential claims. In the
4 insurance policy hearing recently, Mr. Kobak reported that the
5 trustee, the SIPA Trustee filed a claim with the E & O
6 insurers, just -- I don't know precisely when, but before that
7 hearing took place.

8 So things are moving forward, maybe not as quickly as
9 everybody would like, but there's a lot on everybody's plate.
10 So your point about the need for information, I take that as a
11 given. That's been true from the start of the case. I do
12 think the June 4 date, given where we are now, it's about a
13 month and a half from now, is ample time for very good reports
14 to be done by both trustees.

15 MR. BIENENSTOCK: Okay. Your Honor, if I just might
16 --

17 THE COURT: Go ahead, Mr. Bienenstock.

18 MR. BIENENSTOCK: -- make a couple comments.

19 In addition to the various -- up until now, I've
20 covered the liability questions and potential equity or not, et
21 cetera, and there are several pages of potential asset
22 recoveries in the United States, 244 million in margin at what
23 we call FINCO, MFG Finance U.S.A., accounts of MF Global
24 Special Investor at MFGI of substantial value perhaps of up to
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1 350 million, et cetera -- I won't take the Court's time to
2 repeat everything in the report. All of this -- once obviously
3 information is available, some effort and time is going to be
4 required in recovery, so clearly time is of the essence. I
5 appreciate the Court's words. There's a lot on everyone's
6 plate, but time really is our enemy here.

7 We also shared our report that we filed, Your Honor,
8 a month before we filed it with the Chapter 11 Trustee because
9 we -- and we took their comments -- because we didn't want to
10 make statements about lack of information that were incorrect
11 because a lot of our information comes from the Chapter 11
12 Trustee who meets with the SIPA Trustee.

13 So clearly what we infer from this is they may -- as
14 our understanding is there have only been a couple meetings for
15 altogether -- a few hours altogether, but they obviously have
16 somewhat different views. They're obviously trying to some
17 extent to cooperate. The bottom line is it could be better and
18 we hope it will be. And I'm sure the Court hopes it --

19 THE COURT: I am sure that if Mr. Freeh calls Mr.
20 Giddens or Mr. Miller and Mr. Marinuzzi call Mr. Kobak and his
21 colleagues, those calls will be answered, questions will be
22 posited, where answers can be given they will, where they can't
23 be given efforts will be made to respond. So I think that June
24 4 is an appropriate date for both trustees to update the Court,

25

1 and when I say June -- well, we'll have -- I don't know when
2 the next hearing after June 4 is. So if that's the date when I
3 expect the reports will be filed, at the next omnibus hearing
4 thereafter, there undoubtedly will be some discussion in Court
5 about it, a brief summary given of the reports, and if the
6 Court has questions, the Court will give the questions. I'm
7 sure you won't be shy, Mr. Bienenstock, if you have questions
8 you want to convey to Mr. Kobak, you'll do it.

9 MR. BIENENSTOCK: Well, we'll do it before the
10 hearing.

11 THE COURT: You'll answer your calls. Well, I know
12 you will before the reports are done.

13 MR. BIENENSTOCK: Yes.

14 THE COURT: And your report, it was in a useful
15 table format, you identified the specific issues where you had
16 concern, and I'm sure Mr. Kobak and his colleagues and Mr.
17 Giddens have all read it, and are mindful of the issues. They
18 seemed appropriate issues to be raising, and hopefully as many
19 issues as possible will be addressed in the two reports.

20 MR. BIENENSTOCK: Your Honor, to --

21 THE COURT: So let's move on with the agenda.

22 MR. BIENENSTOCK: Okay. Taking Your Honor's comment
23 about not being shy up for one last comment. This is ---
24 because this is really an example of what needs to improve.

25

1 The SIPA Trustee has remarked in multiple responses to our
2 report that since we have some of the key employees, three of
3 them, at the holding company, that they know the information.
4 That is a key misconception. They can't memorize these
5 records. They need access to the records with the SIPA Trustee
6 in order to put things, two and two together. And I just
7 wanted to leave the Court with that, because that's the last
8 reply we've had from the SIPA Trustee, and it is a
9 misconception.

10 THE COURT: I don't want Mr. Kobak to feel he needs
11 to respond to what you're saying. I don't think this is a
12 productive use of a Court time today.

13 MR. BIENENSTOCK: I know.

14 THE COURT: Okay? I think I've made clear what I
15 expect to happen if. You know, I'm satisfied with the date
16 that's the six month date, and hopefully as much information
17 sharing in advance and raising of questions in advance where
18 people have legitimate requests for information, that'll happen
19 well before the deadline for the reports, and all
20 constituencies will benefit from full reports by both trustees.

21 MR. BIENENSTOCK: Thank you, Judge.

22 THE COURT: Okay. Thank you very much.

23 Mr. Miller?

24 MR. MILLER: Yes, Your Honor, very briefly. Brett
25

1 Miller, Morrison & Foerster on behalf of the Chapter 11
2 Trustee.

3 We will be --- we will submit a status report on the
4 fourth, a hearing --- the next omnibus following the filing of
5 the status report is on the fourteenth, so that's timely. We
6 would be prepared to answer questions at that time. Just like
7 with the 60-day report, we will --- well, the report that took
8 60 days for us regarding the bank accounts, we work closely
9 with the SIPA Trustee. After we filed our statement in the
10 SIPA case, the two trustees have corresponded. We've been
11 speaking with Mr. Kobak and his colleagues at Hughes Hubbard,
12 and we expect the information flow to work in order to get both
13 reports done timely and efficiently, and be productive for all
14 customers and creditors.

15 THE COURT: Thank you. You know, and I've said
16 before that if there are problems where one trustee or the
17 other believes the other is not being responsive, you will
18 endeavor to work it out directly, and if you can't, whoever
19 thinks they need the assistance of the Court will arrange a
20 telephone conference and we'll do it. That hasn't been
21 necessary so far. I have no doubt that the two trustees can
22 work cooperatively to move this forward. Okay?

23 MR. MILLER: Right. Thank you very much, Your
24 Honor.

25

1 THE COURT: Thank you very much.

2 Okay. That's it, Mr. Marinuzzi?

3 MR. MARINUZZI: Nothing left on the calendar, Your
4 Honor.

5 THE COURT: All right. We'll --- in about one
6 minute, we'll move to the MF Global Inc. docket. Everybody
7 just stay in their place. I need to get some papers off my
8 desk everyone else can bring out. No one has to get up when I
9 come back in.

10 (Whereupon the Judge briefly left the courtroom.)

11 THE COURT: Okay. Mr. Kobak?

12 MR. KOBAK: Good morning, Your Honor. James Kobak,
13 Hughes Hubbard & Reed for the SIPA Trustee.

14 We do intend to file a comprehensive report on June 4
15 indeed. One of my colleagues is in the courtroom today who is
16 principally responsible for that, and I'm sure she was
17 listening attentively to Your Honor's remarks, and we look
18 forward also to seeing the Chapter 11 Trustee's report, and we
19 will be talking to them about that as well as many other things
20 I'm sure in the coming weeks.

21 I do want to note that Mr. Wasserman from the CFDC
22 and Mr. LaRosa from SIPA are both on the line, along with
23 various other people.

24 The first item on our agenda today is a status
25

1 report, and I think I can maybe address the 1.6 billion in the
2 process of doing this. But I'd like to start with where we are
3 in the claims process because I think that's the most critical
4 thing that's happening right now. The figures are essentially
5 what we reported in the motion --- or in the reply, I guess ---
6 the omnibus reply to the distribution motion. We've basically
7 determined and sent out letters of determination on
8 approximately 21,000 commodities claims --- that's all kinds of
9 commodities claims 4(d) and 30.7 out of about 23,000, so it's a
10 little over 90 percent. I think the time period is consistent
11 with what we reported last time, which would be we would be far
12 along in the process by the beginning of this month, April, and
13 hope to substantially conclude it by the end of the month. And
14 I think that still holds. The 2,000 or so that remain do
15 contain some very complicated large accounts with many
16 transactions with them, so they inevitably take longer to do
17 than some of the others. We also include in our population
18 several hundred that were actually filed as general creditor
19 claims but that we've determined seem to claim commodities
20 claims, so we treat them as commodities claims, but it
21 obviously we get to them a little bit later in the process and
22 some of the others. I do think that in the next few days, by
23 the beginning of next week, we'll have at least several hundred
24 more determinations that will go out.

25

1 Over half the claims that we've decided to date have
2 become final in the sense that people have either returned the
3 letter of determination agreeing with our claim, or the time to
4 file an objection has expired. The time for many more thousand
5 objections will expire towards the end of this month, so we'll
6 have a somewhat clearer picture, obviously, of where we are at
7 that point.

8 We've received 59 objections to date, many of which -
9 -- most of which are quite minor, and we've instituted a
10 process of contacting those objectors in hopes that we can
11 resolve, you know, very modest, trivial amounts without having
12 to have a lot of motion practice. I should also mention that
13 we maintain, we instituted an objections hotline so if people
14 receive an objection to their claim and have a question about
15 it, they have a place that they can call, and I think that has
16 been perhaps one reason why we don't have more objections than
17 the 59 that we have received.

18 We have done some work, considerable work, actually,
19 on the securities claims. We have approximately 350 of those
20 after a lot of them turned out to be commodities claims or
21 general creditors claims that were reclassified. We do expect
22 to begin issuing letters of determination on those in a few
23 weeks as we near the end of the commodities process. As Your
24 Honor knows, the actual time period for people to file
25

1 securities claims doesn't officially end until the end of June,
2 but we can start processing those that are in before that, and
3 we do intend to do that. And that will probably include a
4 determination of holdings which filed a very substantial
5 customer claim, some of which we disagree with or think is
6 subordinated.

7 One thing we have realized that based on the work
8 we've done, we think the estimates of claims that we've been
9 kind of informally working on are pretty close to what the
10 actual claims may be. We obviously don't know that precisely
11 and the amounts claimed are maybe a little bit higher than we
12 estimated, but I think that in the objection and determination
13 process, some of those figures will come down. So that leaves
14 us with the shortfall which we continue to think is in the area
15 of \$1.6 billion. We've always said it was an estimate, and
16 we've always tried to describe it as a shortfall, not
17 necessarily missing securities. The way we look at it is, we
18 look at what all -

19 THE COURT: You're using securities include
20 commodities -

21 MR. KOBAK: I'm sorry. Missing property, Your
22 Honor. We look at the total of all the claims that are filed
23 that we --- that our estimate of what the amount of the total
24 claims that are filed are across all the commodities --- all

25

1 the pools, commodities as well as securities, and compare that
2 to the property that we have on hand to satisfy them. And the
3 difference between those numbers at present is approximately
4 \$1.6 billion.

5 THE COURT: Does that include the claims for funds
6 that are being held in the U.K.?

7 MR. KOBAK: Yes, it does.

8 THE COURT: That's about 700 million?

9 MR. KOBAK: Yes, Your Honor. So that's a big part
10 of it.

11 THE COURT: You know where that money is.

12 MR. KOBAK: We know where that money is.

13 THE COURT: You're just not getting it back at the
14 moment.

15 MR. KOBAK: That's correct, and I'll get to that in
16 a second, Your Honor. And I think --- you know, the creditors
17 committee I think referred to a five --- or hundred --- \$600
18 million estimate by CME. I'm not sure if that's exactly the
19 CME's number, but I don't think --- I think our estimate of
20 what's kind of missing from the 4(d) might be a little higher
21 than that, because I think we see the claims as a little
22 higher, but I don't think it's far off the mark. But we've
23 never said that all of this is missing money, it's just
24 shortfall in the terms of it's money that we do not have to pay

25

1 the claims that have been made against us that we think are
2 likely to be allowable.

3 THE COURT: Okay.

4 MR. KOBAK: So that leaves me to our investigation
5 which Your Honor indicated he wanted to hear some more about
6 and, and again, I'm somewhat constrained in what I can say
7 about details. But we have been looking particularly at areas
8 where there might be possible recoveries of funds. With
9 respect to the U.K., we've had discussions, extensive
10 discussions, and some exchange of information with the
11 administrators. I think it's fair to say that our views on how
12 the money that they're holding should be treated are pretty
13 diametrically opposed at this point as a legal matter,
14 primarily, also to some extent perhaps as a factual matter.
15 We've been urging, and I think the U.K. administrators now
16 agree, that really for the benefit of creditors in both
17 estates, this is an issue that needs to get in front of the
18 U.K. Courts and decided. And what we've been advocating is in
19 a fairly brief time schedule, if we can moving lately for
20 directions, I think --- while I don't want to commit the U.K.
21 Administrators to anything, but I think generally they agree
22 with that approach. So hopefully we'll at least get that issue
23 teed up in the U.K. Courts in the very near future.

24 THE COURT: I'm assuming with the recent Lehman
25

1 ruling provides some guidance of answers.

2 MR. KOBAK: I don't know if it provides guidance or
3 more questions, but it certainly is something that the parties
4 need to take into account. I know it's of great concern to the
5 U.K. administrators exactly what its application might be to
6 our situation and what it implies. So we've all studied that
7 with a great deal of care.

8 We've also been working closely with attorneys for a
9 number of claimants who have 30.7 funds, so that's been a very
10 collaborative process to now. Our investigation is continuing.
11 It's led the Trustee to believe that he has more than colorable
12 claims against some parties to seek return of funds. We
13 announced a few days ago that we have entered serious
14 discussion with JPMorgan Chase, so those discussions are
15 underway. The Trustee believes he may have claims against
16 other parties. I really do not think it would be appropriate
17 to get into that today, but I think we will be pursuing claims.
18 It's our intention at least with some claims and to the extent
19 that we're able to work out the details of how to do it, to try
20 to coordinate any claims we might pursue with those that are
21 being pursued by commodities claimants in the class actions.
22 And our goal ultimately is if there are funds that can be
23 recovered, and parties will have defenses --- it's not like
24 pushing a button --- but if there are funds that can be

25

1 recovered, that they be recovered as efficiently as possible
2 but with as few arguments about standing and everything else as
3 possible, and that there be some mechanism that they get return
4 to customer property so that they can be distributed in
5 accordance with the claims process in our estate, unless that
6 makes a lot more sense than having some kind of duplicate or
7 parallel class action claims process.

8 So we'll be having some discussions with
9 representatives of some customers to see if anything can be
10 worked out along those lines. And the fact that we want to
11 pursue those claims is one reason that we've asked for
12 assignments to the extent that that might help us on standing
13 arguments. It's also a reason that we've made claims against
14 insurance policies and why we advocated that there be at least
15 some degree of monitoring of expenses under the policies by the
16 SIPA Trustee as well as the Chapter 11 Trustee.

17 On the administrative side, I'll just conclude
18 briefly. We have closed the Chicago office. We have some
19 equipment and I think some related technology that's housed
20 somewhere in Illinois that we're --- is no longer needed for
21 operations and may have some value, so we are in the process of
22 trying to sell that. We are now down to 32 former MF Global
23 employees and I think by mid-May that number will be more like
24 16 or 17. We've been basically letting people go as we've have

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1 no further need for their services, and in some cases, I'm
2 happy to report people have actually been able to get more
3 permanent employment.

4 We do intend to file a comprehensive report in June.
5 It's possible that we may release a report on our investigation
6 before that which I think would shed some light on some of the
7 causes of MF Global's demise. We have established hotlines,
8 not only a general hotline, but as I said a hotline that
9 customers can call about questions about objections and we have
10 another hotline for people that have questions about their tax
11 situation and their tax claims to the extent that we can help
12 them. And we do update and continue to update our website
13 continually as new developments arise.

14 So again we'll report further and --- on June 4 and
15 we do look forward to sharing information with the Chapter 11
16 Trustee and learning what they are prepared to report as well.

17 THE COURT: Thank you.

18 MR. KOBAK: Your Honor, I'd like to turn to the next
19 item on the agenda which is our motion to make an interim
20 distribution to commodities customers. I'm going to handle
21 this, but if it's all right with Your Honor, when we get to
22 whether there should be a delivery class and how that will
23 work, I'll turn the podium over to Mr. Trager.

24 THE COURT: Okay.

25

1 MR. KOBAK: Your Honor, this is a motion that seeks
2 to distribute up to \$600 million, additionally, to the 4(d)
3 claimants and the distribution will go to those whose claims
4 have become final, either because --- and who have signed and
5 agreed to our determination of the claim. We're holding back
6 approximately \$700 million which we think is a prudent reserve
7 in excess of any claims that we expect that aren't covered by
8 this motion that could possibly be made. We're also proposing
9 for the first time to make a distribution to the 30.7
10 customers. We are seeking authority to go up to \$50 million on
11 that, and we're holding back \$40 million for the same reasons
12 as I expressed with the 4(d). Unfortunately, we can't make a
13 larger distribution because \$90 million is essentially all the
14 property we have in our possession at this time.

15 And finally, the motion seeks approval of an
16 additional class, a delivery class, and we are seeking
17 authority to distribute up to \$35 million for that class with a
18 hold back of \$10 million for potential other claims. We don't
19 know with precision what these distributions will mean in terms
20 of percentage recoveries by people, but we do think that on the
21 4(d) side and for the delivery class, it will probably get
22 people up to 80 percent or perhaps a tad above that. It will
23 unfortunately probably be ten --- less than ten percent on the
24 30.7 side, but again, that's a function of this being all the

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1 property that we have available.

2 THE COURT: Let me ask you this. With respect to
3 delivery class --- and I know you said Mr. Trager is going to
4 deal with that --- the objections in part have focused on
5 whether debits and credits that weren't segregated, where cash
6 wasn't segregated, are properly placed in the delivery class,
7 if I were to approve the distribution that you've requested and
8 the Court were subsequently to determine that the objectors are
9 correct, would there remain sufficient funds to true them up?
10 I guess where I'm really going is do I have to decide that
11 today, or ---

12 MR. KOBAK: Let me confer with Mr. Trager.

13 THE COURT: Yeah, Mr. Trager, if you want to wait
14 till we deal with the delivery class, we can deal with it then.
15 I didn't ---

16 MR. KOBAK: Your Honor, the answer is yes, but I'll
17 leave it to Mr. Trager.

18 THE COURT: Okay. We'll cut --- I didn't mean to
19 jump it out of order. I'm happy to hear from Mr. Trager on the
20 delivery class.

21 MR. KOBAK: So we've had a number of objections; one
22 of them is the objection by the Chapter 11 Trustee joined in by
23 the creditors committee. I don't really think that's germane
24 to this motion as Your Honor is ---

25

1 THE COURT: But I think I addressed that already.

2 MR. KOBAK: Yes.

3 THE COURT: That was about information sharing. I
4 intended my comments earlier to apply now. I do think
5 information that's important for it to be broadly disseminated,
6 to be as accurate as possible, and I've already addressed that.
7 So to the extent that would --- I don't know if I'm not even
8 sure those were intended to be objections per se. If they
9 weren't, they're overruled to the extent that I dealt with it
10 before, explained both trustees will do reports by June 4. And
11 I don't mean to say you ought to hold --- if you're prepared to
12 disseminate a report on your investigation, interim report
13 before June 4, please ---

14 MR. KOBAK: No, no.

15 THE COURT: --- do it as soon as you can.

16 MR. KOBAK: Yes, yes. Of course, Your Honor.

17 THE COURT: All right.

18 MR. KOBAK: I think in addition to that, I'm going
19 to skip over the relief and assignment which is responsible for
20 a lot of the objections.

21 THE COURT: Yes, and I can't tell whether that's
22 been worked out or not. I mean, it really comes up in two
23 contexts ---

24 MR. KOBAK: Yeah.

25

1 THE COURT: --- the objections to the motion to
2 approved a distribution, and then there's the separate
3 stipulation.

4 MR. KOBAK: Yeah, let me get to that in a minute.

5 THE COURT: Okay.

6 MR. KOBAK: There was one other objection that the
7 issue order approved the motion, but with some kind of deadline
8 by when we should complete ---

9 THE COURT: I'm not imposing a deadline.

10 MR. KOBAK: Okay. So I think the ---

11 THE COURT: I'm just going to --- so that it's
12 clear. The objection to the distribution motion, that any
13 distribution should be conditioned on a deadline for completing
14 is overruled. There's a lot of work. It's proceeding in a
15 good pace. Everyone wishes it was faster. But that objection
16 is overruled.

17 MR. KOBAK: Okay. Thank you, Your Honor.

18 So I think that leaves the release and assignment.
19 Your Honor is correct that we also met with a number of
20 representatives of commodities customers who had concern about
21 the original language, and in those couple series of meetings
22 we worked out with them a stipulation, an order, which is also
23 before you, which resolves those concerns. I'd like to say
24 that it resolves everyone's concerns, but unfortunately that's
25

1 not the fact. What we primarily did was make it clear that the
2 --- and we thought the original language already did this ---
3 but for avoidance of doubt, to make clear that the language
4 only released claims or assigned claims up to the amount of
5 distributions that are actually received from us from the funds
6 of customer property so that no additional rights are being
7 compromised or given up. There was some concern about the
8 parties that were released. So it was only intended to be the
9 Trustee, people that are working for the Trustee, SIPC, people
10 that are working for SIPC. We have some language in the
11 stipulation that basically limits that language so if there was
12 somebody that we employed who perhaps had been a former MFGI
13 employee that might have some liability under some theory, they
14 wouldn't --- that wouldn't be affected by this stipulation.
15 And we have language --- because I think one of the concerns
16 that people have is if they're assigning these amounts to us,
17 what does that do in any subsequent litigation that they have
18 against third parties? And we have language that nothing in
19 this stipulation will be any determination on that score, and
20 that all can be worked out, which is where I think it should be
21 worked out in the context of some action when and if arguments
22 about standing are ever raised. And as I've said, I'm hoping
23 if we can do it that we can coordinate and work jointly with
24 commodities customer representatives sufficiently so that we
25

1 may have actions that are consolidated and be in the same cases
2 and the question of exactly whose claim something is may never
3 arise.

4 THE COURT: Tell me what the authority is for the
5 Trustee to impose the requirement on commodities customers to
6 assign their claims. I view the assignment of claims
7 differently from if there is a determination, if there is an
8 agreed determination of the amount of a customer's claim asking
9 them to agree that they have no further claim against MF Global
10 Inc., that I understand. But the point was made in most of
11 those objections that unlike on securities side, on the
12 commodities side, there is no authority for the Trustee to
13 insist on the assignment.

14 MR. KOBAK: I don't think on the commodities side,
15 there's any --- there's no guidance either way. There's
16 nothing that says you can do it. There's nothing that says you
17 can't do it. And we think it's appropriate thing to do. We
18 think that since there's net equity process and particularly in
19 this case a fund of customer property, that the same reasons
20 that make it appropriate in SIPA would really make it
21 appropriate here. We also --- and it's the kind of assignment
22 that's been used for years in SIPA liquidations. I don't think
23 ---

24 THE COURT: --- on the securities side.

25

1 MR. KOBAK: --- on the securities side, but that
2 really doesn't have anything to do with the fact of what people
3 --- it's not really insurance, but what they call SIPA
4 insurance, which is the SIPC advances.

5 THE COURT: But SIPC advances money, and stands in
6 the shoes of the customers in an effort to recover, at least up
7 to the amount that they've paid out.

8 MR. KOBAK: That's correct.

9 THE COURT: But that's not true on the commodities
10 side.

11 MR. KOBAK: No, that's not true on the commodities
12 side. But nevertheless in SIPA cases, broader assignments have
13 been used.

14 THE COURT: But you've argued --- we had the round
15 of briefing about what rules for distribution. Several of the
16 opinions I've issued have dealt with the rules for
17 distribution.

18 How can the Trustee impose as a condition to
19 commodities customers receiving a distribution that they assign
20 rights against third parties? Where does your authority to
21 insist on that? You keep referring to Section 190 and all of
22 its subparts as setting out the CFTC's rules for distribution.
23 There's nothing in any of those as I've seen that would say,
24 oh, but that only applies if a customer assigns some or all of
25

1 its rights to proceed against others.

2 MR. KOBAK: There is nothing in the commodities
3 rules either way as I said, Your Honor.

4 THE COURT: And I don't find 105 --- you've in part
5 relied on Section 105 of the Bankruptcy Code to fill that gap.
6 And that I don't agree with.

7 MR. KOBAK: All right. Well, we think it's a
8 prudent thing for a trustee to ask for. We would like to have
9 the authority. We would hope Your Honor would seek to grant
10 it. We think it makes a lot of practical sense in this
11 context. I don't think the CFTC is disagreeing with it.

12 THE COURT: Well, they didn't take a position.

13 MR. KOBAK: I don't think they've taken any position
14 on it.

15 THE COURT: Well, but, you know, one of the things
16 that bothered me, Mr. Kobak, I read the motion papers. Then I
17 get objections and the objections say, oh, it's not in the
18 motion papers. It's a document that was sent to us that they
19 haven't even told you about, Your Honor. And that's true. The
20 release was not --- there's nothing --- I read your motion.
21 There was nothing in there that indicated that you were
22 conditioning distributions to customers on their releasing or
23 assigning rights. I think --- and I'll listen to the objectors
24 --- as to the release portion, if there's an agreed

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1 determination of the claim, it's one thing for the Trustee to
2 be saying, okay, you're releasing any further --- once you've
3 agreed that this is the amount of the claim, you're basically
4 releasing any argument that your claim ought to be 2X instead
5 of X.

6 MR. KOBAK: Right. I understand the distinction,
7 Your Honor, is growing, I think, for basically the same reasons
8 we should have an assignment of the claim. We did distribute a
9 lot of property, a lot of that was done through CME and other
10 people. That we could still have issues of people being over-
11 delivered, under-delivered, not delivering appropriately. I
12 don't want to do anything that would compromise our ability to
13 pursue that kind of claim.

14 THE COURT: That's --- you know, if distributions
15 are made without prejudice to a final determination of rights,
16 that's one thing. But you've gone further. You want an
17 assignment of rights to proceed against others. And that's
18 what I'm searching for where is the authority for you to impose
19 that as a condition to receiving distributions?

20 MR. KOBAK: There is no statutory or regulatory
21 authority. We concede that.

22 THE COURT: And you didn't impose that for the first
23 72 percent of the distributions?

24 MR. KOBAK: No, because we've ---
25

1 THE COURT: That wasn't a claim determination.

2 MR. KOBAK: No, and essentially that was done
3 through the clearinghouses and people went to other brokers, so
4 we didn't have really direct correspondence with the claimants
5 the way we do in the claims process.

6 THE COURT: But one of the things that concerns me
7 is, look, there's a lot of litigation pending elsewhere, and if
8 people have assigned their rights, whose the real party in
9 interest, are the claims that are asserted in the various class
10 actions going to be subject to motions to dismiss because,
11 well, they've signed an --- you know, they entered into an
12 assignment agreement with the Trustee.

13 MR. KOBAK: Well, it only goes up to what they've
14 received, so ---

15 THE COURT: How do you split? That's what I don't
16 understand. How can someone split a claim? I didn't think you
17 could do that.

18 MR. KOBAK: As I've said, I'm hoping that we will be
19 able to coordinate our activities with some of those, maybe all
20 of those, class action claimants so that in one case, they will
21 be consolidated actions and there won't be any question that
22 somebody has standing to pursue claims.

23 THE COURT: So what is the basis for the Trustee's
24 authority to insist on an assignment of claims?

25

1 MR. KOBAK: If Your Honor orders it, we have a basis

2 ---

3 THE COURT: Well, I'm not ordering it unless there's
4 a legal basis for it.

5 MR. KOBAK: I don't --- I can't tell you that other
6 than Section 105 implementing a claims process ---

7 THE COURT: Do you have any ---

8 MR. KOBAK: --- it's very similar to the SIPA claims
9 process. There is no specific CFTC regulation or statute that
10 deals with this either way.

11 THE COURT: Okay. Is there anything else you want
12 to add on that?

13 MR. KOBAK: No, Your Honor.

14 THE COURT: Okay. Is there anything else on the
15 motion to --- well, let me hear the delivery side, the delivery
16 class, and then I'll hear the objectors.

17 MR. TRAGER: Good morning, Your Honor. Josiah
18 Trager, Hughes Hubbard & Reed for the SIPA Trustee.

19 Your Honor, the short answer to your question which
20 was if Your Honor turns out that you're wrong, and later on you
21 change ---

22 THE COURT: --- or it turns out I didn't decide it.

23 MR. TRAGER: --- or didn't decide it, and ultimately
24 decide that the objector was correct and that in fact the

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1 delivery credits and the frozen proceeds and delivery debits
2 were not part of the delivery class, are we holding back
3 enough? The answer is yes. The answer is yes because the
4 difference will ultimately be a few cents on the dollar, and
5 here's why. If, in fact, it is not readily traceable to the
6 delivery class as we maintain that it is, it would have to be
7 readily traceable to another class of customer property. The
8 only logical class that that would be in this case would be the
9 30 point --- I'm sorry --- the 4(d) segregated property.
10 Again, we maintain that it is not the case. We maintain that
11 it is not required to be segregated under 4(d), it is in fact
12 part of the delivery class, but the difference in distributions
13 at this point is going to be a few percentage points.

14 THE COURT: Yeah, if it's included in the delivery
15 class, it has a slight diluted affect on what people will
16 receive now; correct?

17 MR. TRAGER: Correct.

18 THE COURT: Okay. All right. Go ahead.

19 MR. TRAGER: And the reason for that, Your Honor, is
20 because the physicals comprise the bulk of the delivery class
21 in terms of the percentage of the value of that class;
22 additional items in that delivery class that we've identified
23 are in fact these frozen proceeds, all of which are present
24 for, because they were frozen at the exchanges; and the pre-

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1 existing delivery credits, which essentially would have been
2 frozen had they taken place a day later, and in fact were among
3 the funds that are part of the shortfall. I have no doubt at
4 some point, Your Honor, we will be back here with other
5 claimants bringing novel theories to Your Honor about why their
6 particular property should not be subject to the shortfall or
7 subject to a particular type of shortfall, or some other
8 theory. But the fact remains, Your Honor, that the CFTC rules
9 require a shortfall be distributed pro rata per class. And
10 these are the items in that class; the physicals, the frozen
11 proceeds from the delivery of physicals, the pre-existing
12 delivery credits from the delivery of physicals, the delivery
13 debits which are essentially when you buy physicals on large
14 and --- I believe there was a fifth element that right now
15 escapes me. I'm sorry, I'm fighting off a cold and it seems to
16 be winning. But that --- the short answer to your question,
17 Your Honor, is it would have to be attributable to a class of
18 customer property. At this point, we can't foresee a situation
19 where it would be ---

20 THE COURT: It's going to be dilutive of one class
21 or another.

22 MR. TRAGER: Correct. It's going to comprise one
23 class or the other and have an affect. In the case of removing
24 the delivery credits and assigning them to a different class,

25

1 that would be a dilutive effect.

2 THE COURT: Can you tell me what the total dollar
3 value of this item?

4 MR. TRAGER: Because the physicals --- because net
5 equity is calculated when the account becomes fully liquid, and
6 in fact Your Honor just recently ordered the liquidation of the
7 physicals, the physicals' value moves daily and has been slowly
8 becoming liquid as it's been transferred or sold and will in
9 bulk be done this week with the remainder. But the number is
10 somewhere in the neighborhood of \$120 to \$160 million, of which
11 approximately \$15 million is considered a shortfall. Again,
12 these are very round numbers and they will be subject to all
13 the claims determinations along with everything else that's
14 been going on.

15 THE COURT: Okay. I'm not sure what I'm going to do
16 on it. I mean, I'm taking this under submission today in any
17 event, but I think you've addressed it --- I mean, I may well
18 decide this issue of whether the credits and debits are part of
19 the delivery class or not. I just wanted to explore whether
20 something had needed to be decided right now.

21 MR. TRAGER: Understandable, Your Honor. And I
22 believe --- that covers it ---

23 THE COURT: I think I understand your arguments
24 about why it should be included into the delivery class. The

25

1 reply brief in particular I think was very clear about it. So
2 I understand your arguments. You can go into it, but that I do
3 have in mind.

4 MR. TRAGER: If Your Honor understands it, I have no
5 need to go further with it. I believe that was essentially the
6 issue related to the delivery class. There was another
7 response that actually not only supported the motion,
8 specifically the inclusion of these items, but requested a
9 timing issue, and I think Your Honor has already addressed that
10 as part of the previous issue.

11 THE COURT: Right. Okay, thank you.

12 All right. Let me hear from objectors.

13 MR. SCHMELTZ: Your Honor, Vincent Schmeltz for a
14 limited number of objectors on the delivery class issue.

15 THE COURT: Yes, go ahead, Mr. Schmeltz.

16 MR. SCHMELTZ: Your Honor, under --- I want to be
17 just clear about the three categories of cash, if you will, or
18 debits and credits that are at issue. Frozen proceeds are
19 literally proceeds from the sale of physical commodities or
20 warehouse receipts that took place after the petition date for
21 whatever reason, either to meet a contract obligation, or for
22 some other reason, and they --- those things literally were
23 physical property on the date of liquidation and we don't
24 contest that the frozen proceeds properly represent physicals

25

1 that are part of the delivery class. Delivery debits are funds
2 owed by a customer because they took delivery of a commodity
3 and owed money or because they, as I understand it, margined
4 their physicals. In the case of, for example, gold bars, one
5 could trade on margin and so if that's liquidated, there would
6 be a delivery debit associated with the margin that would have
7 to be paid before the final proceeds would be paid out. And
8 that, too, is readily traceable to the delivery class and
9 likely falls within the delivery class.

10 The real rub is on these delivery credits. And the
11 delivery credits, Your Honor, are funds that were taken in by
12 MF Global because a commodity customer ordered their physical
13 property to be sold in the days preceding the petition,
14 literally in the two or three or maybe four days prior to and
15 even on October 31. And the physical property or the warehouse
16 receipts were sold, funds were taken in, and they weren't
17 properly secured, and they were pilfered. And there are maybe
18 a variety of reasons that were uses that they were put to, but
19 they weren't returned to the customers. With respect to that
20 cash, there's no evidence, Your Honor, that the cash was
21 intended by the customer to be used in the making or the taking
22 of delivery of a commodity. One holds typically a warehouse
23 receipt or a physical commodity for the purpose of making
24 delivery. I may hold soybean oil, a warehouse receipt for
25

1 soybean oil, in order to make the delivery to someone on a
2 contract. Cash is often held in an account for the taking of
3 delivery, for the specific purpose of when someone arrives with
4 my truckload of Robusta coffee, me being able to pay for that
5 on my contract. Here ---

6 THE COURT: Mr. Schmeltz, stop for a second. I
7 don't see anything in the law that has this issue controlled by
8 the intent of the customer. This is not a customer by customer
9 intent specific issue. If customers had the misfortune that
10 they either were purchasing physicals or selling physicals and
11 the money which at least the Trustee argues was not required to
12 be segregated, wasn't, and is now not there, what is it that in
13 --- you have some decision or some regulation of the CFTC that
14 says is a question of intent of the customer?

15 MR. SCHMELTZ: First of all, Your Honor, under
16 190.05(a)(2), a delivery account shall mean any account
17 prominently designated as such in the records of the debtor
18 which contains only the specifically identifiable property
19 associated with delivery, except as set forth in 190.01(kk) and
20 none of those in (kk) deal with anything other than
21 specifically identifiable property. The textual argument that
22 the Trustee makes is that under these regulations, the money or
23 the funds or the debits, the credits or the debits, are
24 associated with the customer's account for the purpose of

25

1 making or taking delivery. And I would submit to Your Honor
2 that the concept of making or taking delivery is one of common
3 parlance in the commodity industry that means, as I have
4 suggested, I hold something to make delivery or I hold
5 something in order to take delivery. It has to have a specific
6 meaning. It is not a fiction, and it can't be stretched to
7 include the proceeds of a sale just because the proceeds of the
8 sale are lost. With greater specificity, Your Honor, 17 CFR
9 1.21 deals with the care of money and equities accruing to
10 customers, and it provides money and equities accruing in
11 connection with commodity or option customers open trades,
12 contracts, or commodity options need not be separately credited
13 to individual accounts, but may be treated and dealt with as
14 belonging, undivided, to all commodity or option customers
15 having open trades, contracts, or commodity option positions,
16 which at close would result in a credit to such commodity or
17 option customers. We would submit then, Your Honor, that under
18 17 CFR 1.21, proceeds of the sale of a warehouse receipt need
19 not be separately segregated as the Trustee has argued. We
20 agree with that. But they should be apportioned to all
21 customers and as a result, if the funds are lost, should have
22 been apportioned to all classes the same way that their credit
23 would have been apportioned to all customers under 1.21.

24 That's the controlling regulation here, Your Honor, and that's

25

1 what ought to be done, not have an artificial definition of the
2 concept of making and taking delivery.

3 Ultimately, for these credits to have a dilutive
4 effect on the delivery class would be antithetical to the
5 purpose of the delivery class as set forth, and we set this
6 forth in our response, and it's provided for in 48 Fed. Reg.
7 8731, and that is --- sets forth the intent of the delivery
8 class as to mitigate the dilution effect of pro rata provisions
9 of the Code.

10 THE COURT: Mr. Schmeltz, I just opened to your
11 objections, and I don't see anything in your objection that
12 refers to 17 CFR 1.21 ---

13 MR. SCHMELTZ: And Your Honor, the reason ---

14 THE COURT: --- and the argument you've made here
15 today.

16 MR. SCHMELTZ: --- the reason that we're making this
17 argument now, and it wasn't in our objection, is we didn't have
18 the Trustee's reply or the Trustee's further explanation of why
19 these credits should apply to the delivery accounts. And so as
20 Your Honor pointed out, the reply I thought was much more clear
21 as to purpose and intent. The reply is what stated this making
22 or taking delivery argument and so we have a greater
23 understanding of the Trustee's arguments at this time, and a
24 greater understanding than we did when we wrote our brief, Your
25

1 Honor. But the --- in 48 Fed. Reg. 8731, it notes that this
2 means that although this property will not be distributed, to
3 the extent its value exceeds a claimant's net equity claim, and
4 will be distributed pro rata among claimants with delivery
5 claims which are of the same class, it will not be diluted by
6 other types of customer claims. And a claim for loss proceeds
7 is an other type of customer claim. It is not a claim for
8 funds that were held for the making or taking of delivery of a
9 commodity. It is an other type of claim. It is a claim that
10 my funds were pilfered. I was expected to receive funds from
11 the sale of a commodity that I would have taken out of my
12 account and used for other purposes. Right? The people who
13 were liquidating immediately prior to the petition date in many
14 cases as we understand it were doing so because they understood
15 the Titanic was sinking and they wanted to get off. This is an
16 other --- they were not trying to roll the cash over in order
17 to be used for additional transactions down the road. And so
18 it is an other type of customer claim. Under the very intent
19 for the delivery class, it ought not be applied as dilutive to
20 the delivery class, and we believe under 1.21, it ought to be
21 applied across all classes.

22 THE COURT: All right. Mr. Schmeltz, I'm going to
23 give you until 5 PM, April 17 to file a surreply addressing
24 just this issue and not to exceed five pages in length.

25

1 MR. SCHMELTZ: Thank you, Your Honor.

2 THE COURT: All right. Next objector.

3 MR. SCHMELTZ: But, Your Honor ---

4 THE COURT: No, I'm going to take people in the
5 courtroom first.

6 MR. ENTWISTLE: Thank you, Your Honor. My name is
7 Andrew Entwistle, I'm with the law firm of Entwistle &
8 Cappucci, and we represent various commodity customers. We
9 filed objections both in this proceeding and in the respect to
10 the release and assignment issue.

11 And Your Honor asked the key questions of Mr. Kobak;
12 one, obviously, where is or is there a statutory authority to
13 take an assignment here and the answer is no. There is none
14 anywhere. And every court that's looked at the issue from the
15 Giddens v. D.H. Blair case in 2002 ---

16 THE COURT: That's a securities case, though; isn't
17 it?

18 MR. ENTWISTLE: It is a securities case, Your Honor,
19 but it's still looked at the same issues of whether there was
20 statutory authority to take an assignment of third party
21 claims, which is what they're trying to do here.

22 THE COURT: I read the decision this morning, the
23 short decision, Judge Beatty's decision.

24 MR. ENTWISTLE: It is, and Judge Rakoff's more
25

1 recent decision involving Mr. Picard, and Judge Mann's recent
2 decision involving Mr. Picard, really are consonant with that
3 decision. They look at all these same arguments that have been
4 presented here, both in the context of this proceeding and in
5 the assignment and they rejected each one as we go down the
6 line. I don't think I need to take a lot of time, unless Your
7 Honor has got questions about that, but I think it is important
8 to note that with regard to the release language, after working
9 through the process relative to the objections when that was
10 raised, we did narrow that scope through our ---

11 THE COURT: You agree about the --- you've reached
12 an agreement about the language of the release?

13 MR. ENTWISTLE: Just the language of the release
14 itself. Mr. Davidoff is here and he worked hard on that as
15 well, and I think now it really is limited really just to the
16 net equity claims and only to the extent they're against the
17 estate. And I think that while maybe belt and suspenders, I
18 don't think the language is objectionable to the customers.
19 The assignment is a completely different issue. There is no
20 statutory authority for it, and we pointed that out to the
21 Trustee and as you saw in our responsive papers we also said
22 that, look, even if you were entitled to one, the most it could
23 do would be to track the statute. What you've asked for here
24 is far beyond that. It's not limited to the assignment of net

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1 equity claims. It's not --- and it doesn't provide that any
2 assigned claims are going to stand behind the customers. I
3 think all that's clearly provided for in the statute, none of
4 it made its way into the release here, even if they have the
5 authority for it which I think it's very clear under the case
6 law and the statutes themselves that they don't.

7 THE COURT: Thank you.

8 MR. ENTWISTLE: Thank you, Your Honor.

9 THE COURT: All right. Next objector in the
10 courtroom.

11 MR. WITMEYER: Your Honor, John Witmeyer, counsel
12 for Sapere CTA Fund.

13 I'd just like to briefly add here, let's look at what
14 these claims are that are sought to be assigned. Essentially,
15 MFGI is a bailee for hire. When it gives money back, it's ---

16 THE COURT: You run the risk of talking yourself out
17 of winning on this issue ---

18 MR. WITMEYER: Okay.

19 THE COURT: --- but go ahead.

20 MR. WITMEYER: The claim, Your Honor, is against a
21 third party for tort damages, punitive damages, exemplary
22 damages, other damages ---

23 THE COURT: You know, believe it or not, I really
24 get this.

25

1 MR. WITMEYER: --- in court. All right. Thank you,
2 Your Honor. That's my only point.

3 THE COURT: I really get this point.

4 MR. WITMEYER: Okay. And there's no statutory
5 authority as Your Honor pointed out.

6 THE COURT: Okay. Next objector in the courtroom.

7 MR. GOODMAN: Your Honor, Geoff Goodman, Foley &
8 Lardner, on behalf of Thomas Ritter, John ---

9 THE COURT: Tell me your name one more time.

10 MR. GOODMAN: Geoff Goodman ---

11 THE COURT: Okay, Mr. Goodman.

12 MR. GOODMAN: --- for Foley & Lardner on behalf of -
13 --

14 THE COURT: Sure.

15 MR. GOODMAN: --- Thomas Ritter, John Supple,
16 Greenbrier Partners.

17 We filed a joinder --- I'm back to the first
18 distribution motion and I believe last two dealt with the
19 assignment. We filed a joinder in support of the motion and I
20 wanted to respond briefly, Your Honor, to a couple of the
21 points Mr. Schmeltz made ---

22 THE COURT: Go ahead.

23 MR. GOODMAN: --- on the phone. First thing is Mr.
24 Schmeltz, in both orally and in his papers, makes a lot of the

25

1 fact that the funds that were so-called delivery credits ---
2 and I can't speak to every delivery credit, although I believe
3 based on discussions with Mr. Trager that my clients are about
4 25, maybe 40 percent of what the so-called delivery credits
5 are. These are people who tendered warehouse receipts for
6 delivery within the last day or two before the petition. There
7 may have been some that actually were a little before that, but
8 most of it was at the end. And these are proceeds of that
9 delivery. They were set forth in an account indicated as
10 delivery account on the MF Global's records. It was labeled
11 "FD." Mr. Schmeltz made the point that these funds weren't
12 supposed to be segregated. He's right, but that's not ---
13 that's obviously not the test for a delivery account, because
14 frankly the warehouse receipts which are part of the delivery
15 class aren't segregated property either.

16 THE COURT: And I thought that the Trustees' omnibus
17 reply went right to that. The only reason I've given Mr.
18 Schmeltz a chance to file a surreply is because issue about
19 Section 1.21 hasn't been addressed before. I'll consider it.

20 MR. GOODMAN: Thank you, Your Honor. And I wasn't
21 familiar with that section either and I would like the --- I
22 haven't had a chance to review it and I don't even know what it
23 says as we stand here today. The one point --- and I know,
24 Your Honor, we may raise the point Your Honor has already
25

1 overruled it about setting a deadline for making a distribution
2 --- but I do want to make one point. Our --- it's tangential to
3 that, but I don't think it points to what Your Honor has
4 already ruled on. My clients are those who either received
5 nothing or have received a small amount because they haven't
6 been part of the bulk transfer. If Your Honor decides not to
7 decide, to punt this issue, I just want to make sure ---
8 because as the Trustee has set this up, we don't --- none of my
9 clients receive anything until the claim determinations has and
10 as part of this delivery class --- if Your Honor decides not to
11 decide until later, any mechanism set up for making
12 distributions will allow my --- set up in such a way that while
13 this issue peculates, my clients are able to get a distribution
14 because they need some kind of home.

15 THE COURT: Look, from day one in this case, my
16 overriding objective has been that as many customers as
17 possible receive a return of as much of their money or property
18 as soon as possible. That remains --- you know, there were
19 earlier on when the bulk transfer orders, I couldn't believe
20 it. There were people who were objecting --- you know, don't
21 pay anybody else until I get mine. Well, I've made clear on
22 the record what I thought about that argument. My objective
23 remains to try and facilitate a distribution of as much
24 property as possible as soon as possible. That may leave some

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1 issues remaining to be determined. I don't know whether I'm
2 going to decide this issue about debits and credits or not now.
3 I've been pretty prompt in issuing my rulings after hearings in
4 this case, because I don't want people unnecessarily held up.
5 Okay? So I've been trying, you know --- we're pushing this
6 along. All I can say is I'm going to continue to. I hope
7 that, and I think the Trustee has been sensitive to this, and I
8 must say until this round of motions, it wasn't clear to me
9 that there are a group of customers who haven't been trued up,
10 they haven't gotten the 72 percent because they fall into one,
11 you know, a different category class. So I hope the Trustee
12 will expedite to the fullest extent possible getting as much
13 money to people as possible.

14 MR. GOODMAN: Yeah. My only concern was if there
15 was a punting on the issue, somehow my clients wouldn't have a
16 home. I understand, Your Honor, and the Trustee will work with
17 that. But that was my only concern if this issue wasn't
18 decided.

19 THE COURT: Okay. Know that --- okay.

20 MR. GOODMAN: And one last point within the
21 substance ---

22 THE COURT: Sure.

23 MR. GOODMAN: --- I believe that I don't believe
24 this was raised in the Trustee's papers, so I want to briefly
25

1 raise it, is that the CFTC has weighed in on this issue, and to
2 the extent that there's any ambiguity, I would argue that the
3 CFTC's ---

4 THE COURT: When you say they've weighed in on the
5 issue, on this issue about delivery class ---

6 MR. GOODMAN: --- of delivery class.

7 THE COURT: Yes.

8 MR. GOODMAN: And that they be entitled to deference
9 if there's any ambiguity on that, and their interpretation of
10 their own regulations.

11 THE COURT: Okay.

12 MR. GOODMAN: Thank you, Your Honor.

13 THE COURT: Thank you very much.

14 All right. Other objectors in the courtroom?

15 MR. ZUNSHINE: Good morning. My name is Zach
16 Zunshine, and I represent Jill Zunshine.

17 THE COURT: Yes, go ahead.

18 MR. ZUNSHINE: I filed yesterday a pleading ---

19 THE COURT: --- untimely. But go ahead.

20 MR. ZUNSHINE: I could read it in the record, if you
21 don't mind.

22 THE COURT: You're not going to read it in the
23 record, I'll tell you that right now.

24 MR. ZUNSHINE: It's less than two pages.

25

1 THE COURT: I --- go ahead. Make your argument.
2 Very --- don't read it into the record.

3 MR. ZUNSHINE: Okay.

4 THE COURT: Just tell me what your point is.

5 MR. ZUNSHINE: My point is that I would like this
6 Court to deem with the Trustee as (indiscernible 11:31:03)
7 abandoned, a demand for heightened immunity and also his demand
8 for claimants to give up remedies (indiscernible 11:31:11) of
9 law that states ---

10 THE COURT: But I mean, I tell you the same thing I
11 told Mr. Witmeyer, careful you don't argue yourself out of
12 something you're ahead on. The assignment issue, if that's
13 what you're ---

14 MR. ZUNSHINE: I'm not talking about the assignment.
15 I'm talking about the claim that he wants more ---

16 THE COURT: Look, if you want your money now, you're
17 --- and have you received --- has your, I don't know if it's
18 your relative. I don't know if it's your sister or your wife
19 or --- has she received a determination of claim letter?

20 MR. ZUNSHINE: That's right.

21 THE COURT: Okay. Does she agree with it?

22 MR. ZUNSHINE: No ---

23 THE COURT: The amount?

24 MR. ZUNSHINE: The amount, yes, but not with the
25

1 release.

2 THE COURT: Okay.

3 MR. ZUNSHINE: We filed an objections.

4 THE COURT: You --- yes. And I read your
5 objection.

6 MR. ZUNSHINE: All right.

7 THE COURT: Okay? You don't get to receive a
8 distribution pursuant to a resolved claim if you're not
9 agreeing that to the determination of the claim that you have
10 no further claim against this estate. That's perfectly
11 appropriate. Okay? Where I had pause and where I thought the
12 objectors were on solid ground was insisting on an assignment
13 of claims against third parties. Where in the release that the
14 Trustee has asked for is there something that you believe goes
15 beyond the bounds of what's appropriate, specifically?

16 MR. ZUNSHINE: I'm talking about paragraph 2 of his
17 unnumbered release in which he sets for himself and SIPC more
18 immunity than he's entitled under the law.

19 THE COURT: Okay. I have your argument. I did read
20 your objection. Anything --- other points?

21 MR. ZUNSHINE: Okay. With regard to the third
22 paragraph of that release, in which he wants to claimants to
23 waive remedies under the law, I would like to give you an
24 example looking at this release how is it absolutely

25

1 inappropriate.

2 THE COURT: Go ahead.

3 MR. ZUNSHINE: All right. So I have a declaration
4 release of assignment right here. It says here at the end, and
5 I'm going to quoting it, number three, to be subject to liens
6 or claims of MFG estate or any other entity or other person,
7 and will indemnify and hold harmless the released persons
8 remaining and against any damages, cost losses, that might
9 result from any association blaming such other entity or other
10 person with any such liens or claims. Suppose the interest
11 here received a notice that there is a lien against my
12 claimant's account. And suppose he screwed up, and suppose he
13 distributed money anyway, and suppose the party who has the
14 lien now sues the Trustee for damages caused in losses, and
15 suppose losses are not available under State law, and suppose
16 Trustee screws again, and doesn't object to the jury
17 instructions and eventually gets his no delivery damages in
18 court, but also his losses, which could be ---

19 THE COURT: I'll tell you what.

20 MR. ZUNSHINE: Right.

21 THE COURT: Ms. Zunshine shouldn't take a
22 distribution. Okay? Just if you're --- if you find the
23 release language inappropriate, then don't take the
24 distribution, don't sign it. Okay? You'll wait till the end
25

1 of the case.

2 MR. ZUNSHINE: Well, I came here.

3 THE COURT: I understand, but what you're saying is
4 you're objecting to language in the release. I think you're
5 alone in objecting to this portion of it.

6 MR. ZUNSHINE: That's right.

7 THE COURT: That's fine, and the answer is don't
8 sign it, don't accept a distribution now. When the case is
9 over, and any liens, claims, or encumbrances have been
10 asserted, we'll know exactly where things stand, and you won't
11 have to worry about claims for indemnification at that point,
12 but you also won't get any money now. It's really not that
13 complicated. Just don't take the money.

14 MR. ZUNSHINE: But in first instance, I wanted to
15 come here and argue to this Court that that part of the release
16 is inappropriate.

17 THE COURT: I hear you.

18 MR. ZUNSHINE: All right.

19 THE COURT: Okay. Your objection is overruled.

20 MR. ZUNSHINE: All right. Thank you.

21 THE COURT: So if you don't want the money, don't
22 take the money. No one is forcing the claimant to accept the
23 money.

24 MR. ZUNSHINE: I understand my options. I wanted to
25

1 use my first off to come here ---

2 THE COURT: Okay.

3 MR. ZUNSHINE: --- and argue in front of this Court

4 ---

5 THE COURT: You did. Okay.

6 MR. ZUNSHINE: --- and you overruled my objection --

7 -

8 THE COURT: Okay.

9 MR. ZUNSHINE: --- and that's enough for me. Thank
10 you.

11 THE COURT: All right. Any other objectors on the -
12 -- anyone in the courtroom?

13 All right. Anyone --- all right. One more in the
14 courtroom. Please come up.

15 MR. STEVENS: Your Honor, Neil Stevens, Schuyler,
16 Roche & Crisham. I represent a number of MF Global customers
17 that had several different business relationships, and they had
18 commodity customer accounts and they were also executing trades
19 on behalf of other clients.

20 And so they have both commodity customer claims and
21 they have general unsecured claims for broker's commissions,
22 and my clients are concerned that the release, you know, may be
23 broadly read to release their general --- their unsecured
24 claims.

25

1 THE COURT: Okay. Mr. Trager, can you address that
2 or Mr. Kobak? That's a valid concern I understand, and I don't
3 think that was the intent, but if ---

4 MR. KOBAK: No, and I think --- and certainly in the
5 stipulation, I think the language clarifies that it the release
6 only goes to the extent of what the claimant has received, so
7 if they have some other kind of claim, that would not be
8 affected by it. And it certainly wasn't our intention.

9 THE COURT: Just so we're clear on the record, it's
10 the Trustee's position that nothing in the release would
11 release any general unsecured claims that a party may have.

12 MR. KOBAK: Other than the commodities claim, to the
13 extent it's been satisfied. Yes, Your Honor.

14 THE COURT: Mr. Stevens, are you satisfied with
15 that? Okay. Thank you. That was an affirmative response from
16 Mr. Stevens.

17 Anyone else in the courtroom wish to be heard?

18 All right. On the telephone, any objectors on the
19 telephone?

20 MR. WASSERMAN: Your Honor?

21 THE COURT: Go ahead.

22 MR. WASSERMAN: Okay. This is Robert Wasserman for
23 the CFTC. We are obviously not an objector. I just wanted to
24 address two points very briefly.

25

1 THE COURT: I miss having you in the courtroom, Mr.
2 Wasserman. Go ahead.

3 MR. WASSERMAN: I apologize. I'm actually supposed
4 to be on a plane off to vacation this evening, and I didn't
5 want to miss missing it.

6 THE COURT: Well, I wouldn't want you to miss it
7 either. Go ahead, Mr. Wasserman.

8 MR. WASSERMAN: And so with respect to the delivery
9 class as was mentioned earlier, we have indeed weighed in on
10 this, and tried to explain --- and I apologize for the
11 regulations that are not as clear as I would like them to be,
12 and we'll try to do something about that in future; that
13 unfortunately doesn't help this case --- that the delivery
14 account class includes the specifically identifiable property
15 set forth in (kk)(3), (4), and (5). And (5) includes the cash
16 price tendered for property that was essentially used to make
17 delivery.

18 Second, with respect to the points raised by the
19 Chapter 11 Trustee and the creditors committee, Your Honor has
20 dealt with the issues regarding the information, and so I won't
21 burden the Court with that. I would note however very
22 importantly in terms of any customer claims that might be
23 coming from affiliates that 766(h) of the Code is very clear on
24 this point, and that essentially claims based on a proprietary
25

1 account as determined by commission rule, regulation, or order,
2 and the commission has a rule that makes clear that affiliates
3 and entities under common control are all --- their accounts
4 are all proprietary accounts. And claims based on such
5 proprietary accounts may not be paid, and I'm quoting, "either
6 in whole or in part, directly or indirectly, out of customer
7 property unless all other customer net equity claims have been
8 paid in full."

9 THE COURT: Mr. Wasserman, I don't really have that
10 issue in front of me today; do I?

11 MR. WASSERMAN: Hopefully not.

12 THE COURT: I don't think so.

13 MR. WASSERMAN: Fair enough. And that's all I will
14 say on that point.

15 THE COURT: Thank you. Anything else, Mr.
16 Wasserman?

17 MR. WASSERMAN: No, thank you.

18 THE COURT: All right. Anyone else on the phone
19 wish to be heard?

20 MR. LAROSA: Yes, Your Honor, Christopher LaRosa
21 from the Securities Investor Protection Corporation.

22 THE COURT: Yes.

23 MR. LAROSA: Just very briefly, wanted to make a
24 couple of points. I know Your Honor is aware that the cases
25

1 that were cited in several of the memorandum, the A.R. Baron
2 case and the Madoff cases, deal with securities customers and
3 not commodities customers, and we agree with that, the SIPA
4 assignment provision is not implicated here. But I did want to
5 point out that I think the rationale underlying that statutory
6 provision applies with equal force in the context of
7 commodities. The real basis for the provision, the real public
8 policy rationale underlying it is that you want to ensure that
9 customer property is recovered either by the Trustee or through
10 the estate so that it can be distributed on a rateable basis;
11 that is that customers who are not actually, you know, the
12 claimant or the plaintiff in an action against a third party,
13 are obliged to share whatever recovery of customer property
14 that they may make with other customers of the estates of
15 customers distributed on a rateable basis. That applies under
16 SIPA, and given that there is a rateable distribution
17 requirement under the CFTC commodity broker liquidation
18 provisions it applies with equal force there.

19 THE COURT: But the law hasn't gone your way on
20 this; has it? I mean ---

21 MR. LAROSA: Well, I was going to point out, Your
22 Honor ---

23 THE COURT: --- the case law --- let me finish ---

24 MR. LAROSA: --- there's quite a lot of case law to
25

1 the contrary. I mean, first of all, the Madoff case, just to
2 address that very briefly --- the Madoff case was one that did
3 not involve the issue of assignment. It's discussed in the
4 case, but all of the discussion is dictive because the Trustee
5 and Madoff never actually took assignments. And so, you know,
6 the issue was raised but by several of the parties and the
7 Court ---

8 THE COURT: Mr. LaRosa, let me ask you this. I draw
9 a distinction between the Trustee demanding an assignment,
10 which is what's happened here, and the Trustee receiving an
11 assignment. If this were, for example, a settlement under 9019
12 that was a negotiated settlement, and as part of a settlement,
13 Trustee received an assignment of claims, I think --- and I
14 can't remember the name of the Second Circuit case now --- but
15 I thought that, you know, if you go back to the Marine Midland
16 case and that whole line of authority about what a Trustee has
17 standing to assert, I can't remember the name of the --- I
18 thought there was a subsequent Second Circuit case that
19 basically said if you get an assignment of a claim, you can ---
20 you may be able to proceed with that. Here, to me, the issue
21 is in the face of the objections is, in the absence of ---
22 look, the Trustee has got statutory and rule authority to make
23 a distribution of property to commodity customers and he's in
24 the process of doing that. And the issue is whether the

25

1 Trustee can impose a condition, the receipt of an assignment of
2 claims that isn't provided for in any statute or governing
3 regulation. That's where I have the problem. If for whatever
4 reason commodity customers concluded that, look, we ought to
5 assign all these claims to the Trustee, let him go fight the
6 battle, that's going to assure the promptest resolution and
7 equitable distribution of proceeds, that's one thing.

8 So --- but address the issue of where is the
9 authority of the Trustee to insist on the assignment as a
10 condition to a distribution.

11 MR. LAROSA: It has to come from the statutory
12 purpose, Your Honor. The reason for the insistence is to
13 ensure that a claimant outside the context of this liquidation
14 not recover 100 percent of property that should be distributed
15 to customers on a rateable basis. In other words, that
16 customer may walk away with a hundred percent of property that
17 would otherwise have to be shared with other customers.

18 THE COURT: Well, I'll just give you an example, and
19 I understand your point. Okay? But in another case that I
20 have, the 1031 tax group, where there were numerous adversary
21 proceedings pending before me against third parties that the
22 Trustee, the Chapter 11 Trustee believed there could be
23 recoveries from, there were also parallel class actions pending
24 in the United States District Court for the District of the
25

1 North --- the Northern District of California. And what the
2 plaintiffs and the Chapter 11 Trustee agreed upon was --- and
3 it was approved by both Judge Ware in the Northern District of
4 California, and by me --- what were for sharing of recoveries
5 and for administration of the claims, all recoveries in the
6 class action in California were going to be distributed by in
7 that case the Chapter 11 Trustee, because it was --- the class
8 was call extensive with the creditor classes before me. And
9 they agreed, there were agreements about how fees would be
10 charged, et cetera --- obviously they were both were subject to
11 approval by the Court.

12 But that was all consensual and it dealt with sort of
13 the issues you're raising about what's the most efficient way
14 and the fairest way of recovering money and distributing it
15 among all those who are entitled to it? So I come back to you
16 say, look at the statutory purpose, you get on really shaky
17 ground, Mr. LaRosa, if you're asking me to impose an obligation
18 from a non-existent provision in a statute. This is not
19 filling a gap in an existing unclear statutory provision.

20 So I come back. Do you have any case law, CFTC
21 regulation, anything with the binding force of law, that
22 supports your position that the Trustee can insist on an
23 assignment before making a distribution?

24 MR. LAROSA: I don't, Your Honor, and as I say, I
25

1 think the --- as I say, and just to reiterate the point, the
2 downside risk is that if the Trustee were not able to do this,
3 there is a significant risk that the statutory position or
4 objective could be substantially compromised. In other words,
5 some customers could do significantly better than others, and
6 that obviously is not what we intended ---

7 THE COURT: You know, that's long been true in
8 Chapter 11 cases where the Trustee is denied standing to pursue
9 various claims. If I were writing on a clean slate, I might
10 come out differently, but there's a pretty long line of
11 authority that circumscribes what a Trustee can do, whether
12 it's before me in a Bankruptcy Court, or if the Trustee brings
13 an action in the District Court. I didn't write that stuff. I
14 mean, that's, you know --- that's why I'm open to listening to
15 arguments if somebody has some actual authority to point to,
16 but --- you know, and I don't have the issue of what precisely
17 Mr. Giddens' standing is to pursue various claims. That's not
18 before me now.

19 All right. Anything else, Mr. LaRosa?

20 MR. LAROSA: Nothing, Your Honor.

21 THE COURT: All right. Anything --- anybody else on
22 the telephone?

23 MR. D'APICE: Yes, Your Honor, if I may, Peter
24 D'Apice of Stutzman, Bromberg, on behalf of what we've styled

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1 certain claimants. If I may be heard?

2 THE COURT: Yes, go ahead.

3 MR. D'APICE: Your Honor, I'll make two brief
4 points; one, you asked one of the prior objectors if there was
5 any specific language in the release paragraph that gives
6 concern, and I do have a specific phrase here that is of
7 concern, and that is specifically that the release releases any
8 and all claims arising out of or related to the circumstances
9 that gave rise to the claim, and the way the word "claim" is
10 defined, it includes the entire claim. It's not just limited
11 to the amount that has been distributed. I think that's
12 excessively broad, and if nothing else, Your Honor, this
13 release will be litigated in some other action, somewhere else
14 where claimants are pursuing their unpaid amounts. And it'll
15 be heavily briefed, it'll be argued, it'll be litigated, and
16 any of the qualifications or changes that the Trustee has
17 agreed to in Court will have to be sort of appended as
18 asterisks to this actual document that's been delivered to
19 claimants.

20 THE COURT: Mr. Kobak, do you agree or disagree with
21 the arguments being made?

22 MR. D'APICE: I'm sorry, Your Honor?

23 THE COURT: I'm asking Mr. Kobak because I'm not
24 sure this is a disagreement here.

25

1 MR. KOBAK: Yeah. No, Your Honor. I think the ---
2 and I think the ---

3 THE COURT: So why don't you clarify the language so
4 we ---

5 MR. KOBAK: --- stipulation and order does do that.
6 And I think the original release made it clear it was only t o
7 the extent of what they got.

8 THE COURT: Okay. But I think there ought to be
9 something that somebody could look at the four corners of the
10 applicable document and not have to ask for a transcript from a
11 hearing and et cetera. But you're not disagreeing in principal
12 with your argument ---

13 MR. KOBAK: No, and I thought we had clarified that.

14 THE COURT: Okay.

15 MR. KOBAK: We will think hard about ---

16 THE COURT: But I'm not ruling today, so what I
17 would ask is ---

18 MR. KOBAK: Right.

19 THE COURT: --- that you confer with counsel who
20 have raised these objections about the precise --- because I
21 think you're agreeing in principal with what's the appropriate
22 scope of the release.

23 MR. KOBAK: Yeah. I think that this is dealt with
24 in the stipulation. I guess the question is how to implement

25

1 that perhaps more than anything.

2 THE COURT: Okay.

3 MR. KOBAK: And I don't quite know the answer to
4 that because we have received a large number of releases. I
5 think we need to reflect on that.

6 THE COURT: Okay. Why don't you confer? I'm not
7 ruling today from the bench, but I think this issue needs to be
8 --- I want to be sure that somebody can look at something
9 specifically and know this is the release that has been given.

10 MR. KOBAK: And it may be, Your Honor, that we'll
11 also consider putting something on the website about the
12 assignment having heard Your Honor's views about it.

13 THE COURT: Okay.

14 MR. KOBAK: I think I need to talk to Mr. LaRosa and
15 the Trustee and also just figure out what we could do.

16 THE COURT: Okay. Anybody else on the telephone
17 wish to be heard?

18 MR. D'APICE: Your Honor, Peter D'Apice again. Just
19 one small additional point; some of my claimants have, since we
20 filed our papers, received determinations along with the
21 original proposed release, and to the extent that that four
22 corners of the release that they have in their hands is
23 objectionable, they won't be signing it, but we don't want to
24 blow the 30-day deadline for not objecting to the claim on that

25

1 basis.

2 THE COURT: Look, this issue about the scope of the
3 --- I think you're in agreement about the release. I take your
4 point. You're not going to get resolve just in a matter of a
5 day or two. Now, I understand you've got to deal with the
6 issue of those who have already signed a release.

7 MR. KOBAK: You know, our idea was to get an order
8 signed by the Court and then, you know, basically say this is
9 what the release now means. If we need to send that back to
10 the claimants that have already signed, I'm not sure what the
11 best way is ---

12 THE COURT: All right.

13 MR. KOBAK: --- to handle that. But I don't think
14 it's of a dispute about substance. It's just, I think, a
15 dispute about how to make people aware of this and kind of the
16 mechanics of how to do it.

17 THE COURT: Okay.

18 MR. D'APICE: And also the specific language that we
19 can then present that we'll end up litigating in some other
20 forum, at least we know what specifically we've agreed to and
21 not agreed to.

22 THE COURT: I agree with Mr. Kobak that it will be
23 in an order that the Court will sign.

24 MR. D'APICE: Thank you, Your Honor.

25

1 MR. KOBAK: Thank you, Your Honor.

2 THE COURT: All right. Anybody else on the
3 telephone wish to be heard?

4 All right. Any other reply or response, Mr. Kobak or
5 Mr. Trager?

6 MR. KOBAK: I have nothing further, Your Honor.

7 MR. TRAGER: Briefly, Your Honor.

8 THE COURT: Go ahead, Mr. Trager.

9 MR. TRAGER: Just briefly regarding the issues about
10 the delivery class and the delivery credits. Your Honor, I,
11 too, am not familiar with 17 CFR 1.21 and look forward to the
12 surreply. But in respect to something that Mr. Goodman
13 mentioned, as I'm sure Your Honor is aware, it's always been
14 the Trustee's goal as well to distribute as much property to
15 customer claimants as possible as quickly as possible. We're
16 doing our best to stay ahead of the curve. We filed this
17 motion close to a month ago in the effort to know when the
18 claimants were coming in. We would be further along in the
19 process and be able to make distributions right away, and in
20 fact that was one of Mr. Goodman's issues, making sure that his
21 customer, his clients who had not yet received anything because
22 they were neither 4(d) nor in physical form, would get property
23 right away obviously to the best of our ability, but, Your
24 Honor, taking this issue under submission, it does in fact

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1 theoretically leave his customers and similarly situated
2 customers in a no-man's land.

3 THE COURT: I don't think I've ever taken more than
4 a week to issue a ruling in this case, Mr. Trager.

5 MR. TRAGER: That was not going to be my issue, Your
6 Honor. As to whether or not you were to defer the issue of
7 this particular item, as Your Honor may recall we were doing
8 bulk transfers, one after the other, shoring up issues as they
9 came up. We added deliveries into the third bulk transfer,
10 even though we had to punt on the issue of the delivery class.
11 We're here as quickly as we possibly can with the
12 identification of that delivery class. With that, you know, I
13 make no secret of the fact that it's Mr. Goodman's clients in
14 similarly situated who literally have gotten close to zero
15 percent of a distribution. Our goal for making sure that Your
16 Honor takes a look at this issue as quickly as possible and
17 unfortunately has to come to a ruling on it. I appreciate it.
18 Thank you, Your Honor.

19 THE COURT: Thank you. Okay. All right.

20 Mr. Kobak, anything else you want to raise?

21 MR. KOBAK: No, Your Honor. I do want to apologize
22 to the Court. I see in retrospect, and I don't know why when
23 we did our initial orders on the claims process, we didn't
24 include the assignment and release language. I think frankly

25

1 we were doing everything on such a rushed basis, we just
2 neglected to put it in, and it obviously would have cleared up
3 a lot of confusion had we done it then.

4 THE COURT: I don't think --- I still haven't seen
5 it, so maybe it's attached to one of the objections, but ---

6 MR. KOBAK: We ---

7 THE COURT: --- could you provide my chambers with a
8 copy?

9 MR. KOBAK: Yes, we can get you that along with a
10 proposed order and stipulation, if that will help Your Honor.

11 THE COURT: So, what else do we have to deal with
12 today, Mr. Kobak?

13 MR. KOBAK: The last item on the docket is the ---
14 on our docket is the Sapere motion concerning the insurance
15 issue which is their motion.

16 THE COURT: Yeah. Before we get to that, do I need
17 to do something with the stipulation now? I mean, it was
18 intended to resolve issues about the release and assignment.
19 I've --- I mean, I'll rule on anything I need to rule on.

20 MR. KOBAK: Well, we have a proposed order. From
21 Your Honor's ---

22 THE COURT: Go ahead.

23 MR. KOBAK: --- comments, you might agree with the
24 release language in that order, but perhaps not the part of it

25

1 that refers to assignment ---

2 THE COURT: What gives you that idea?

3 MR. KOBAK: --- so it may need --- I just have a
4 feeling, Your Honor. It's why I'd be such a successful
5 commodities trader, Your Honor.

6 So it may be that when you write your decision that
7 the appropriate order would not refer to the assignment
8 language at least as it is in that stipulation.

9 MR. DAVIDOFF: If the Court please, I think the
10 discussion of ---

11 THE COURT: Just identify yourself for the record.

12 MR. DAVIDOFF: Yes. Merrill Davidoff from Berger &
13 Montague, speaking for seven of the nine class action cases
14 pending in the Southern District, Your Honor.

15 We concurred in the two rounds of negotiations and
16 with the amended stipulation and order. I just want to make
17 our position clearer. We were faced with this situation where
18 hundreds and now thousands upon thousands of these releases
19 have been returned. And so we thought the --- we don't think
20 the amended stipulation and order is perfect, but we think it
21 got us three-quarters to seven-eighths of the way to where we
22 needed to be. It left for future determination the question of
23 who has priority in a standing contest, and it also, and most
24 importantly, retroactively modified the many thousands of

25

1 unvarnished releases, and I have a copy of the unvarnished
2 release if Your Honor wants me to provide that, that had
3 already been sent to the claimants and returned by the
4 claimants.

5 Now to the extent that the Trustee asserts in his
6 response that the stipulation and order somehow allows the
7 Trustee to require --- require --- execution of the document,
8 the original or the amended document, as a condition for the
9 receipt of further distributions beyond the approximately 72
10 percent that claimants have already --- most claimants have
11 already received, we oppose that.

12 THE COURT: Hold, Mr. Davidoff.

13 MR. DAVIDOFF: Yes?

14 THE COURT: The release assignment is intended to
15 apply where there's been a claim determination. All of the
16 distributions to date, the first 72 percent, were based on
17 unaudited figures and it was the goal of getting as much money
18 out as possible. Now people are having --- they're receiving
19 determination letters and if they agree with it that that's
20 their net equity claim, they're receiving additional payment.
21 What's wrong with the Trustee asking for a release against the
22 estate in return for that distribution that resolves the
23 letter, you know, that resolves the claim?

24 MR. DAVIDOFF: No, that wasn't the most
25

1 objectionable part of the document, and the stipulation and
2 order resolves as to the release certainly the most
3 objectionable issues as to the release. And I think even Mr.
4 Entwistle and some of the other objectors would agree with
5 that. And as to the assignment, it leaves the issue of
6 priority of claims for future determination. So I do concur
7 with Mr. Kobak that we --- that Your Honor should enter ---

8 THE COURT: Well, here, look. With respect to the
9 joint notice of presentment of stipulation and order resolving
10 objection relating to assignment and release of claims from
11 future customers, it's ECF docket no. 1050 ---

12 MR. DAVIDOFF: That's the first one, Your Honor. I
13 think the second one was attached to ECF document no. 1274,
14 because we had two rounds of negotiations on this and the
15 second amended version of the stipulation and order, which was
16 agreed to by the Trustee, contains further protections for the
17 customers.

18 THE COURT: Where is it in the binder? Can somebody
19 tell me that? I've got ---

20 MR. KOBAK: Item 15, Your Honor.

21 THE COURT: Thank you.

22 MR. DAVIDOFF: Well, tab 15 is, I think ---

23 THE COURT: That's not the stipulation; is it?

24 MR. DAVIDOFF: No, I ---

25

1 THE COURT: Yeah, it has an amended stipulation and
2 order attached.

3 MR. DAVIDOFF: Well, I don't know which tab you have
4 it in, Your Honor. I have it as docket 1274 ---

5 THE COURT: Stop. I'm not approving stipulation,
6 either one, because it covers the assignment.

7 MR. DAVIDOFF: Okay.

8 THE COURT: Okay? So the stipulation and order,
9 either the original or the amended, the Court is declining to
10 approve. Okay?

11 Mr. Kobak, see if you can finalize the release
12 language. Okay? I'm awaiting Mr. Schmeltz's surreply.

13 MR. SCHMELTZ: Right.

14 THE COURT: I'm going to proceed as I have with
15 respect to every other motion in either of these two cases, and
16 hope to be able to rule not --- you know, not before I get a
17 surreply. We'll proceed in due course, hopefully
18 expeditiously, to rule. I think I would put the issues about
19 the release that have been raised as they seem to be --- there
20 seems to be agreement about what's intended. It may be a tweak
21 of some language that will resolve the issue. With respect to
22 the assignment, I'm going to rule. Okay? The only other
23 objection I think I haven't ruled on is over the delivery
24 class.

25

1 MR. KOBAK: --- the delivery class. That's correct.

2 THE COURT: Does anyone have a different view about
3 it?

4 MR. KOBAK: I don't, Your Honor.

5 THE COURT: Okay. All right.
6 Anything else for today?

7 MR. D'APICE: Your Honor, Peter D'Apice. May I make
8 one quick point?

9 THE COURT: I don't think so. You've had your
10 chance. You've --- we've spoken --- what --- tell me quickly
11 what it is.

12 MR. D'APICE: Your Honor, I'm not --- I understand
13 you'll issue an order that will clarify what the release means.
14 All I ask is that my clients get an extension of time until
15 that order is issued in which to respond to the Trustees'
16 demand ---

17 THE COURT: I'm --- deal with the Trustee about it.
18 If you have a problem getting an agreement, arrange a telephone
19 hearing about it. I don't think you're going to --- if you're
20 making a reasonable request, I don't think you're going to have
21 a problem with the Trustee. I'm not ruling on --- I don't have
22 any papers in front of me.

23 MR. D'APICE: Thank you, Your Honor.

24 MR. WASSERMAN: Your Honor?
25

1 THE COURT: Do you agree with that, Mr. Kobak?

2 MR. KOBAK: Yes. I'm certain we can work something
3 out.

4 THE COURT: Okay. Yes, who else is on the phone?

5 MR. WASSERMAN: This is Robert Wasserman for the
6 CFTC.

7 THE COURT: Yes?

8 MR. WASSERMAN: Will you want anything further after
9 that surreply?

10 THE COURT: No, I don't. It was just an argument
11 that I hadn't seen or read before. I will read it. I don't
12 think I need any more papers after that.

13 Okay. Anybody else have anything else to raise for
14 today?

15 MR. KOBAK: We do have the Sapere motion.

16 THE COURT: Okay. Let's deal with --- I don't think
17 it's going to take very long. Come on, Mr. Witmeyer, because I
18 think I already ruled on it.

19 MR. WITMEYER: Your Honor, I think I just have one
20 point I want to make on it.

21 THE COURT: Go ahead, Mr. Witmeyer. Come on up to
22 the microphone.

23 MR. WITMEYER: Your Honor, I'd like to point out on
24 behalf of Sapere that it has been conclusively demonstrated
25

1 that MFGI has liability to commodities customers for wrongful
2 acts which consist of allowing customer funds to be out of
3 segregation. Whether we call them missing, shortfall, or
4 whatever, they exited segregation so they weren't there on
5 October 31, 2011. That's a violation of the Commodities
6 Exchanged Act. It's a breach of the common law rule governing
7 bailees for hire. That's a violation of CFTC regulations.
8 It's a wrongful act as defined in the policy. It's
9 incontrovertible. The Trustee has conceded that prior
10 management let it out of segregation. They put in a chart
11 showing the amount that they calculated as almost one billion
12 in October. Everybody has conceded it's in excess of 500
13 million. It's more than 120 million. We think that justifies
14 the branch of our motion that clarifies this that the Court
15 decrees that as of October 31 ---

16 THE COURT: Does the Trustee have \$120 million in
17 proceeds from insurance sitting in an account, Mr. Witmeyer?

18 MR. WITMEYER: It's not to get into ---

19 THE COURT: This is hypothetical, and you're asking
20 me to rule on something that has not yet occurred. You're
21 asking for me to order a distribution of \$120 million that the
22 Trustee has not received; correct or not?

23 MR. WITMEYER: No, that's not correct, Your Honor.

24 I'm asking that Your Honor decree that the MFGI entity, the
25

1 estate, owed that as damages ---

2 THE COURT: Stop.

3 MR. WITMEYER: --- on October 31. That's the
4 predicate ---

5 THE COURT: I ruled --- all right.

6 MR. WITMEYER: --- for the insurance ruling.

7 THE COURT: Thank you. The motion by Sapere et al.,
8 for entry of order, judgment, and decree that the Trustee make
9 restitution to commodities customers of \$120 million to be paid
10 from the proceeds of professional liability policies insuring
11 MF Global Inc. issued by MFG Assurance Co. Limited. It's ECF
12 docket no. 1113. The motion is denied.

13 MR. WITMEYER: Thank you, Your Honor.

14 THE COURT: It's frivolous. It has also resolved
15 the issue that Mr. Witmeyer raises in this motion arguing that
16 the \$120 million vested whether I was right or wrong, I
17 resolved it in a written opinion I issued earlier this week
18 overruling the Sapere objection in connection with the MFG
19 Assurance and U.S. Specialty Insurance issues. So that in my
20 view is already resolved. I intend that at least as to this
21 aspect of it, that I cover in the opinion, it applies equally
22 here.

23 I would also comment once again that this Court and
24 the estate is being burdened with frivolous motions. You had
25

1 some serious objections today, Mr. Witmeyer, with respect to
2 the assignment. And you actually won one. You tried to talk
3 yourself out of it, but you won one. Okay? Where you make a
4 serious objection on a serious issue, the Court will treat it
5 appropriately. If I continue to get what I consider to be
6 frivolous motions or objections, the Court is going to deal
7 with it appropriately with all of its power and force.

8 Anybody else have anything? Is there anything else,
9 Mr. Kobak, on the agenda?

10 MR. KOBAK: No, Your Honor.

11 THE COURT: All right. Mr. Kobak, would you submit
12 a proposed order in connection with the Sapere denial and
13 Sapere motion?

14 MR. KOBAK: We will, Your Honor.

15 THE COURT: All right. Anything else today?

16 All right. We're adjourned. Thank you very much,
17 everybody.

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19 (Whereupon these proceedings were concluded at 12:06 PM)

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

I, Anna Maria Leon, certify that the foregoing transcript is a true and accurate record of the proceedings.

ANNA MARIA LEON

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Date: April 16, 2012