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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re MF GLOBAL HOLDINGS, LTD; MF GLOBAL FINANCE USA, INC., *et al.*, Debtors.	Chapter 11 Case No. 11-15059 (MG) Case No. 11-15058 (MG) Case No. 11-02790 (MG) SIPA (Jointly Administered)
Todd Thielmann, Pierre-Yvan Desparois, Natalia Sivova, Sandy Glover-Bowles and Arton Sina, Individually, and on behalf of All Other Similarly Situated Former Employees, Plaintiffs, v. MF GLOBAL HOLDINGS, LTD; MF GLOBAL HOLDINGS USA, INC., MF GLOBAL FINANCE USA, INC., Defendants.	Adv. Pro. No. 11-02880 (MG)

REPLY MEMORANDUM IN SUPPORT OF MF GLOBAL HOLDINGS, LTD, MF GLOBAL HOLDINGS USA, INC., AND MF GLOBAL FINANCE USA, INC.'S MOTION TO DISMISS SECOND AMENDED CLASS ACTION ADVERSARY PROCEEDING COMPLAINT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE SINGLE EMPLOYER DOCTRINE DOES NOT PERMIT PLAINTIFFS' CLAIMS TO SURVIVE DISMISSAL 2

III. FAILING TO ALLEGE THAT PLAINTIFFS WERE EMPLOYED BY ANY OF THE REMAINING DEFENDANTS IS FATAL TO PLAINTIFFS' CLAIMS 4

IV. PLAINTIFFS HAVE NOT REBUTTED DEFENDANTS' ARGUMENT THAT PLAINTIFFS FAILED TO ALLEGE THEY WERE EMPLOYED BY ANY OF THE REMAINING DEFENDANTS 6

V. CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcraft v. Iqbal, 129 S.Ct. 1937 (2009) 1, 7

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) 1, 7

Blue Tree Hotels Inv. (Canada), Ltd. v Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212 (2d Cir. 2004) 7

Brass v. American Film Technologies, Inc., 987 F.2d 142 (2d Cir. 1993) 7

Clinton's Ditch Cooperative Co., Inc. v NLRB, 778 F.2d 132 (2d Cir. 1985) 2

In re Federal Communications Commission, 208 F.3d 137 (2nd Cir. 2000) 7

Local 397, International Union of Electronic, Electrical Salaried Machine and Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc. 779 F. Supp. 788 (D.N.J. 1992) 2

Murray v. Miner, 74 F.3d 402 (2d Cir. 1996) 5

In re: Old Carco LLC, 2011 U.S. Dist. LEXIS 134539, (S.D.N.Y. 2011) 7

STATUTES

15 U.S.C. §78fff(a) 4

29 U.S.C. §2101 et seq. 3

WARN Act 1, 2, 3, 4, 5

OTHER AUTHORITIES

20 C.F.R. §639.3(a)(2) 3

Defendants, MF Global Holdings, Ltd ("MF Ltd"), MF Global Holdings USA, Inc. ("Holdings USA"), and MF Global Finance USA, Inc. ("MF Finance") (collectively the "Defendants"), respectfully submit this Reply Memorandum in Support of their Motion to Dismiss Second Amended Class Action Adversary Proceeding Complaint.

I. INTRODUCTION

Plaintiffs' Response fails to rebut Defendants' primary argument that Plaintiffs' Second Amended Complaint must be dismissed because the five Plaintiffs have all failed to allege they were employed by any of the remaining Defendants. Without such a rebuttal or further allegation that the remaining Defendants did employ any of these Plaintiffs, the Second Amended Complaint and its "threadbare" allegations must be dismissed as the United States Supreme Court mandated in *Ashcraft v. Iqbal*, 129 S.Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and as this Court warned in its October 23, 2012 Opinion and Order. (Ex. 1, pp 20-21, fn. 12.)[1]

Plaintiffs rely exclusively on the single employer doctrine to defeat Defendants' Motion to Dismiss. As this Court is aware, it previously dismissed with prejudice MF Global, Inc. ("MFGI") because the SIPA Trustee was a "liquidating fiduciary" not subject to state and federal WARN Act notice requirements. Plaintiffs now attempt to use the single employer doctrine to hold the remaining Defendants liable for alleged WARN and New York WARN Act violations even though their immediate employer has been dismissed. However, Plaintiffs provide no authority to support their position. The single employer doctrine has not previously

[1] The Exhibits cited to herein refer to those exhibits that were attached to Defendants' opening Memorandum in Support of their Motion to Dismiss Second Amended Class Action Adversary Proceeding Complaint.

been applied the way Plaintiffs urge this Court to apply it here. This Court should not create a new body of case law by expanding the single employer doctrine.

II. THE SINGLE EMPLOYER DOCTRINE DOES NOT PERMIT PLAINTIFFS' CLAIMS TO SURVIVE DISMISSAL

Plaintiffs allege that the single employer doctrine allows their lawsuit to survive Defendants' Motion to Dismiss even if their true employer was MFGI. They claim "it is well recognized that affiliated entities may be jointly and severally liable for damages under the WARN Act upon a showing that the affiliates operated as a 'single business enterprise.'" (Plaintiffs' Opposition, p. 1.) While this general proposition may be true for as far as it goes, the proposition would need to go farther to be applicable here. There is no authority by which the single employer doctrine could be used to find WARN or New York WARN Act liability against the remaining Defendants when Plaintiffs' WARN and New York WARN Act claims against their true employer have already been dismissed with prejudice as a matter of law. Plaintiffs have provided no authority to the Court to support this proposition. The single employer doctrine cannot be used to resuscitate Plaintiffs' claims to make them viable again against different entities.

The single employer doctrine is nothing more than various factors that Courts look to in determining whether related companies can be considered a single business enterprise. *Local 397, International Union of Electronic, Electrical Salaried Machine and Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc*. 779 F. Supp. 788, 976 (D.N.J. 1992) ("Under the single-employer or 'single-enterprise' test, the question is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise."); *Clinton's Ditch Cooperative Co., Inc. v NLRB*, 778 F.2d 132, 137 (2d Cir. 1985) ("A 'single employer' situation exists where two nominally separate entities are actually part of a single integrated enterprise so

that, for all purposes, there is in fact only a 'single employer.'"). The WARN Act itself (29 U.S.C. §2101 *et seq*.) does not address the single employer doctrine, but the Act's Regulations at 20 C.F.R. §639.3(a)(2) do. They provide:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

20 C.F.R. §639.3(a)(2)

In short, the single employer doctrine simply provides that under certain circumstances multiple entities can be treated as one. The doctrine does not allow state or federal WARN Act liability to attach to related entities after an employee's WARN Act claims against his or her immediate employer have been barred as a matter of law. The WARN Act's Regulations do not allow for such an application of the doctrine and, tellingly, Plaintiffs do not provide authority, controlling or otherwise, that would permit such an expansion of the doctrine.

If anything, if Plaintiffs were employees of MFGI and want to now treat the remaining Defendants and MFGI as a single employer, then the remaining Defendants should be entitled to rely upon the liquidating fiduciary doctrine as a basis for dismissal just as MFGI was so allowed. As this Court noted, the liquidating fiduciary doctrine "exempt[s] from the protection of the WARN Act employee layoffs by liquidating fiduciaries." (Ex. 1, p. 3.) If MFGI was Plaintiffs' immediate employer and Plaintiffs' WARN and New York WARN Act claims were dismissed against it, then Plaintiffs' WARN and New York WARN claims against the remaining Defendants must also be dismissed.

III. FAILING TO ALLEGE THAT PLAINTIFFS WERE EMPLOYED BY ANY OF THE REMAINING DEFENDANTS IS FATAL TO PLAINTIFFS' CLAIMS

Plaintiffs allege it is a "non-issue" that they have failed (and continue to fail) to identify the entity by which they were employed. (Plaintiffs' Opposition, p. 4.) Plaintiffs are proceeding as if this Court's October 23, 2012 Opinion and Order was a "non-issue." This Court's October 23, 2012 directive that Plaintiffs identify the entity by which they were employed is an issue that Plaintiffs were required to address in order to survive dismissal. In dismissing Plaintiffs' initial Amended Complaint, this Court specifically held:

> [T]he Court concludes that the allegations in the Amended Complaint are nevertheless deficient.… More importantly, the Amended Complaint does not indicate where each Plaintiff worked (at MFGI or at one of the chapter 11 Debtors), who gave each Plaintiff a notice of termination, or when it was given. If the Complaint is going to survive, a further amended complaint must be filed setting forth appropriate allegations.

(Ex. 1, Opinion p. 20.)

Plaintiffs failed to heed this Court's instructions, which were more than simply "a natural inquiry in the context of the motions to dismiss on the liquidating fiduciary theory," as Plaintiffs would suggest. (Plaintiffs' Opposition, p. 4.) In light of this Court's dismissal with prejudice of MFGI, Plaintiffs' failure to articulate the specific entity by which they were employed is even more important. As this Court is well aware, through its October 23, 2012 Opinion and Order, this Court dismissed MFGI because:

> Plaintiffs have not put forth any triable issues of fact with respect to its WARN Act claims against MFGI. From the moment the SIPA proceeding was removed to this Court on October 31, 2011, the SIPA Trustee was unquestionably a "liquidating fiduciary." The statute governing the appointment of the SIPA Trustee states that the SIPA Trustee's purpose is "to liquidate the debtor's business." 15 U.S.C. §78fff(a). The SIPA Trustee immediately began to wind down MFGI's assets and engage in other activities for the purpose of liquidating the estate. Even if the SIPA Trustee

> had wanted to continue operating the business as a going concern, he was statutorily prohibited from doing so.

(Ex. 1, p. 19.)

Therefore, if these five Plaintiffs were employed by MFGI, then Plaintiffs' claims against the remaining Defendants must be dismissed too because the remaining Defendants could not have "controlled the decision to effect the mass layoff" as to these specific Plaintiffs, as Plaintiffs' response ponders. (Plaintiffs' Opposition p. 5.) As this Court previously ruled: "Even if the SIPA Trustee had wanted to continue operating the business as a going concern, he was statutorily prohibited from doing so." (Ex. 1, p. 19.) Plaintiffs' theory that the remaining Defendants could have "controlled the decision to effect the mass layoff" as to these specific Plaintiffs is flawed because the SIPA Trustee was required to liquidate.

Plaintiffs cite to *Murray v. Miner*, 74 F.3d 402, 405 (2d Cir. 1996) for the proposition that the "policy underlying the single employer doctrine is the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship." (Plaintiffs' Opposition, p. 8.) But the *Murray* holding goes on to also declare: "The single employer doctrine is an exception to the doctrine of limited liability, which allows corporations to organize so as to isolate liabilities among separate entities. The rationale for the exception is the fairness of imposing responsibility on the entity that shares decision making authority with the employing entity." *Id*. at 405. Because here the SIPA Trustee was required to liquidate MGFI, the remaining Defendants could not share this authority as to MFGI employees. As this Court properly concluded at the September 12, 2012, hearing on Defendants' original motion to dismiss: "If I dismiss the case against MF Global, Inc. and any of the plaintiffs were employees of MF Global, Inc. – it certainly sounds that Mr. Thielmann was an employee of MF Global, Inc. – you know, his claim is going to go along with the dismissal."

(Ex 2, at pp. 62-63.) Because Plaintiffs have failed to allege that they were employed by any entity other than MFGI, Plaintiffs' WARN and New York WARN Act claims must go along with the previous dismissal.

IV. PLAINTIFFS HAVE NOT REBUTTED DEFENDANTS' ARGUMENT THAT PLAINTIFFS FAILED TO ALLEGE THEY WERE EMPLOYED BY ANY OF THE REMAINING DEFENDANTS

Defendants' Motion to Dismiss is premised on Plaintiffs' failure to sufficiently allege that these five plaintiffs were employed by any of the remaining Defendants. Plaintiffs' response simply does not address this issue head on. Instead, it ducks the issue by focusing exclusively on the single employer doctrine. As shown above, that doctrine does not allow Plaintiffs to survive dismissal.

Here, in the operative Second Amended Complaint, Plaintiffs Thielmann and Glover-Bowles have merely alleged they were employed by "Defendants," and Plaintiffs Desparois, Sivova and Sina, providing even less detail, have only identified the office location out of which they worked. (Ex 5, Second Amended Complt, §§ 7-11, emphasis added.) The United States Supreme Court has made clear that these threadbare allegations are insufficient to withstand a motion to dismiss. *Ashcraft v. Iqbal,* 129 S.Ct. 1937, 1979 (2009); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

Moreover, this Court's October 23, 2012 Opinion and Order declared: "[I]f the Plaintiffs worked for MFGI (even if their payroll checks came from MF Global USA) and were terminated at the direction of the SIPA Trustee, it is not clear on what basis their claims can survive against the chapter 11 Debtors. Plaintiffs cannot hide behind vague allegations to avoid confronting the issues." (Ex. 1, pp 20-21, fn. 12.) Plaintiffs have been given ample opportunity to allege that their employer was one of the remaining Defendants. They have not done so. The allegations in Plaintiffs' Second Amended Complaint have not "nudged [their] claims across the

line from conceivable to plausible." *Twombly*, 550 U.S. at 570; *Iqbal, 129 S. Ct. at 1950-51.* As the United States Supreme Court has instructed, Courts should not make plausibility determinations in a vacuum, but instead the determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 129 S. Ct. at 1950.* Plaintiffs' Second Amended Complaint simply does not allege that any of the five Plaintiffs were employed by the remaining Defendants. Instead, the record confirms that each of the five Plaintiffs were employed by MFGI, the entity that this Court has already dismissed with prejudice. (Ex 3, 9/14/2012 Correspondence [Doc. No. 59]).[2] The record likewise confirms that Plaintiffs were terminated as a result of the SIPA Trustee's actions. (Ex. 2, p. 42; Ex 4, 9/14/2012 Correspondence from R. Roupinian.) Plaintiffs' continued hiding behind vague allegations mandates dismissal with prejudice of the WARN and New York WARN Act claims asserted in their Second Amended Complaint.

V. CONCLUSION

For the foregoing reasons, as well as those in the Defendants' opening papers, Defendants respectfully request that this Honorable Court dismiss Plaintiffs' Second Amended Class Action Adversary Proceeding Complaint with prejudice.

[2] On a motion to dismiss, Courts may consider matters of which the court may take judicial notice. *Blue Tree Hotels Inv. (Canada), Ltd. v Starwood Hotels & Resorts Worldwide, Inc*., 369 F.3d 212, 217 (2d Cir. 2004); *Brass v. American Film Technologies, Inc*., 987 F.2d 142, 150 (2d Cir. 1993). See also, *In re Federal Communications Commission*, 208 F.3d 137, 138 (2nd Cir. 2000) (where Second Circuit took judicial notice of pleading filed with the bankruptcy court); *In re: Old Carco LLC*, 2011 U.S. Dist. LEXIS 134539, *32-33 (S.D.N.Y. 2011) ("it is appropriate to take judicial notice of filings in bankruptcy proceedings.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2013, a copy of the foregoing Reply Memorandum in Support of MF Global Holdings Ltd, MF Global Holdings USA, Inc., and MF Global Finance USA, Inc.'s Motion to Dismiss Second Amended Class Action Adversary Proceeding Complaint and this Certificate of Service were filed electronically with the United States Bankruptcy Court, Southern District of New York, and notice will be sent by operation of the Court's electronic filing system to all ECF participants.

I further certify that a copy of the foregoing was caused to be served via United States Mail, postage prepaid, upon:

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