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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MF GLOBAL HOLDINGS LTD., et al.,	:	**Case No. 11-15059 (MG)**
Debtors.[1]	:	**(Jointly Administered)**

PLAN PROPONENTS' MEMORANDUM OF LAW IN SUPPORT OF PLAN CONFIRMATION AND REPLY TO PLAN CONFIRMATION OBJECTIONS

[1] The debtors in these chapter 11 cases are MF Global Holdings Ltd.; MF Global Finance USA Inc.; MF Global Capital LLC; MF Global Market Services LLC; MF Global FX Clear LLC; and MF Global Holdings USA Inc. (collectively, the "Debtors").

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The Creditor Co-Proponents[2] and Louis J. Freeh, the chapter 11 trustee (the "Chapter 11 Trustee," and together with the Creditor Co-Proponents, the "Plan Proponents") in the above-captioned chapter 11 cases, submit this *Plan Proponents' Memorandum of Law in Support of Plan Confirmation and Reply to Plan Confirmation Objections* and assert that the *Amended and Restated Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code for MF Global Holdings Ltd., MF Global Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC, MF Global Market Services LLC, and MF Global Holdings USA Inc.* [Docket No. 1267] (the "Plan") satisfies the requirements of section 1129 of title 11 of the United States Code (the "Bankruptcy Code") and should therefore be confirmed.

I. BACKGROUND[3]

A. The Chapter 11 Filings

1. On October 31, 2011, MF Global Holdings Ltd. ("Holdings Ltd.") and MF Global Finance USA Inc. ("Finance USA") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On December 19, 2011, MF Global Capital LLC ("MFG Capital"), MF Global Market Services LLC ("MFG Market Services"), and MF Global FX Clear LLC ("FX Clear") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, and on March 2, 2012, MF Global Holdings USA Inc. ("MFG Holdings USA") filed a voluntary

[2] Capitalized terms not otherwise defined herein shall have the meaning given to them in the Plan (as defined below).

[3] A thorough description of the Debtors' prepetition business operations, product and service offerings, regulation and exchange memberships, corporate and capital structure, insurance policies, and events leading to the filing of the Chapter 11 Cases (as defined below) can be found in paragraphs 7 through 36 of the *Declaration of Bradley I. Abelow Pursuant to Local Bankruptcy Rule 1007-2 and in Support of Chapter 11 Petitions and Various First-Day Applications and Motions* [Docket No. 9] and in section II of the Disclosure Statement (as defined below). Likewise, section III of the Disclosure Statement includes a description of the major events in the Chapter 11 Cases leading up to the filing of the Plan. These descriptions are incorporated herein by reference.

petition for relief under chapter 11 of the Bankruptcy Code. Other than Holdings Ltd., each of the Debtors is a direct or indirect subsidiary of Holdings Ltd. [Docket No. 507, Ex. A].

2. The Debtors' chapter 11 cases (the "Chapter 11 Cases") have been consolidated for procedural purposes and are being jointly administered. [Docket No. 528]. On November 7, 2011, the United States Trustee (the "UST") appointed an official committee of unsecured creditors (the "Creditors' Committee") pursuant to section 1102 of the Bankruptcy Code. [Docket No. 51]. The Chapter 11 Trustee has been appointed as chapter 11 trustee for the estate of each of the Debtors. [Docket Nos. 170, 306, 548].

B. The Plan

3. On January 10, 2013, the Creditor Co-Proponents filed the *Plan of Liquidation for MF Global Holdings Ltd., MF Global Finance USA Inc., and Their Debtor Affiliates* [Docket No. 996] and a corresponding disclosure statement [Docket No. 995]. Following the filing of this initial plan, the Chapter 11 Trustee agreed to become a plan proponent, and the Chapter 11 Trustee's professionals worked with counsel for the Creditor Co-Proponents to update the plan and disclosure statement with current and other necessary information. On February 2, 2013, the Plan Proponents filed the *Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code for MF Global Holdings Ltd., MF Global Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC, MF Global Market Services LLC, and MF Global Holdings USA Inc.* [Docket No. 1031] and a corresponding disclosure statement [Docket No. 1029].

4. The joint plan went through several more iterations, with amended versions filed on February 12, 2013 [Docket No. 1070] and February 15, 2013 [Docket No. 1094]. Corresponding disclosure statements were filed with these new versions of the joint plan. [Docket Nos. 1069, 1092].

5. On February 19, 2013, the Court entered an order [Docket No. 1101] (the "Disclosure Statement Order") (i) approving the February 15, 2013 version of the disclosure statement [Docket No. 1092] as containing adequate information under section 1125(a) of the Bankruptcy Code, (ii) establishing procedures for solicitation of votes on the joint plan (the "Solicitation Procedures"), and (iii) scheduling a hearing on confirmation of the joint plan (the "Confirmation Hearing").

6. The joint plan was amended again and filed, as amended, on February 20, 2013 [Docket No. 1111-3], along with an amended version of the disclosure statement [Docket No. 1111-1]. The February 20, 2013 versions of the joint plan and disclosure statement are hereinafter referred to as the "Original Plan" and the "Original Disclosure Statement."

7. After the Original Plan was filed, the Plan Proponents engaged in discussions with JPMorgan Chase Bank N.A. ("JPMorgan"), a member of the Creditors' Committee and a lender and administrative agent under the Debtors' prepetition liquidity facility. JPMorgan informed the Plan Proponents that it intended to file an objection to the Original Plan based on the proposed settlement of Intercompany Claims (the "Original Interco Settlement") under the Original Plan. On February 27, 2013, the Court ordered the Creditor Co-Proponents and JPMorgan to submit to mediation (the "Mediation") before the Honorable James M. Peck of the Bankruptcy Court for the Southern District of New York. The parties met with Judge Peck on March 4, 2013, and the Mediation was ultimately successful. JPMorgan and the Plan Proponents entered into a *Stipulation Settling Disputes Between JPMorgan Chase Bank, N.A. and Plan Proponents* [Docket No. 1192] (the "Mediation Settlement").

8. Pursuant to the terms of the Mediation Settlement, the Plan Proponents agreed to amend the Original Plan and Original Disclosure Statement to include, among other

things, a revised version of the Original Interco Settlement (the "Revised Interco Settlement"). On March 8, 2013, the Plan Proponents filed their *Motion to (I) Approve the Disclosure Statement Supplement, (II) Approve Expedited Solicitation Procedures with Respect to the Disclosure Statement Supplement and Plan Adjustment, and (III) Grant Related Relief* [Docket No. 1182] (the "Supplement Motion"), wherein the Plan Proponents (i) sought approval of a supplement to the Original Disclosure Statement (the "Disclosure Statement Supplement") which, among other things, included the Revised Interco Settlement, and (ii) amended the Plan through a "Plan Adjustment." On March 11, 2013, the Court granted the Supplement Motion. [Docket No. 1193]. The Original Disclosure Statement, as modified by the Disclosure Statement Supplement, shall be referred to herein as the "Disclosure Statement." On April 1, 2013, the Plan Proponents filed the Plan, which updates the Original Plan to include the changes set forth in the Plan Adjustment.

1. Overview of the Plan[4]

9. The Plan constitutes six separate chapter 11 plans of liquidation, one for each Debtor. The primary objective of the Plan is to maximize the value of recoveries for all Holders of Allowed Claims and Allowed Interests and to distribute Estate property in accordance with the priorities established by the Bankruptcy Code.

10. The Plan divides Claims and Interests into nine Classes: Priority Non-Tax Claims, Secured Claims, JPMorgan Secured Setoff Claims, Convenience Claims, Liquidity Facility Unsecured Claims, General Unsecured Claims, Subordinated Claims, Preferred Interests, and Common Interests. The Plan also provides for the satisfaction of other types of Claims that

[4] The following overview is for illustrative purposes only. To the extent there is any discrepancy between the overview and the terms of the Plan itself, the Plan controls. A more thorough description of the Plan can be found in the Disclosure Statement.

do not require classification, including Administrative Claims, Professional Fee Claims, Creditor Co-Proponents Fee/Expense Claims, Indenture Trustee Fee/Expense Claims, and Priority Tax Claims. The allowance, classification, and treatment of all Allowed Claims and Interests under the Plan are designed to account for and conform with the relative priority and rights of the Claims and Interests in each Class.

11. The Plan generally follows a waterfall scheme based on the priority of the Claims and Interests in each Class. Administrative and priority claims are paid first out of available unencumbered funds. Secured claims are paid to the extent of their security interests in collateral and the proceeds thereof, unsecured claims are paid before subordinated claims, subordinated claims are paid before preferred interests, and preferred interests are paid before common interests.[5] As described in more detail in the Disclosure Statement, and with some exceptions for certain Debtors, the Plan Proponents expect that under the Plan, (i) Priority Non-Tax Claims, Secured Claims, and the JPMorgan Secured Setoff Claims will be paid in full, (ii) Convenience Claims and Unsecured Claims generally will be paid in part,[6] and (iii) Subordinated Claims and Interests generally will receive no distribution.[7]

12. The Plan takes certain measures to ensure that it is properly implemented after the Effective Date. The Debtors' liquidation will be administered by Holdings Ltd. as Plan Administrator for each of the Debtors. As Plan Administrator, Holdings Ltd. is authorized, among other things, to adjudicate Claims, make Distributions to Holders of Allowed Claims and

[5] The foregoing sentence is not a guarantee that sufficient funds will be available to pay subordinated claims or interests.

[6] Liquidity Facility Unsecured Claims and General Unsecured Claims in Classes 5C, 5E, 6C, and 6E are expected to be paid in full.

[7] Subordinated Claims in Class 7E are expected to be paid in full. Interests in Classes 9C and 9E are expected to be paid in part or in full.

Allowed Interests, pursue Causes of Action, maintain and/or liquidate the Debtors' assets, administer the Debtors' tax obligations, determine whether to create a liquidating trust, and to take other actions required by the Plan. The Plan also contemplates the creation of a Plan Trust to hold the Plan Trust Stock.

13. Finally, the Plan incorporates the Revised Interco Settlement, which (i) resolves all Intercompany Claims between the Debtors, the aggregate amount of which exceeds $2 billion, and (ii) provides that Holdings Ltd.'s right to receive Distributions on account of a portion of its Intercompany Claim against Finance USA shall be subordinated to the rights of the Holders of Liquidity Facility Unsecured Claims against Finance USA to receive Distributions until such Liquidity Facility Unsecured Claims are paid in full.

2. Objections to Plan Confirmation

14. Four objections to confirmation of the Plan were filed: one by Sapere Wealth Management LLC, Granite Asset Management, and Sapere CTA Fund (the "Sapere Objection") [Docket No. 1235], one by the UST (the "UST Objection") [Docket No. 1236], one by Occidental Energy Marketing, Inc. (the "Occidental Objection") [Docket No. 1239], and a joinder by the United States of America (the "United States") to the UST Objection (the "USA Objection") [Docket No. 1248].[8]

15. The Sapere Objection states that the Plan violates sections 1122 and 1129(a)(1) of the Bankruptcy Code; the UST Objection states that the Plan violates sections

[8] Certain class action plaintiffs also filed a reservation of rights. [Docket No. 1234]. In the reservation of rights, the plaintiffs simply state that they reserve the right "(a) to be heard in connection with confirmation of the Plan to the extent that any issues may be raised or addressed, including without limitation, in connection with any proposed Confirmation Order, supplements, amendments, modifications, or adjustments to the Plan filed on or after the date of this ROR, that purport to affect the claims, rights or interests of Lead Plaintiffs or members of the Securities Class; and (b) to supplement this ROR and to adopt or join in any further objections raised by other parties." Because the class action plaintiffs did not raise any objection to confirmation of the Plan, this memorandum does not address the reservation of rights any further.

503(b), 1129(a)(1), and 1129(a)(3); the Occidental Objection states that the Plan violates sections 1129(a)(7) and 1129(a)(10); and the USA Objection joins the UST Objection. For the reasons set forth below, the Court should overrule each of these objections.

II. THE PLAN COMPLIES WITH SECTION 1129(a) OF THE BANKRUPTCY CODE.

16. The Plan Proponents will demonstrate by a preponderance of the evidence[9] that (i) the Plan satisfies the requirements of all applicable subsections of section 1129(a) of the Bankruptcy Code with respect to Finance USA, MFG Capital, MFG Market Services, FX Clear, and MFG Holdings USA, and (ii) with respect to Holdings Ltd., the Plan does not satisfy the requirements of section 1129(a)(8) of the Bankruptcy Code, but the Plan does satisfy the "cramdown" requirements of section 1129(b) of the Bankruptcy Code because the Plan is fair and equitable and does not discriminate unfairly with respect to any non-accepting Classes. Accordingly, the Court should confirm the Plan.

A. Section 1129(a)(1) — The Plan complies with the applicable provisions of the Bankruptcy Code.

17. Section 1129(a)(1) of the Bankruptcy Code requires the Plan to comply with the applicable provisions of the Bankruptcy Code. Compliance with section 1129(a)(1) generally requires a plan to satisfy the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification and contents of the plan. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 648-49 (2d Cir. 1988); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 757 (Bankr. S.D.N.Y. 1992) (section 1129(a)(1) "embodies the requirements of §§ 1122 and 1123, respectively, governing classification of claims and the contents of the Plan"); *In re Mesa Air Grp., Inc.*, No. 10-10018 (MG), 2011 WL 182450, at *3-5 (Bankr. S.D.N.Y. Jan. 20, 2011) (plan

[9] *See In re Chemtura Corp.*, 439 B.R. 561, 608 (Bankr. S.D.N.Y. 2010) ("The proponent of confirmation bears the burden of proof by a preponderance of the evidence.").

confirmed and complied with section 1129(a)(1) where it satisfied the requirements of sections 1122 and 1123).

18. For the reasons set forth below, the Plan complies with sections 1122 and 1123 of the Bankruptcy Code and thereby satisfies the requirements of section 1129(a)(1).

1. Section 1122 — The Plan properly classifies all Claims and Interests.

19. Section 1122(a) of the Bankruptcy Code provides that except for convenience claims under section 1122(b), "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." On its face, section 1122(a) only requires that all claims in a single class be substantially similar to each other; it does not require all substantially similar claims to be placed in a single class. *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 246 (Bankr. S.D.N.Y. 2007) ("section 1122(a), by its terms, doesn't require that all similarly-situated claims be classified together"). Nonetheless, courts in the Second Circuit have found that substantially similar claims may only be placed in separate classes if there is a "legitimate reason" or "reasonable basis" to do so. *In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996); *Adelphia*, 368 B.R. at 246-47 ("caselaw has made clear that separate classification of substantially similar unsecured claims is permissible only when there is a reasonable basis for doing so or when the decision to separately classify does not offend one's sensibility of due process and fair play"). Within the confines of these limitations, however, a plan proponent has "significant flexibility" in classifying claims and interests under a plan. *In re Source Enters., Inc.*, 392 B.R. 541, 556 (S.D.N.Y. 2008); *In re Quigley Co.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007).

(a) Each Class of Claims and Interests under the Plan contains only Claims and Interests that are substantially similar to the other Claims and Interests in that Class.

20. Whether claims or interests are "substantially similar" for purposes of section 1122(a) generally depends on the legal nature of the claims or interests and their respective priority entitlement under the Bankruptcy Code. *See In re Wash. Assocs.*, 147 B.R. 827, 830 (E.D.N.Y. 1992) ("Section 1122 provides that a plan must treat each class of creditors according to its members' priority status to ensure that claims of similar priority are treated similarly."); *Quigley*, 377 B.R. at 116 ("Claims are similar if they have substantially similar rights to the debtor's assets.") (citation omitted); *In re Am. Media, Inc.*, No. 10-16140 (MG), 2010 WL 5483463, at *8 (Bankr. S.D.N.Y. Dec. 20, 2010) (plan confirmed where claims and interests were classified "based on differences in the legal nature or priority" of such claims and interests).

21. Priority claims, secured claims, secured setoff claims, unsecured claims, and subordinated claims are not substantially similar to each other and therefore must be placed in separate classes. *See* Collier on Bankruptcy ¶ 1122.03[3] ("a plan of reorganization must separately classify nonpriority unsecured claims, priority claims, secured claims, including secured setoff claims, and equity interests"); *Wash. Assocs.*, 147 B.R. at 830 (claims must be separately classified based on priority status); *In re Unbreakable Nation Co.*, 437 B.R. 189, 200-01 (Bankr. E.D. Pa. 2010) (subordinated claims properly placed in a separate class); *In re Multiut Corp.*, 449 B.R. 323, 334-35 (Bankr. N.D. Ill. 2011) (plan properly placed claims subject to setoff in a separate class).

22. Likewise, preferred interests and common interests are not substantially similar to each other because preferred interests are entitled to a higher priority than common interests. *See In re Johns-Manville Corp.*, 68 B.R. 618, 637-38 (Bankr. S.D.N.Y. 1986) (claims

of preferred shareholders are "superior on the ladder of absolute priorities to common equity") (citation omitted). Thus, preferred and common interests must be placed in separate classes. *See Kane*, 843 F.2d at 640 (affirming bankruptcy court order confirming plan where plan separately classified preferred and common interests); *Drexel Burnham*, 138 B.R. at 716 (separate classification of preferred stock interests satisfied section 1122(a)).

23. The Plan divides Claims against and Interests in each Debtor into up to nine separate Classes. Each Class is identified by a number, which corresponds to the type of Claims or Interests in that Class, and a letter, which identifies the respective Debtor to which the Class applies. The Debtors' identifying letters are as follows:

Debtor	**Debtor Name**
A	Holdings Ltd.
B	Finance USA
C	MFG Capital
D	FX Clear
E	MFG Market Services
F	MFG Holdings USA

See Plan § III.A.1.

24. The Plan's classification scheme complies with section 1122(a) because each Class contains Claims or Interests that are substantially similar to the other Claims or Interests in that Class, as follows:

25. Classes 1A through 1F include all Priority Non-Tax Claims against the respective Debtors. Under the Plan, a Priority Non-Tax Claim is "any Claim that is entitled to priority in payment pursuant to § 507(a) of the Bankruptcy Code that is not an Administrative Claim or a Priority Tax Claim." *See* Plan § I.A.121.

26. Classes 2A through 2F include all Secured Claims against the respective Debtors.[10] Under the Plan, a Secured Claim is "a Claim, other than the JPMorgan Secured Setoff Claim, that is secured by a Lien on property in which an Estate has an interest or that is subject to valid setoff under § 553 of the Bankruptcy Code, to the extent of the value of the Claim Holder's interest in such Estate's interest in such property or to the extent of the amount subject to valid setoff, as applicable, as determined pursuant to § 506 of the Bankruptcy Code." *See* Plan § I.A.135.

27. Classes 3A and 3B include all JPMorgan Secured Setoff Claims against Holdings Ltd. and Finance USA, respectively. Under the Plan, a JPMorgan Secured Setoff Claim is "any Claim (or portion thereof) against Holdings Ltd. or Finance USA held by JPMorgan to the extent of its asserted setoff claim in respect of funds contained in accounts of Holdings Ltd. and/or Finance USA held or controlled by JPMorgan on the Initial Debtors' Petition Date." *See* Plan § I.A.86.

28. Classes 4A, 4B, and 4F include all Convenience Claims against the respective Debtors. Convenience Claims are discussed in more detail below. *See infra* ¶ 38.

29. Classes 5A and 5B include all Liquidity Facility Unsecured Claims against Holdings Ltd. and Finance USA, respectively. Under the Plan, a Liquidity Facility Unsecured Claim is "any Claim (or portion thereof) against Holdings Ltd. or Finance USA arising under or related to the Liquidity Facility." *See* Plan § I.A.96.

30. Classes 6A through 6F include all General Unsecured Claims against the respective Debtors. Under the Plan, a General Unsecured Claim is "any Claim that is unpaid as of the Effective Date that is not an Administrative Claim, Professional Fee Claim, Creditor Co-

[10] The JPMorgan Secured Setoff Claims are secured, but they are not "Secured Claims" as defined by the Plan.

Proponents Fee/Expense Claim, Indenture Trustee Fee/Expense Claim, Cure Amount Claim, Priority Tax Claim, Priority Non-Tax Claim, Secured Claim, JPMorgan Secured Setoff Claim, Liquidity Facility Unsecured Claim, or Subordinated Claim." *See* Plan § I.A.67. General Unsecured Claims include "Intercompany Claims" and "Notes Claims." *Id.*

31. Classes 7A through 7F include all Subordinated Claims against the respective Debtors. Under the Plan, Subordinated Claims means "Governmental Penalty Claims, Claims within the meaning of §§ 726(a)(3) or 726(a)(4), or Claims subordinated under § 510(b) of the Bankruptcy Code on account of the purchase or sale of Notes." *See* Plan § I.A.137. A Governmental Penalty Claim is "any Claim by a Governmental Unit asserting a fine, penalty, assessment or forfeiture other than on account of a Priority Tax Claim including a penalty within the meaning of § 726(a)(4) of the Bankruptcy Code. *See* Plan § I.A.68.

32. Class 8A includes all Preferred Interests in Holdings Ltd. Under the Plan, Preferred Interests means "the Series A and Series B Preferred Stock of Holdings Ltd. and any options, warrants, rights, or other securities or agreements to acquire preferred stock (whether or not arising under or in connection with any employment agreement), including any claim against Holdings Ltd. related to such Preferred Interests subject to subordination pursuant to § 510(b) of the Bankruptcy Code." *See* Plan § I.A.120.

33. Classes 9A through 9F include all Common Interests in the respective Debtors. Under the Plan, Common Interests means "the common stock, limited liability company interests, and any other equity, ownership, or profits interests in any Debtor and options, warrants, rights, or other securities or agreements to acquire common stock, limited liability company interests, or other equity, ownership, or profits interests in any Debtor (whether or not arising under or in connection with any employment agreement), including any claim

against Holdings Ltd. related to such Common Interests subject to subordination pursuant to § 510(b) of the Bankruptcy Code." *See* Plan § I.A.28.

34. The Classes established by the Plan are routinely used in chapter 11 cases, and the distribution of estate assets under the Plan generally follows a waterfall distribution scheme consistent with the priorities set forth in the Bankruptcy Code. *See supra* ¶¶ 21-22 (explaining that priority claims, secured claims, unsecured claims, subordinated claims, preferred interests, and common interests are not similar to each other and must be placed in separate classes). Thus, the Plan's classification scheme satisfies section 1122(a) of the Bankruptcy Code.

(b) There is a reasonable basis for separately classifying Liquidity Facility Unsecured Claims and General Unsecured Claims.

35. To the extent that Liquidity Facility Unsecured Claims and General Unsecured Claims are substantially similar and could have been placed in a single Class, their separate classification is nonetheless justified. The Plan Proponents have broad discretion to classify similar claims in different classes if there is a reasonable basis for doing so. *See Source Enters.*, 392 B.R. at 556; *Adelphia*, 368 B.R. at 246-47. Courts generally find that separate classification of similar claims is permissible as long as the plan proponent is not attempting to gerrymander voting on the plan by artificially creating an impaired consenting class. *See In re Boston Post Road Ltd. P'ship*, 21 F.3d 477, 482-83 (2d Cir. 1994) ("There is one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.") (quoting *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991)); *Adelphia*, 368 B.R. at 247 (plan properly classified similar claims separately because the separate classification was not designed to gerrymander an impaired consenting class); *In re*

B&B W. 164th Street Corp., 147 B.R. 832, 839 (Bankr. E.D.N.Y. 1992) (plan did not comply with section 1122(a) where separate classification of claims was for sole purpose of gerrymandering an affirmative vote on the plan).

36. Here, the separate classification of Liquidity Facility Unsecured Claims and General Unsecured Claims under the Plan was not designed to gerrymander an impaired consenting Class because — as the Plan Proponents expected at the time the Original Plan was drafted — there are numerous impaired consenting Classes. *See Declaration of Jeffrey S. Stein of the Garden City Group, Inc. Certifying the Methodology for the Tabulation of Votes on and Results of Voting with Respect to the Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code for MF Global Holdings Ltd., MF Global Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC, MF Global Market Services LLC, and MF Global Holdings USA Inc.* [Docket No. 1260] (as amended by Docket No. 1266, the "Tabulation Affidavit") (stating that Classes 3A, 3B, 5A, 5B, 6A through 6F, 7A, and 7F, each of which is impaired, voted to approve the Plan). Furthermore, the Plan Proponents had legitimate reasons to separately classify Liquidity Facility Unsecured Claims and General Unsecured Claims. As provided in the Plan, Class 5A and 5B Liquidity Facility Unsecured Claims shall each be allowed in an amount of $1,148,087,718. *See* Plan §§ III.B.6-7. These allowed amounts, however, assume that JPMorgan will apply its JPMorgan Secured Setoff Claims to reduce the principal amount of the Liquidity Facility Unsecured Claims. *See* Plan §§ III.B.6-7. To the extent JPMorgan does not apply its JPMorgan Secured Setoff Claims to reduce the principal amount of the Liquidity Facility Unsecured Claims, the allowed amount of the Liquidity Facility Unsecured Claims must be increased. *See* Plan §§ III.B.6-7. The JPMorgan Secured Setoff Claims cannot be used to reduce the principal amount of General Unsecured Claims, and thus,

the Plan Proponents exercised their reasonable judgment in separately classifying Liquidity Facility Unsecured Claims and General Unsecured Claims.

37. The separate classification of Liquidity Facility Unsecured Claims and General Unsecured Claims is also necessary in light of the Revised Interco Settlement. *See infra* ¶¶ 134-148. Under the terms of the Revised Interco Settlement, Holdings Ltd. has agreed to subordinate its right to Distributions on account of $275 million of its Class 6B Intercompany Claim against Finance USA to the Distribution rights of the Holders of Allowed Class 5B Liquidity Facility Unsecured Claims. As discussed in more detail below, the Revised Interco Settlement is in the best interests of creditors and satisfies the requirements of Bankruptcy Rule 9019. *Id.* Because the separate classification of Liquidity Facility Unsecured Claims and General Unsecured Claims facilitates the Revised Interco Settlement, the Plan Proponents have established that there is a legitimate reason for separate classification under section 1122(a) of the Bankruptcy Code.[11]

(c) The designation of Convenience Claims in Class 4 complies with section 1122(b).

38. Section 1122(b) of the Bankruptcy Code states that a plan "may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative purposes." For administrative convenience, the Plan has established Classes 4A, 4B, and 4F as Classes of

[11] Furthermore, no party is prejudiced by the separate classification of Liquidity Facility Unsecured Claims and General Unsecured Claims because Holders of Allowed Claims in these Classes receive substantially the same treatment under the Plan. *See* Plan §§ III.B.6-9 (Holders of Allowed Class 5 and 6 Claims are all entitled to their "Pro Rata Share of . . . Available Cash until such Holder receives up to one hundred percent (100%) of its Allowed Claim and, if applicable, post-petition interest . . . ."); Disclosure Statement § I.C (showing that the expected recovery for Holders of Allowed Claims in Class 5A and 6A is the same, and the expected recovery for Holders of Allowed Claims in Class 5B and 6B is the same except as inconsequentially affected by the subordination of Holdings Ltd.'s right to Distributions on account of its Intercompany Claim under the Revised Interco Settlement).

Convenience Claims. Convenience Claims include all General Unsecured Claims (other than Intercompany Claims and Notes Claims) less than or equal to $500,000. *See* Plan § I.A.33.[12] Over 1100 General Unsecured Claims have been filed in the Chapter 11 Cases in an amount less than or equal to $500,000, and thus, it is reasonable and necessary to classify these Claims as Convenience Claims in Classes 4A, 4B, and 4F. *See In re Elmwood, Inc.*, 182 B.R. 845, 849 (D. Nev. 1995) (convenience class is appropriate where unsecured claims are numerous).

(d) The Sapere Objection is meritless and should be overruled.

39. Sapere Wealth Management LLC, Granite Asset Management, and Sapere CTA Fund, L.P. (collectively "Sapere") filed the Sapere Objection asserting that the Plan does not comply with section 1122 of the Bankruptcy Code. The Plan Proponents' reply to the Sapere Objection is included in section IV of this memorandum.

2. Section 1123 — The Plan satisfies the requirements of section 1123(a).

40. Section 1123(a) of the Bankruptcy Code contains seven plan requirements. As set forth below, the Plan satisfies each of these requirements.

41. Section 1123(a)(1) requires a plan to "designate, subject to section 1122 of [the Bankruptcy Code], classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of [the Bankruptcy Code], and classes of interests." The Plan designates Classes of Claims and Interests as set forth above and therefore complies with section 1123(a)(1). *See supra* ¶¶ 24-33.

42. Section 1123(a)(2) requires a plan to "specify any class of claims or interests that is not impaired under the plan." Section III.A of the Plan specifies that Classes 1A through 1F and 2A through 2F are unimpaired. Thus, the Plan complies with section 1123(a)(2).

[12] A Holder of a General Unsecured Claim exceeding $500,000 is also entitled to amend its Proof of Claim to reduce the amount of its claim to $500,000 and thereby be placed in Class 4. *See* Plan §§ III.B.8.c, III.B.9.c.

43. Section 1123(a)(3) requires a plan to "specify the treatment of any class of claims or interests that is impaired under the plan." Classes 3A, 3B, 4A, 4B, 4F, 5A, 5B, 6A through 6F, 7A through 7F, 8A, and 9A through 9F are impaired under the Plan. *See* Plan §§ III.A.2-7. The Plan specifies the treatment of each of these impaired Classes and therefore complies with section 1123(a)(3). *See* Plan §§ III.B.3-13.

44. Section 1123(a)(4) requires a plan to "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." With the exception of Class 6B, the Plan provides the same treatment for each Claim or Interest in a particular Class, and thus, the Plan complies with section 1123(a)(4) with respect to these Classes. *See* Plan §§ III.B. All creditors in Class 6B receive the same treatment under the Plan except for Holdings Ltd., which holds an Intercompany Claim in Class 6B. As part of the Revised Interco Settlement, Holdings Ltd. has agreed to subordinate to the Holders of Class 5B Claims its right to receive distributions on account of $275 million of its $1.887 billion Intercompany Claim against Finance USA. *See* Plan § III.C; Disclosure Statement § IV.A. Because Holdings Ltd. has "agreed to a less favorable treatment," the Plan complies with section 1123(a)(4) with respect to Class 6B as well.

45. Section 1123(a)(5) requires a plan to "provide adequate means for the plan's implementation." Article IV of the Plan describes the means for the Plan's implementation, which includes (A) distribution of all Cash held by or for the benefit of each Debtor on the Effective Date plus Cash realized after the Effective Date from the sale, collection, or other disposition of Property of the estates; (B) a senior secured Exit Facility to fund Plan Administration Expenses and the Claims to be paid on or as soon as practicable after the Effective Date, (C) the appointment of Holdings Ltd. as Plan Administrator to, among other

things, (i) pursue and settle Claims against the Debtors' estates, (ii) make distributions to Holders of Allowed Claims and Allowed Interests, (iii) pursue and settle all Causes of Action, (iv) liquidate estate property, (v) employ professionals to facilitate its duties as Plan Administrator, (vi) maintain estate property, (vii) pay Plan Administration Expenses, (viii) administer each Debtor's tax obligations, (ix) determine whether to create a Liquidating Trust, and (x) pay required statutory fees; (D) establishment of a Plan Trust to hold the Plan Trust Stock, (E) implementation of the Revised Interco Settlement, (F) preservation of Causes of Action, (G) investment of Available Cash, (H) allocation of fee reserves, (I) the provisions governing Distributions under the Plan; (J) the procedures governing the allowance of Claims or Interests under the Plan; (K) the dissolution or wind down of the Debtors in accordance with applicable law and consistent with the implementation of the Plan; and (L) the liquidating trust vehicles that may be created under the Plan, thereby satisfying § 1123(a)(5) of the Bankruptcy Code. *See* Plan Arts. IV-IX.

46. Section 1123(a)(6) requires a plan to "provide for the inclusion in the charter of the debtor . . . a provision prohibiting the issuance of nonvoting equity securities" and to provide an "appropriate distribution" of voting power among all classes of securities possessing voting power. As set forth in Exhibit V.E of the Plan, an amended version of which will be filed prior to the Confirmation Hearing, the respective certificates of incorporation, by-laws, operating agreements, and articles of organization of the Debtors have been amended and restated, and each applicable document satisfies the requirements of section 1123(a)(6) of the Bankruptcy Code.

47. Section 1123(a)(7) requires a plan to "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with

respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." The Plan provides for the appointment of a three-member Director Selection Committee. *See* Plan § V.B.1. Each member of the Director Selection Committee is required to appoint one member of the three-member Holdings Ltd. board of directors, and the Creditors' Committee is entitled to interview the candidates, make a recommendation to the Director Selection Committee, and object to the appointment of any director. *See* Plan § V.B.2. The initial members of the Director Selection Committee are Andrew Shannahan of Knighthead Master Fund L.P., Joe Kronsberg of Cyrus Capital Partners, and Austin Saypol of Silver Point Capital Fund L.P.[13] The Plan also provides that the respective boards of directors or managers of the Debtors other than Holdings Ltd. "shall consist of one (1) individual who shall be a concurrently serving member of the Holdings Ltd. board of directors." *See* Plan § V.C. The appointment of the Debtors' boards of directors or managers is consistent with the interests of creditors and equity security holders and with public policy, and thus, the Plan satisfies section 1123(a)(7) of the Bankruptcy Code.

3. The UST Objection is meritless and should be overruled.

48. The UST Objection incorrectly asserts that the Plan does not comply with section 1129(a)(1) of the Bankruptcy Code. The Plan Proponents' reply to the UST Objection is included in section IV of this memorandum.

B. Section 1129(a)(2) — The Plan Proponents have complied with the applicable provisions of the Bankruptcy Code.

49. Section 1129(a)(2) of the Bankruptcy Code requires the Plan Proponents to comply with the applicable provisions of the Bankruptcy Code. Courts in the Second Circuit

[13] Knighthead Master Fund L.P., Cyrus Capital Partners, and Silver Point Capital Fund L.P. are Creditor Co-Proponents.

generally find that section 1129(a)(2) requires satisfaction of sections 1125 and 1126 of the Bankruptcy Code. *In re Boylan Int'l, Ltd.*, 452 B.R. 43, 51 n.4 (Bankr. S.D.N.Y. 2011) ("Courts have interpreted the 1129(a)(2) requirement to include satisfaction of the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code, as well as section 1126, concerning plan acceptance."); *Mesa Air Grp.*, 2011 WL 182450, at *6 (plan complied with section 1129(a)(2) where plan proponents complied with sections 1125 and 1126).

50. The Plan Proponents have complied with section 1125 because the Court has already approved the Disclosure Statement as containing adequate information. [Docket Nos. 1101, 1193]. The Plan Proponents have complied with section 1126 because the Plan Proponents solicited votes in accordance with the Court's order approving the Solicitation Procedures. *See* Disclosure Statement Order ¶ 5. Furthermore, no party in interest has objected to the Plan on the grounds that the Plan Proponents have failed to satisfy the requirements of section 1126.

C. Section 1129(a)(3) — The Plan has been proposed in good faith and not by any means forbidden by law.

51. Section 1129(a)(3) of the Bankruptcy Code requires a plan to be "proposed in good faith and not by any means forbidden by law." In the Second Circuit, a plan is proposed in good faith if it was "proposed with honesty and good intentions and with a basis for expecting that a reorganization can be effected." *In re Bd. of Directors of Telecom Argentina, S.A.*, 528 F.3d 162, 173-74 (2d Cir. 2008) (quoting *In re Koelbl*, 751 F.2d 137, 139 (2d Cir. 1984)); *see also Chemtura*, 439 B.R. at 608 ("Good faith is generally interpreted to mean that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code.") (citations omitted). Whether a plan has been proposed in good faith depends on the totality of the circumstances and is a mixed question

of fact and law, *see Chemtura*, 439 B.R. at 591, 608, though if no party objects, "the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues," *see* Fed. R. Bankr. P. 3020(b)(2).

52. As set forth in the declaration of Louis J. Freeh in support of confirmation of the Plan, filed concurrently herewith (the "Freeh Declaration"), the Plan has been proposed in good faith and not by any means forbidden by law. The Plan seeks to achieve a result that is consistent with the objectives of the Bankruptcy Code because, among other things, it (i) is intended to maximize the value of recoveries to all Holders of Allowed Claims and Allowed Interests,[14] (ii) provides for an orderly liquidation of the Debtors,[15] (iii) proposes to distribute all available estate property to Holders of Allowed Claims and Allowed Interests,[16] (iv) adheres to the priority scheme set forth in the Bankruptcy Code,[17] (v) has the support of a substantial majority of Holders of Allowed Claims and Allowed Interests — the parties whose rights are most affected by the Plan,[18] (vi) provides adequate means for implementation of the Plan,[19] and (vii) resolves numerous Intercompany Claims through the Revised Interco Settlement.

1. The UST Objection is meritless and should be overruled.

53. The UST Objection incorrectly asserts that the Plan does not comply with section 1129(a)(3) of the Bankruptcy Code. The Plan Proponents' reply to the UST Objection is included in section IV of this memorandum.

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[14] *See* Disclosure Statement § I.B.

[15] *See In re Jandous Elec. Constr. Corp.*, 115 B.R. 46, 52-53 (Bankr. S.D.N.Y. 1990) (debtor may be liquidated under plan in good faith).

[16] *See* Disclosure Statement § I.B.

[17] *See generally* Plan § III.B.

[18] *See* Tabulation Affidavit.

[19] *See supra* ¶ 45.

D. Section 1129(a)(4) — Payments made for services, costs, and expenses in connection with the Chapter 11 Cases are subject to review by the Court as reasonable.

54. Section 1129(a)(4) of the Bankruptcy Code requires that payments for "services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case" be subject to approval by the Court as reasonable. Pursuant to the Court's *Order Pursuant to 11 U.S.C. §§ 105(a) and 331 Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* [Docket No. 841] (the "Professional Expenses Order"), all professionals' fees and expenses remain subject to the reasonableness requirements set forth in section 330 of the Bankruptcy Code, and all professionals "shall still be required to serve and file interim and final applications for approval of fees and expenses in accordance with the relevant provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules." *See* Professional Expenses Order ¶ 1(b). Likewise, Sections II.A.3 and II.A.4 of the Plan provide that all Creditor Co-Proponents Fee/Expense Claims and Indenture Trustee Fee/Expense Claims shall be subject to the Court's review for reasonableness, consistent with section 1129(a)(4).[20] Thus, the Plan complies with section 1129(a)(4).

1. The UST Objection is meritless and should be overruled.

55. The UST Objection incorrectly asserts that the payment of certain fees and expenses under the Plan must comply with section 503(b) of the Bankruptcy Code as opposed to section 1129(a)(4). The Plan Proponents' reply to the UST Objection is included in section IV of this memorandum.

[20] Furthermore, the Creditor Co-Proponents have agreed that the Plan may be confirmed if the Court rejects application of the reasonableness standard under section 1129(a)(4) and concludes that the Creditor Co-Proponents Fee/Expense Claims must be evaluated under section 503(b)(3)(D). *See* Disclosure Statement § VI.B.1.c.

E. Section 1129(a)(5) — The Plan Proponents have satisfied the disclosure requirements set forth in section 1129(a)(5).

56. Section 1129(a)(5) of the Bankruptcy Code requires the Plan Proponents to disclose "the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor . . . or a successor to the debtor under the plan." Section 1129(a)(5)(A) does not require the Plan Proponents to identify the specific identity of every such individual, as long as the Plan discloses the manner in which such individuals will be chosen following confirmation of the Plan. *See In re Charter Commc'ns*, 419 B.R. 221, 260 n.30 (Bankr. S.D.N.Y. 2009) ("Although section 1129(a)(5) requires the plan to identify all directors of the reorganized entity, that provision is satisfied by the Debtors' disclosure at this time of the identities of the *known* directors.") (citing *In re Am. Solar King Corp.*, 90 B.R. 808, 815 (Bankr. W.D. Tex. 1988) ("The debtor's inability to specifically identify future board members does not mean that the debtor has fallen short or the requirement imposed by 1129(a)(5).")); *In re Am. Media, Inc.*, No. 10-16140 (MG), 2010 WL 5483463, at *12 (Bankr. S.D.N.Y. Dec. 20, 2010) (plan complied with section 1129(a)(5) where it identified the "manner in which additional officers and directors of the Reorganized Debtors will be chosen following confirmation").

57. As discussed above, the Plan provides for the appointment of Andrew Shannahan, Joe Kronsberg, and Austin Saypol as members of the Director Selection Committee. *See* Plan § V.B.1. Each member of the Director Selection Committee is required to appoint one member of the three-member Holdings Ltd. board of directors, and the Creditors' Committee is entitled to interview the candidates, make a recommendation to the Director Selection Committee, and object to the appointment of any director. *See* Plan § V.B.2. Furthermore, Section V.C of the Plan provides that the respective boards of directors or managers of the other

Debtors "shall consist of one (1) individual who shall be a concurrently serving member of the Holdings Ltd. board of directors." The Plan therefore provides for the manner in which the directors or managers of each of the Debtors shall be selected.[21] Thus, the Plan Proponents have complied with section 1129(a)(5) of the Bankruptcy Code.

F. Section 1129(a)(6) is inapplicable.

58. Section 1129(a)(6) of the Bankruptcy Code provides that a plan may only be confirmed if "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." Because the Plan does not contain any such rate changes, section 1129(a)(6) does not apply.

G. Section 1129(a)(7) — The Plan satisfies the best interests of creditors test.

1. All Holders of Allowed Claims and Allowed Interests will receive at least as much under the Plan as they would if the Debtors were liquidated under chapter 7.

59. Section 1129(a)(7) of the Bankruptcy Code requires, with respect to each impaired class of claims or interests, that each holder of a claim or interest in that class (i) has accepted the plan, or (ii) will receive a distribution under the plan that is greater than or equal to the amount it would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. Commonly referred to as the "best interests" test, satisfying section 1129(a)(7) requires a court to "conjure up a hypothetical chapter 7 liquidation that would be conducted on the effective date of the plan." *In re W.R. Grace & Co.*, 475 B.R. 31, 142 (D. Del. 2012); *accord Adelphia*, 368 B.R. at 251. The process of creating a hypothetical chapter 7 liquidation scenario has been described by various courts as "inherently speculative," "replete with assumptions and

[21] Furthermore, the Plan Proponents expect to disclose the members of the Holdings Ltd. board of directors at or before the Confirmation Hearing.

judgments," and "not an exact science." *See In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 365 (S.D.N.Y. 2007); *In re Affiliated Foods, Inc.*, 249 B.R. 770, 787 (Bankr. W.D. Mo. 2000). It necessarily "entails a considerable degree of speculation," and requires the court to value "hard to determine values." *Affiliated Foods*, 249 B.R. at 787. In light of this uncertainty, a Court need only make a "well-reasoned estimate" of the hypothetical liquidation value under chapter 7 to satisfy itself that a plan complies with the best interests test. *See W.R. Grace*, 475 B.R. at 142; *see also Mesa Air Grp.*, 2011 WL 182450, at *7 (plan satisfied section 1129(a)(7) where the plan proponents provided a liquidation analysis with a "reasonable estimate of the liquidation values upon conversion to a case under chapter 7 of the Bankruptcy Code").

60. In analyzing whether a plan satisfies the best interests tests, a court must "take into consideration the applicable rules of distribution of the estate under chapter 7, as well as the probable costs incident to such liquidation." *Adelphia*, 368 B.R. at 252. Furthermore, creditors derive value from the certainty that a chapter 11 plan provides as compared to the uncertainty of a chapter 7 liquidation. *See Affiliated Foods*, 249 B.R. at 788 ("some courts have considered more intangible sources of value such as the increased likelihood of a creditor recovering money through a structured settlement in a Chapter 11 versus a difficult collection process in a Chapter 7"); *W.R. Grace*, 475 B.R. at 143 (finding that the best interests test was satisfied in part because litigation in chapter 7 would be "very uncertain and complex," and "the guaranteed certainty of a Chapter 11 Joint Plan, as opposed to the high degree of uncertainty in a hypothetical Chapter 7 proceeding, is in the creditors' best interest"); *see also In re Cypresswood Land Partners I*, 409 B.R. 396, 428 (Bankr. S.D. Tex. 2009) (finding it relevant for purposes of section 1129(a)(7) that a liquidating chapter 11 plan may be more cost-effective than a chapter 7 liquidation).

61. Under the Plan, Holders of Allowed Claims in Classes 1A through 1F and 2A through 2F are unimpaired, and thus, section 1129(a)(7) does not apply to those Classes. *See* 11 U.S.C. § 1129(a)(7) ("With respect to each impaired class of claims or interests . . .") (emphasis added). Likewise, although Classes 3A, 3B, 6C, 6E, and 7E are impaired, the Plan Proponents' recovery analysis estimates that Holders of Allowed Claims in those Classes will receive a 100% recovery under the Plan. *See* Disclosure Statement, Ex. III; Disclosure Statement § I.C.2. Thus, Holders of Allowed Claims in those Classes will necessarily receive at least as much as they would in a chapter 7 liquidation. *See Adelphia*, 368 B.R. at 258 ("In a liquidation, a creditor could not be paid more than in full . . .").

62. The Plan satisfies the best interests test with respect to Holders of Allowed Claims or Allowed Interests in the remaining Classes (4A, 4B, 4F, 5A, 5B, 6A, 6B, 6D, 6F, 7A, 7B, 7C, 7D, 7F, 8A, 9A, 9B, 9C, 9D, 9E, and 9F) as well. On January 23, 2012, the Chapter 11 Trustee filed an application (the "FTI Application") to employ FTI Consulting, Inc. ("FTI") as financial advisor to the Initial Debtors and to the Chapter 11 Trustee. [Docket No. 389]. As the Chapter 11 Trustee recognized in the FTI Application, "FTI has a wealth of experience in providing restructuring advisory services and enjoys an excellent reputation for services it has rendered in large and complex chapter 11 cases on behalf of debtors and creditors throughout the United States." *See* FTI Application ¶ 10. No party in interest objected to the Chapter 11 Trustee's proposed engagement of FTI, and the Court approved the Chapter 11 Trustee's retention of FTI on February 9, 2012. [Docket No. 438].

63. Together, the Plan Proponents' advisors and FTI prepared a 21-page hypothetical liquidation analysis (the "Liquidation Analysis") that specifically addresses the

Plan's compliance with section 1129(a)(7).[22] The Liquidation Analysis assumes, among other things, that (i) the Court would appoint a single chapter 7 trustee to oversee the liquidation of each of the Debtors, (ii) the Debtors would not be substantively consolidated and would be liquidated separately under chapter 7, (iii) the liquidation of the Debtors under chapter 7 would likely take considerably longer than six months, (iv) the chapter 7 trustee would need to hire professionals separate and apart from the professionals currently employed by the Chapter 11 Trustee, (v) the chapter 7 trustee would use the proceeds of any liquidation of estate assets for the payment of costs and expenses of the liquidation, chapter 7 trustee fees, and other administrative expenses before making any distributions to Holders of Allowed Claims and Allowed Interests, (vi) as more fully described in the notes to the Liquidation Analysis, certain of the Debtors' recoveries on their claims against MFGI would be lower in a hypothetical chapter 7 case as compared to their treatment under the Plan, and (vii) the chapter 7 trustee would adopt the Revised Interco Settlement. *See* Liquidation Analysis § I. As described more fully in the declaration of Sean A. Gumbs in support of confirmation of the Plan, filed concurrently herewith (the "Gumbs Declaration"), the Plan Proponents believe that each of these assumptions is reasonable and consistent with what would actually occur if the Debtors were liquidated under chapter 7 of the Bankruptcy Code.

64. The Liquidation Analysis includes two thorough comparisons (a low recovery scenario and a high recovery scenario) of the estimated distribution to each Class under the Plan as compared to the estimated distribution that would be made to each Class under a hypothetical chapter 7 liquidation of the Debtors. These comparisons show that each Holder of an Allowed Claim or Allowed Interest in Classes 4A, 4B, 4F, 5A, 5B, 6A, 6B, 6D, 6F, 7A, 7B,

[22] The Liquidation Analysis is attached as Exhibit VI to the Disclosure Statement.

7C, 7D, 7F, 8A, 9A, 9B, 9C, 9D, 9E, and 9F will receive at least as much under the Plan as it would if the Debtors were liquidated under chapter 7.[23] As set forth in the notes to the Liquidation Analysis, Holders of Claims against the Unregulated Debtors — who are expected to be paid in full under the Plan — may fare far worse in a hypothetical chapter 7, as the treatment in chapter 7 of certain of the Unregulated Debtors' claims against MFGI may not be the same as the treatment afforded them under the MFGI-Debtors Letter Agreement. A summary of the conclusions set forth in the Liquidation Analysis is set forth below:

Low Recovery Scenario

Class	Chapter 11 Recovery	Chapter 7 Recovery
4A[24]	45.0%	10.4%
4B	37.5%	13.5%
4F	37.5%	6.6%
5A	11.4%	10.4%
5B	14.6%	13.5%
6A	11.4%	10.4%
6B	14.6%	13.5%
6D	82.0%	79.5%
6F	12.9%	6.6%
7A	0.0%	0.0%
7B	0.0%	0.0%
7C	0.0%	0.0%
7D	0.0%	0.0%
7F	0.0%	0.0%
8A	0.0%	0.0%
9A	0.0%	0.0%
9B	0.0%	0.0%
9C	95.5%	0.0%

High Recovery Scenario

Class	Chapter 11 Recovery	Chapter 7 Recovery
4A	45.0%	32.5%
4B	37.5%	32.5%
4F	37.5%	18.7%
5A	34.4%	32.5%
5B	33.7%	32.5%
6A	34.4%	32.5%
6B	33.7%	32.5%
6D	97.2%	94.8%
6F	24.3%	18.7%
7A	0.0%	0.0%
7B	0.0%	0.0%
7C	0.0%	0.0%
7D	0.0%	0.0%
7F	0.0%	0.0%
8A	0.0%	0.0%
9A	0.0%	0.0%
9B	0.0%	0.0%
9C	139.0%	51.8%

[23] As discussed above, section 1129(a)(7) has been satisfied with respect to Classes 1A through 1F, 2A through 2F, 3A, 3B, 6C, 6E, and 7E. *See supra* ¶ 61 (stating that Claims and Interests in these Classes satisfy section 1129(a)(7) because they are either unimpaired or paid in full under the Plan). Regardless, the Liquidation Analysis shows that each Holder of an Allowed Claim in these Classes will receive at least as much under the Plan as it would under a chapter 7 liquidation.

[24] For purposes of both the low recovery scenario and high recovery scenario, the Liquidation Analysis assumes that all Class 4 Convenience Claims would be liquidated as General Unsecured Claims in a chapter 7 liquidation.

Class	Chapter 11 Recovery	Chapter 7 Recovery
9D	0.0%	0.0%
9E	152.3%	0.0%
9F	0.0%	0.0%

Class	Chapter 11 Recovery	Chapter 7 Recovery
9D	0.0%	0.0%
9E	183.4%	73.5%
9F	0.0%	0.0%

65. As these tables and the more detailed Liquidation Analysis show, the expected recovery under the Plan is greater than or equal to the expected recovery in a hypothetical chapter 7 liquidation for each Class of Claims and Interests. Thus, the Plan satisfies the best interests test with respect to each Holder of an Allowed Claim or Allowed Interest that has not accepted the Plan.

2. The Revised Interco Settlement would likely be adopted if the Debtors were to liquidate under chapter 7.

66. When a plan includes a settlement of estate claims, the court must determine whether the settlement value of the claims under the plan settlement is greater than the liquidation value of those claims. *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1159 (5th Cir. 1988); *Affiliated Foods*, 249 B.R. at 788. This requires the court to consider "whether a hypothetical chapter 7 trustee of the debtor's estate would have adopted the settlement as being in the best interest of the parties in interest." *Adelphia*, 361 B.R. at 365. If the chapter 7 trustee in a hypothetical liquidation would adopt the settlement, then the settlement does not affect whether creditors would receive more under the plan than in a hypothetical liquidation. *See In re Best Products Co.*, 168 B.R. 35, 71 (Bankr. S.D.N.Y. 1994) (when estate claims are settled as part of a plan, the hypothetical liquidation value for purposes of chapter 7 is the same as the settlement value under the plan, unless there is some reason to believe that a chapter 7 trustee would not endorse the same settlement); *see also In re Wash. Mutual, Inc.*, 442 B.R. 314, 359 (Bankr. D. Del. 2011) (even where plan proponents failed to show that hypothetical chapter 7 trustee would adopt the same settlement, the other benefits of the plan were sufficient for the

court to conclude that creditors would receive more under the plan than in a chapter 7 liquidation).

67. Here, there is no reason to believe that a hypothetical chapter 7 trustee would not adopt the Revised Interco Settlement. The Revised Interco Settlement was negotiated on the one hand by certain Plan Proponents and on the other by JPMorgan, and the parties' competing interests required them to aggressively negotiate the terms of the Revised Interco Settlement. The parties were represented by experienced bankruptcy and restructuring counsel, and the negotiations took place in the context of the Mediation before the Honorable James M. Peck, an experienced bankruptcy judge and former bankruptcy attorney. *See supra* ¶ 7. In the absence of the Revised Interco Settlement, the Intercompany Claims — which have potential allowable amounts of over $2.2 billion[25] — would need to be adjudicated by representatives of each of the six Debtors' hypothetical chapter 7 estates.[26] Each of these representatives would incur fees and expenses litigating the Intercompany Claims, and given the size of the claims, litigation undoubtedly would be protracted and complex and would delay resolution of the Debtors' hypothetical chapter 7 cases. *See infra* ¶¶ 142-145. In light of the numerous benefits to the creditors of each of the Debtors' estates, it is likely that in a hypothetical chapter 7 liquidation, the Revised Interco Settlement would be adopted, and thus, the Plan satisfies the best interests test.

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[25] *See infra* ¶ 144.

[26] It is possible that six separate parties would have to seek standing under *In re STN Enterprises*, 779 F.2d 901 (2d Cir. 1985), one for each Debtor's estate, to represent the respective Debtors' interests with respect to the Intercompany Claims. *See Carey v. Ernst*, 333 B.R. 666, 677 n.13 (S.D.N.Y. 2005) (noting that some courts have applied *STN* in the chapter 7 context); *Glinka v. Abraham & Rose Co. Ltd.*, 199 B.R. 484, 493 (D. Vt. 1996) (extending the holding of *STN* to an individual creditor in a chapter 7 case). This would substantially increase the costs of litigating the Intercompany Claims and would increase the probability that a chapter 7 trustee would adopt the Revised Interco Settlement.

3. The Occidental Objection is meritless and should be overruled.

68. The Occidental Objection asserts that the Plan does not comply with section 1129(a)(7) of the Bankruptcy Code. The Plan Proponents' reply to the Occidental Objection is included below in section IV of this memorandum.

H. Section 1129(a)(8)

1. The Plan satisfies section 1129(a)(8) with respect to Debtors Finance USA, MFG Capital, MFG Market Services, FX Clear, and MFG Holdings USA.

69. Section 1129(a)(8) of the Bankruptcy Code requires each class of impaired claims and interests to accept a plan. Under the Plan, Classes 1B through 1F and 2B through 2F are unimpaired,[27] and thus, Holders of Claims in those Classes are conclusively presumed to accept the Plan. *See* 11 U.S.C. § 1126(f); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 290 (2d Cir. 1992). All other Classes of Claims against or Interests in Debtors Finance USA, MFG Capital, MFG Market Services, FX Clear, and MFG Holdings USA — Classes 3B, 4B, 4F, 5B, 6B through 6F, 7B through 7F, and 9B through 9F — are impaired, and Holders of such Claims and Interests were entitled to vote on the Plan. *See* Plan § III.A.

70. As set forth in more detail in the Tabulation Affidavit, Classes 3B, 4B, 4F, 5B, 6B through 6F, and 7F accepted the Plan. Classes 7B, 7C, 7D, 7E, 9B, 9C, 9D, 9E, and 9F are deemed to have accepted the Plan pursuant to the "Presumed Acceptance by Non-Voting Classes" provision of the Plan and the Court-approved Disclosure Statement, which states:

> IF A CLASS CONTAINS CLAIMS OR INTERESTS ELIGIBLE TO VOTE AND SUCH HOLDERS OF CLAIMS OR INTERESTS WERE GIVEN THE OPPORTUNITY TO VOTE TO ACCEPT OR REJECT THE PLAN AND NOTIFIED THAT A FAILURE OF ANY HOLDER OF CLAIMS OR

[27] As mentioned above, Classes ending in "B" apply to Finance USA, "C" apply to MFG Capital, "D" apply to FX Clear, "E" apply to MFG Market Services, and "F" apply to MFG Holdings USA. *See* Plan § III.A.1. Classes ending in "A" apply to Holdings Ltd. and are discussed below.

> INTERESTS IN SUCH IMPAIRED CLASS TO VOTE TO ACCEPT OR REJECT THE PLAN WOULD RESULT IN SUCH IMPAIRED CLASS OF CLAIMS OR INTERESTS BEING DEEMED TO HAVE ACCEPTED THE PLAN, BUT NO HOLDER OF CLAIMS OR INTERESTS IN SUCH IMPAIRED CLASS OF CLAIMS OR INTERESTS VOTED TO ACCEPT OR REJECT THE PLAN, THEN SUCH CLASS OF CLAIMS OR INTERESTS SHALL BE DEEMED TO HAVE ACCEPTED THE PLAN.

See Plan § X.C.3; Disclosure Statement § XVI.C.3 (same); *see also* Disclosure Statement Order; *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 260 (Bankr. S.D.N.Y. 2007) (plan and disclosure statement stated that if all eligible voters in a given class declined to vote, class would be deemed to accept the plan, and court enforced such provision over creditor's objection).

71. Thus, all Classes of Claims against and Interests in Debtors Finance USA, MFG Capital, MFG Market Services, FX Clear, and MFG Holdings USA have accepted the Plan, and the requirements of section 1129(a)(8) of the Bankruptcy Code have been met with respect to those Debtors.

2. The Plan satisfies the cramdown requirements of section 1129(b) of the Bankruptcy Code.

72. Under the Plan, Classes 1A and 2A are unimpaired, and thus, Holders of Claims in those Classes are presumed to accept the Plan. *Drexel Burnham*, 960 F.2d at 290. As set forth in more detail in the Tabulation Affidavit, Classes 3A, 4A, 5A, 6A, and 7A accepted the Plan. Classes 8A and 9A, however, were deemed to reject the Plan. *See* Plan § III.A.2; Disclosure Statement § I.C.2. Thus, the Plan does not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to Holdings Ltd.

73. If Classes 7B through 7E and 9B through 9F are not deemed to accept the Plan, the Plan will not satisfy section 1129(a)(8) of the Bankruptcy Code with respect to Debtors Finance USA, MFG Capital, MFG Market Services, FX Clear, and MFG Holdings USA because each Debtor will have at least one Class that has not accepted the Plan.

74. Nonetheless, the Plan may still be confirmed in each Debtor's Chapter 11 Case under the cramdown requirements of section 1129(b)(1) of the Bankruptcy Code. Section 1129(b)(1) provides that "if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent under the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

75. A plan is "fair and equitable" with respect to a class of unsecured claims if (i) each holder of a claim in that class will be paid in full under the plan or (ii) "the holder of any claim or interest that is junior to the claim of such class will not receive or retain under the plan on account of such junior claim or interest any property." *See* 11 U.S.C. § 1129(b)(2)(B)(i)-(ii). A plan is "fair and equitable" with respect to a class of interests if "the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property." *See* 11 U.S.C. § 1129(b)(2)(C)(ii).

76. A plan discriminates unfairly with respect to a dissenting class of creditors if (i) the plan creates more than one class of creditors with the same level of priority as the dissenting class, (ii) the plan provides different treatment to those classes, and (iii) the different treatment is unfair. *See In re Journal Register Co.*, 407 B.R. 520, 532 (Bankr. S.D.N.Y. 2009) ("[Section 1129(b)] prohibits unfair discrimination between classes of creditors with the same level of bankruptcy priority. It is concerned with plan treatment between classes—not within classes."); *Mercury Capital Corp. v. Milford Conn. Assocs., L.P.*, 354 B.R. 1, 10 (D. Conn. 2006) (a plan discriminates unfairly if similar claims are treated differently without a reasonable basis for doing so); *In re Dana Corp.*, 2007 WL 4589331, at *16 (Bankr. S.D.N.Y. Dec. 26,

2007) (plan did not discriminate unfairly with respect to dissenting class because each dissenting class was treated "substantially equally to similarly situated classes").

(a) Even if Classes 7B through 7E and 9B through 9F are not deemed to accept the Plan, the Plan satisfies the cramdown requirements of section 1129(b) because the Plan is fair and equitable and does not discriminate unfairly.

77. The Plan is fair and equitable with respect to Classes 7B through 7E. Holders of Allowed Claims in Class 7E are expected to be paid in full, and thus, the Plan satisfies section 1129(b)(2)(B)(i) with respect to Class 7E. With respect to Classes 7B, 7C, and 7D, the only junior Classes are Classes 9B, 9C, and 9D, respectively. Holders of Allowed Interests in Classes 9B, 9C, and 9D will "not receive or retain . . . any property" under the Plan unless Holders of Allowed Class 7B, 7C, and 7D, respectively, are paid in full. Thus, the Plan satisfies section 1129(b)(2)(B)(ii) with respect to Classes 7B, 7C, and 7D. The Plan is also fair and equitable with respect to Classes 9B, 9C, 9D, 9E, and 9F under section 1129(b)(2)(C)(ii) because there are no Interests junior to Classes 9B, 9C, 9D, 9E, and 9F.

78. The Plan does not "discriminate unfairly" with respect to Classes 7B through 7E and 9B through 9F because it does not discriminate at all. As the *Journal Register* court recognized, unfair discrimination applies only as between "classes of creditors with the same level of bankruptcy priority." Here, with respect to each Debtor, there are no classes of creditors with the same level of bankruptcy priority as Class 7, and there are no classes of creditors with the same level of bankruptcy priority as Class 9. Thus, there can be no discrimination — let alone unfair discrimination — against Classes 7B, 7C, 7D, 7E, 9B, 9C, 9D, 9E, or 9F.

79. Because the Plan is both fair and equitable and does not discriminate unfairly against Holders of Allowed Claims and Allowed Interests in Classes 7B through 7E and

9B through 9F, the Plan satisfies the cramdown requirements of section 1129(b)(2) of the Bankruptcy Code.

(b) The Plan does not satisfy section 1129(a)(8) with respect to Debtor Holdings Ltd., but the Plan satisfies the cramdown requirements of section 1129(b) because it is fair and equitable and does not discriminate unfairly.

80. The only Class of Interests that is junior to Class 8A is Class 9A. Holders of Allowed Interests in Class 9A will "not receive or retain . . . any property" under the Plan unless Holders of Allowed Class 8A Interests are paid in full, and thus, the Plan satisfies section 1129(b)(2)(C)(ii) with respect to Class 8A. The Plan also satisfies section 1129(b)(2)(C)(ii) with respect to Class 9A because there are no Interests junior to Class 9A Interests under the Plan.

81. As above, the Plan does not "discriminate unfairly" with respect to Classes 8A and 9A because it does not discriminate at all. There are no Classes with the same level of bankruptcy priority as Class 8A or 9A. Thus, there can be no discrimination — let alone unfair discrimination — against Class 8A or 9A.

82. Because the Plan is both fair and equitable and does not discriminate unfairly against Holders of Allowed Interests in Classes 8A and 9A, the Plan satisfies the cramdown requirements of section 1129(b)(2) of the Bankruptcy Code.

I. Section 1129(a)(9) — The Plan provides for payment of Priority Claims in full.

83. Section 1129(a)(9) of the Bankruptcy Code requires, except to the extent that a holder of a claim agrees otherwise, that:

(A) holders of claims entitled to priority under section 507(a)(2) and (3) of the Bankruptcy Code receive cash equal to the allowed amount of such claims;

(B) holders of claims entitled to priority under section 507(a)(1), (4), (5), (6), and (7) receive deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claims (if such class has

accepted the plan) or cash on the effective date of the plan equal to the allowed amount of such claims (if such class has not accepted the plan); and

(C) holders of claims entitled to priority under section 507(a)(8) receive regular installment payments in cash (i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim, (ii) over a period ending not later than five years after the petition date, and (iii) in a manner "not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)."

See 11 U.S.C. § 1129(a)(9)(A)-(C).

84. Under the Plan, holders of Allowed Administrative Claims shall be paid in full in cash "on the Effective Date or as soon as practicable thereafter, or, if not then due, when such Allowed Administrative Claims is due or as soon as reasonably practicable thereafter." *See* Plan § II.A. Holders of Allowed Priority Tax Claims shall be paid in full "on the latest of (i) the Effective Date, (ii) forty-five days after the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, and (iii) the date on which an Allowed Priority Tax Claim would be due and payable in the ordinary course of business." *See* Plan § II.B. Finally, holders of Allowed Priority Non-Tax Claims — which includes all other Claims entitled to priority under section 507(a) of the Bankruptcy Code[28] — shall be paid in full in cash "on or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) thirty days after the date on which such Claim becomes Allowed." *See* Plan § III.B.1. Accordingly, the Plan satisfies the requirements of section 1129(a)(9).

[28] *See* Plan § I.A.121 (defining a "Priority Non-Tax Claim" as "any Claim that is entitled to priority in payment pursuant to § 507(a) of the Bankruptcy Code that is not an Administrative Claim or a Priority Tax Claim").

J. Section 1129(a)(10) — There are several impaired accepting Classes of Claims.

85. Section 1129(a)(10) of the Bankruptcy Code requires "at least one class of claims that is impaired under the plan" to accept the plan, excluding votes of insiders. As set forth in more detail in the Tabulation Affidavit, Classes 3A, 3B, 5A, 5B, 6A through 6F, 7A, and 7F, all of which are impaired under the Plan,[29] voted to accept the Plan. Thus, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

1. The Occidental Objection is meritless and should be overruled.

86. The Occidental Objection incorrectly asserts that the Plan does not comply with section 1129(a)(10) of the Bankruptcy Code. The Plan Proponents' reply to the Occidental Objection is included below in section IV of this memorandum.

K. Section 1129(a)(11) — The Plan is feasible.

87. Section 1129(a)(11) of the Bankruptcy Code provides that a plan can be confirmed only if confirmation of the plan "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." The Plan is a liquidating plan that proposes the liquidation of each of the Debtors, so arguably, the feasibility requirement of section 1129(a)(11) does not even apply. *In re EUSA Liquidation Inc.*, 2010 WL 4916559, at *6 (Bankr. S.D.N.Y. June 10, 2010) ("The Plan satisfies section 1129(a)(11) because it provides for the liquidation of the Debtor. The Debtor has sold or abandoned substantially all of its assets and will distribute cash to creditors."); *In re Value City Holdings, Inc.*, 2010 WL 4916389, at *5 (Bankr. S.D.N.Y. May 17, 2010) ("As the Plan expressly provides for the liquidation of the Debtors, the Plan is not likely to be followed by the need for further financial reorganization of

[29] *See* Plan § III.A.

the Debtors."); *In re Woodcrest Club, Inc.*, 2010 WL 5053972, at *2 (Bankr. E.D.N.Y. Aug. 9, 2010) (confirming plan and concluding that "the Plan is a plan of liquidation so feasibility is not at issue").

88. Nonetheless, to the extent section 1129(a)(11) applies, the Plan is feasible. To satisfy section 1129(a)(11), a plan proponent needs to establish that there is a "reasonable assurance" of success; success, however, need not be guaranteed. *See In re DBSD N. Am., Inc.*, 634 F.3d 79, 106-07 (2d Cir. 2011). "The key element of feasibility is whether there exists the reasonable probability that the provisions of the Plan can be performed." *Drexel*, 138 B.R. at 762. FTI and the Plan Proponents' other advisors spent significant time preparing a feasibility analysis (the "Feasibility Analysis") to specifically address the Debtors' anticipated financial obligations as of the Effective Date and the Plan Administration Expenses.[30] Subsequent to the Bankruptcy Court's approval of the adequacy of the information contained in the Disclosure Statement, FTI continued its analysis of the Debtors' anticipated financial obligations. FTI concluded that the Debtors will likely: (i) incur higher than anticipated administrative expenses prior to the Effective Date ($2.5 million); (ii) incur greater than anticipated cure costs ($4 million); (iii) experience delayed recovery of funds on Claims against the Debtors' Affiliates and from third parties; and (iv) require an extended time period for funding Plan Administration Expenses. As a result, FTI, in consultation with the Chapter 11 Trustee's other advisors and advisors to the statutory creditors' committee, recommended the Exit Facility be increased to $80 million (from $70 million), which includes an additional $3.5 million of incremental commitment as a prudent level of cushion for further negative variances from forecast and the Facility Availability Period be extended to nine months (from six months).

[30] The Feasibility Analysis is attached as Exhibit II to the Disclosure Statement.

89. As described in detail above, the Plan provides adequate means for implementation of the Plan through, among other things, the Exit Facility (as amended), the appointment of the Plan Administrator, the establishment of the Plan Trust, and the preservation of Causes of Action. *See supra* ¶ 45. Furthermore, as set forth in the Gumbs Declaration, the Plan Proponents expect that as of the Effective Date, the Debtors' estates will have a total of approximately $64 million in Cash, which, when supplemented by the Exit Facility, will be adequate to fund Plan Administration Expenses and the Claims to be paid on or as soon as practicable after the Effective Date. Thus, the Plan is feasible and satisfies section 1129(a)(11) of the Bankruptcy Code.

L. Section 1129(a)(12) — The Plan provides for the payment of statutory fees required by 28 U.S.C. § 1930.

90. Section 1129(a)(12) of the Bankruptcy Code requires "[a]ll fees payable under section 1930 of title 28" to be paid or for the plan to provide for the payment of such fees on the effective date of the plan. The Plan provides: "On or before the Effective Date, Administrative Claims for fees payable pursuant to 28 U.S.C. § 1930 shall be paid by the Chapter 11 Trustee in Cash. Fees payable pursuant to 28 U.S.C. § 1930 for each Debtor's estate after the Effective Date shall be paid by the Plan Administrator from the Plan Administration Expenses Reserve Amount until the closing of the applicable Chapter 11 Case pursuant to § 350(a) of the Bankruptcy Code." *See* Plan § II.A.5; *see also Mesa Air Grp.*, 2011 WL 182450, at *9 (plan satisfied section 1129(a)(12) by providing for payment of required fees both before and after the plan's effective date). Thus, the Plan complies with section 1129(a)(12).

M. Section 1129(a)(13) is inapplicable.

91. Section 1129(a)(13) of the Bankruptcy Code requires that a plan provide for the continued payment, after the effective date, of retiree benefits at a level established by

agreement under section 1114(e)(1)(B) of the Bankruptcy Code or by court order under section 1114(g) of the Bankruptcy Code. Because there has been no such agreement or court order modifying retiree benefits under section 1114, section 1129(a)(13) is inapplicable to the Plan.[31]

III. THE PLAN COMPLIES WITH SECTION 1129(b) OF THE BANKRUPTCY CODE.

92. The Plan satisfies the cramdown requirements of section 1129(b) of the Bankruptcy Code as described above in paragraphs 72-82. Thus, with respect to Debtor Holdings Ltd., the Plan Proponents hereby request that the Court confirm the Plan under section 1129(b). The Plan Proponents also request that the Court confirm the Plan with respect to Debtors Finance USA, MFG Capital, FX Clear, MFG Market Services, and MFG Holdings USA to the extent the Court concludes that the Plan does not satisfy the requirements of section 1129(a)(8) with respect to those Debtors.

IV. THE COURT SHOULD OVERRULE ALL OBJECTIONS TO CONFIRMATION OF THE PLAN.

A. The Sapere Objection is meritless because creditors with customer claims against MFGI are not entitled to priority status in the Chapter 11 Cases.

93. The Sapere Objection rehashes arguments that the Court has already rejected in these Chapter 11 Cases. Early in the Chapter 11 Cases, Sapere filed a motion (the "Sapere Motion") seeking to have the Chapter 11 Cases administered under sections 761 through 767 of the Bankruptcy Code ("Subchapter IV") and 17 C.F.R. § 190 ("CFR 190"). [Docket No. 278]. The Court found that in order for Subchapter IV or CFR 190 to apply, (1) the Chapter 11 Cases would need to be converted to cases under chapter 7 of the Bankruptcy Code, and (2) the

[31] The remaining subsections of section 1129(a) of the Bankruptcy Code are also inapplicable to the Plan. Section 1129(a)(14) is inapplicable because the Debtors are not "required by a judicial or administrative order, or by statute, to pay a domestic support obligation." Section 1129(a)(15) is inapplicable because the Debtors are not individuals. Section 1129(a)(16) is inapplicable because each Debtor is a "moneyed, business, or commercial corporation."

Debtors would need to be "commodity brokers" as defined by the Bankruptcy Code, CFR 190, or the Commodity Exchange Act (the "CEA"). *See Memorandum Opinion Denying Motion to Direct the Debtors' Estates to be Administered Pursuant to 11 U.S.C. §§ 761-767 and 17 C.F.R. § 190* (the "Order Denying Sapere Motion") [Docket No. 400].[32]

94. The Court determined that cause did not exist to convert the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code because a chapter 11 trustee was already in place to "allay the fears and concerns of creditors" and because conversion would "decrease available recoveries for all creditors." Order Denying Sapere Motion at 7-8.

95. The Court also found that the Debtors are not commodity brokers. To be considered a commodity broker, "Sapere must show that the Chapter 11 Debtors (1) solicited or accepted orders for the purchase or sale of a commodity, (2) accepted property to margin trades that result from the purchase or sale of a commodity and (3) had a 'customer' in the ordinary course prior to its bankruptcy filing." *Id.* at 9. The Court also found that "the Chapter 11 Debtors must have actually solicited and accepted customer funds in connection with *their specific* solicitation or acceptance procedures." *Id.* The Court rejected Sapere's contention that the Debtors were commodity brokers because there was no evidence that any of the Debtors solicited or accepted orders for the purchase or sale of a commodity and because "Sapere acknowledged that Sapere had no direct dealings with the Chapter 11 Debtors." *Id.* at 10.

96. The Court's earlier decision is the law of the case in the Chapter 11 Cases, and thus the Court should not disturb its prior rulings that the Debtors are not commodity brokers

[32] As the Court recognized, conversion is required because subchapter IV cannot be applied in a chapter 11 case. *See* Order Denying Sapere Motion at 5-6. ("The Court cannot, as Sapere argues, apply section 766 to the Chapter 11 Debtors' cases pursuant to section 105 of the Bankruptcy Code without converting these cases to cases under chapter 7. Such an application would directly violate the express requirements of section 103(d) of the Bankruptcy Code.").

and that neither Subchapter IV nor CFR 190 applies in the Chapter 11 Cases. *See Pepper v. United States*, 131 S.Ct. 1229, 1250 (2011) (the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 7-8 (2d Cir. 1996) (same); *In re Parmalat Sec. Litig.*, 497 F. Supp. 2d 526, 530 (S.D.N.Y. 2007) ("Under the law of the case, when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case.") (citation omitted); *see also In re Stanley*, 185 B.R. 417, 421 (Bankr. D. Conn. 1995) ("under the law of the case doctrine, a court generally follows its prior interlocutory orders in a case").

97. If the Court chooses to address the Sapere Objection on the merits, it nonetheless should come to the same conclusion as before, namely, that the Sapere Objection should be overruled. In the Sapere Objection, Sapere once again argues that Subchapter IV and CFR 190 must be applied to Holdings Ltd.'s case because, according to Sapere, Holdings Ltd. is a commodity broker. Sapere Objection at 2-3. Accordingly, Sapere argues that the Plan violates section 1122 of the Bankruptcy Code because it fails to place Sapere's claims against Holdings Ltd. in a Class that has priority over Holdings Ltd.'s other creditors. *Id.* at 9.

98. Sapere, however, does not request that Holdings Ltd.'s case be converted to a case under chapter 7 of the Bankruptcy Code, thereby ignoring the Court's conclusion that application of Subchapter IV requires conversion to chapter 7. *See* Order Denying Sapere Motion at 6 ("subchapter IV of chapter 7 of the Bankruptcy Code cannot apply to the Chapter 11 Debtors' cases unless (1) the cases of the Chapter 11 Debtors are converted to cases under chapter 7"). There is no more reason to convert Holdings Ltd.'s case than there was over a year ago when the Court denied the Sapere Motion. *See* Order Denying Sapere Motion at 7-8

(concluding that conversion was not warranted because "conversion would only increase the administrative expenses to the estates and decrease available recoveries for all creditors"). For this reason alone, the Sapere Objection must be overruled.

99. Furthermore, even if the Holdings Ltd. case were converted to a case under chapter 7 of the Bankruptcy Code, Subchapter IV would not apply because Holdings Ltd. is not a commodity broker. Nothing has changed since the Sapere Motion was denied; Holdings Ltd. was not a commodity broker then, and it is not a commodity broker now. As discussed above, in order to establish that Holdings Ltd. is a commodity broker, Sapere must show that Holdings Ltd. (1) solicited or accepted orders for the purchase or sale of a commodity, (2) accepted property to margin trades that result from the purchase or sale of a commodity, and (3) had a "customer" in the ordinary course of its business prior to its bankruptcy filing. *See* Order Denying Sapere Motion at 10. The Court denied the Sapere Motion because Sapere raised no factual allegations supporting any of these three requirements. Likewise, the Court should overrule the Sapere Objection because at no time did Holdings Ltd. solicit or accept orders for the purchase or sale of a commodity or accept property to margin trades that resulted from the purchase or sale of a commodity, nor did Holdings Ltd. at any point have any "customers." Sapere admitted that it cannot meet any of these requirements in its appeal to the district court: "Sapere concedes that . . . Holdings did not solicit and take orders, receive funds for margin and have customers." *See Opening Brief of Appellants Sapere Wealth Management LLP, Granite Asset Management, and Sapere CTA Fund, L.P.*, Case No. 1:12-CV-03757-JMF (June 1, 2012). Likewise, the Sapere Objection does not allege, let alone provide any evidence, that any of these requirements can be met.

100. Instead, Sapere's argument in the Sapere Objection is the same as it was in the Sapere Motion: that Holdings Ltd. and its executives exerted control over MFGI, thereby causing harm to MFGI's customers. *See* Sapere Objection at 10 (acknowledging that customer accounts were with MFGI, not Holdings Ltd., and arguing that Holdings Ltd. misused "funds deposited with MFGI") (emphasis added), Sapere Objection at 14 (alleging only that Holdings "exercised excessive control over MFGI to improperly gain access to commodities customer funds"), Sapere Objection at 17 ("Holdings and a number of MFGI affiliates . . . traded through accounts with MFGI as their commodities FCM . . ."); Sapere Objection at 19 ("Holdings put risk strategies in place that caused the misappropriation of commodities customer funds and [] Holdings executives had excessive control over MFGI and the commodities customer funds.").

101. As the Court recognized in the Order Denying Sapere Motion, even if Holdings Ltd. or its executives exerted control over MFGI, or if Holdings Ltd. misappropriated MFGI's customer funds, this is not the same as Holdings Ltd. itself being a commodity broker. *See* Order Denying Sapere Motion at 9 ("it follows that if customer funds were solicited and accepted by MFGI and then transferred to the Chapter 11 Debtors, the Chapter 11 Debtors would still not be considered an FCM or 'commodity broker' under the Bankruptcy Code and the CEA"). To the extent Sapere has any claims against Holdings Ltd. or any of the other Debtors, therefore, those claims are not entitled to priority.

102. Purportedly relying on "new" evidence that Sapere claims has surfaced since the Court issued its Order Denying Sapere Motion, Sapere argues that the Court should effectively reconsider its prior conclusion that Holdings Ltd. is not a commodity broker. The new evidence that Sapere points to in the Sapere Objection, however, paints precisely the same picture that Sapere painted in the Sapere Motion: that Holdings Ltd. exerted control over MFGI

and contributed to MFGI's misappropriation of customer funds. Even if true, this does not make Holdings Ltd. a commodity broker, and it does not entitle MFGI's customers to priority status in Holdings Ltd.'s chapter 11 case. The Court should deny Sapere the opportunity to relitigate issues that have already been decided in these cases and should overrule the Sapere Objection.[33]

103. Because the Sapere Objection is meritless, and for the other reasons set forth above, the Court should conclude that the Plan satisfies the requirements of section 1122 of the Bankruptcy Code.

B. The Occidental Objection is meritless because the Plan properly provides for a Disputed Claims reserve.

104. Occidental states that it filed a proof of claim (the "Occidental Claim") in Holdings Ltd.'s Chapter 11 Case. *See* Occidental Objection ¶ 3. Occidental then points to (i) Exhibit IV of the Disclosure Statement, which provides that Disputed Claims like the Occidental Claim were excluded when the Plan Proponents estimated creditor recoveries in Section I.C.2 of the Disclosure Statement, and (ii) statements made in the Disclosure Statement regarding the letter agreement between the Chapter 11 Trustee and the SIPA Trustee, which agreement provides for full payment of customer claims in MFGI's SIPA proceeding in certain circumstances. *See* Occidental Objection ¶¶ 5-6. Based on these Disclosure Statement provisions, Occidental states that it is "concerned that a cash reserve, as required by Section VI.E

[33] The Court should also give no weight to Sapere's argument that Holdings Ltd. is a commodity broker based on an alleged "judicial admission" in its petition for relief. *See* Sapere Objection at 10 (arguing that "[c]ommodities customers with accounts at MFGI are entitled to priority treatment in the administration of Holdings' estate because: . . . Holdings judicially admitted it was a commodities broker"). This supposed "judicial omission" occurred in Holdings Ltd.'s bankruptcy petition, which was filed on October 31, 2011. The Court's Order Denying Sapere Motion, wherein the Court concluded that Holdings Ltd. was not a commodity broker, was entered on February 20, 2012. Thus, the Court has already determined that Holdings Ltd.'s bankruptcy petition does not render it a commodity broker, and regardless, to conclude that Holdings Ltd. is a commodity broker based on this "admission," and in the face of evidence to the contrary, would be to improperly elevate form over substance.

of the Plan, will not be established on account of" the Occidental Claim and that the Plan therefore violates sections 1129(a)(7) and 1129(a)(10)[34] of the Bankruptcy Code. *Id.* ¶ 7.

105. Occidental' misinterprets Section VI.E of the Plan. The Plan Proponents agree with Occidental's statement that "the Plan Proponents do not believe that the Debtors will have liability on account of the claims filed by the customers of MF Global Inc." *Id.* ¶ 5. Nonetheless, even though the Plan Proponents believe that allowable commodity customer claims, like the Occidental Claim, will be paid in full in the MFGI SIPA proceeding, and even though the Occidental Claim was not included in the estimation of creditor recoveries in Section I.C.2 of the Disclosure Statement, the Disputed Claims reserve established by Section VI.E of the Plan remains potentially applicable to the Occidental Claim.

106. Section VI.E of the Plan requires the Plan Administrator to "establish and maintain a Cash reserve equal to the Distributions to which Holders of Disputed Claims would be entitled under this Plan if such Disputed Claims were Allowed Claims in the Filed amount of such Disputed Claims . . . ." A Disputed Claim is any Claim that has not yet been Allowed, *see* Plan § I.A.44, and thus, the Occidental Claim is a Disputed Claim under the Plan. To the extent the Occidental Claim becomes an Allowed Claim, the Disputed Claims reserve will have sufficient Cash to pay Occidental the entire amount to which it would be entitled under the Plan. The Disputed Claims reserve would include the Occidental Claim until it is Disallowed, and the Occidental Objection should therefore be overruled.

[34] It is unclear what basis Occidental has for asserting that the Plan violates section 1129(a)(10) of the Bankruptcy Code, which requires an impaired accepting Class. Even if the Occidental Objection has merit, it does not change the fact that the Classes identified above are impaired and have voted in favor of the Plan. *See supra* ¶ 85.

C. The UST Objection should be overruled because the Plan properly provides for the payment of fees and expenses, and the injunctions provided by the Plan satisfy the *Metromedia* requirements.

107. The UST Objection should be overruled because: (a) the the Creditor Co-Proponents Fee/Expense Claim and the Indenture Trustee Fee/Expense Claim (together, the "Fee/Expense Claims") are properly subject to review under the "reasonableness" standard of section 1129(a)(4) of the Bankruptcy Code as provided in the Plan; and (b) the injunction provided for in the Plan is permissible and not overly broad.

1. The UST's objection to review of the Fee/Expense Claims solely under the "reasonableness" standard of section 1129(a)(4) of the Bankruptcy Code should be overruled.[35]

108. The weight of authority in this district supports approval of the Fee/Expense Claims under the "reasonableness" standard of section 1129(a)(4) of the Bankruptcy Code pursuant to the Plan, and does not require that approval of the Fee/Expense Claims be subject to approval under the "substantial contribution" standard set forth in section 503(b) of the Bankruptcy Code. Accordingly, the Plan should be confirmed over the UST Objection.

109. Section 503(b) of the Bankruptcy Code lists several categories of allowed administrative expenses. In particular, sections 503(b)(3) and 503(b)(4) of the Bankruptcy Code provide express statutory authority for the payment of creditors' and indenture trustees' expenses and fees. Although sections 503(b)(3) and 503(b)(4) include a nonconsensual mechanism for payment of certain expenses and fees, section 503(b) does not provide "in words or substance,

[35] At the Court's instruction and with their agreement, the Plan Proponents included language in the Original Disclosure Statement specifically providing that they would proceed with plan confirmation whether the Fee/Expense Claims were ultimately considered under the "reasonableness" standard of section 1129(a)(4) of the Bankruptcy Code or the "substantial contribution" standard of section 503(b)(3)(D) of the Bankruptcy Code. Disclosure Statement, §§ VI.B.1.c, VI.B.1.d.

that it is the only way by which fees of this character may be absorbed by an estate." *In re Adelphia Commc'ns Corp.*, 441 B.R. 6, 12 (Bankr. S.D.N.Y. 2010). Thus, the Court is "free to look to other provisions of the [Bankruptcy] Code that might also authorize a payment [of the type authorized on a nonconsensual basis under section 503(b)]." *Id.* at 13.

110. Section 1123(b) of the Bankruptcy Code lists provisions which "may" be included in a plan. *See* 11 U.S.C. § 1123(b). Specifically, section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." *See* 11 U.S.C. § 1123(b)(6). This provision grants plan proponents wide discretion and broad authority to include in plans provisions that are necessary or appropriate to accomplish restructuring goals, as long as such provisions do not run afoul of other provisions of the Bankruptcy Code or any other applicable federal law. *In re Lehman Bros. Holdings Inc.*, 2013 WL 587343, at *7 (Bankr. S.D.N.Y. Feb. 15, 2013) ("Section 1123(b)(6) is a broadly-worded, open-ended invitation to the creativity of those who are engaged in drafting plan language. . . This amounts to a green light for those engaged in plan negotiations. Just about anything can be included, provided that the terms of the plan do not run afoul of applicable bankruptcy law."); *Adelphia*, 441 B.R. at 16 ("the bankruptcy court has broad equitable power to resolve debtor/creditor matters . . . and absent specific conflicts in the Bankruptcy Code and federal law, *a debtor has broad discretion to deal with its creditors through the plan process*") (emphasis in original).

111. Nothing in section 503(b) or anywhere else in the Bankruptcy Code prohibits the inclusion of a provision in a plan that allows payment of fees and expenses, subject to the reasonableness standard of section 1129(a)(4). *Lehman*, 2013 WL 587343 at *8 ("The Court approaches the issue of plan treatment for professional fees from the point of view that

plan terms are valid unless those terms are inconsistent with another applicable provision of the Bankruptcy Code."). Thus, plan provisions authorizing the payment of creditors' and indenture trustees' fees and expenses subject to section 1129(a)(4) are appropriate and not inconsistent with the provisions of the Bankruptcy Code, including section 503(b).

112. Put another way, although section 503(b) is one way that payment of fees and expenses such as the Fee/Expense Claims can be approved pursuant to the Bankruptcy Code, it is not the only way. Thus, a plan may properly provide for payment of such fees and expenses pursuant to section 1129(a)(4). *Lehman*, 2013 WL 587343 at *8 ("While the provision under the Plan may be another structure to achieve the same basic objective (payment of fees), the path chosen is not improper simply because it provides an alternative method to secure payment of the fees."). There is no conflict or inconsistency between section 1129(a)(4) and section 503(b) because section 503(b) is a nonconsensual mechanism for payment of fees and expenses and a plan provision is a consensual mechanism for payment of fees and expenses.

113. In this district, there is recent caselaw specifically addressing the permissibility of plan provisions allowing for payment of the fees and expenses of the parties enumerated in section 503(b) under section 1129(a)(4), without showing compliance with the standards of section 503(b). Specifically, both Judge Gerber's *Adelphia* decision and Judge Peck's recent *Lehman* decision are directly on point and support the conclusion that the Court should confirm the Plan, inclusive of the provisions in Sections II.A.3 and II.A.4 thereof, providing that the Fee/Expense Claims are subject to review under section 1129(a)(4). The UST's contentions to the contrary are wrong, and the UST Objection should be overruled.[36]

[36] The UST Objection urges the Court to not only ignore, but to hold in direct contradiction to, the only two directly on point opinions in the Second Circuit, both authored by judges in this district. Instead, the UST Objection cites to various opinions outside of the Second Circuit.

114. In *Adelphia*, fourteen ad hoc committees and certain individual creditors sought reimbursement of legal fees and professional expenses pursuant to a plan provision similar to Sections II.A.3 and II.A.4 of the Plan. *Adelphia*, 441 B.R. at 8-9. Likewise, in *Lehman*, members of the official committee of unsecured creditors appointed under section 1102 sought payment of professional fees as allowed pursuant to a plan provision similar to Sections II.A.3 and II.A.4 of the Plan. *Lehman*, 2013 WL 587343, at *2. In both *Adelphia* and *Lehman*, the courts approved review of such fees and expenses pursuant to section 1129(a)(4), rejecting arguments that section 503(b) should apply.

115. Both *Adelphia* and *Lehman* specifically analyzed the issue presented here — whether a plan may provide for payment of fees and expenses of individual creditors and indenture trustees subject only to the "reasonableness" standard of section 1129(a)(4), and not the "substantial contribution" standard section 503(b) — and both held that, pursuant to a bargained for provision in a consensual plan, such fees and expenses may be paid subject to review only under section 1129(a)(4). *Adelphia*, 441 B.R. at 9; *Lehman*, 2013 WL 587343, at *3, *9 (finding Judge Gerber's decision in *Adelphia* persuasive and applicable).

116. The UST Objection urges the Court to find that, notwithstanding Sections II.A.3 and II.A.4 of the Plan, the Fee/Expense Claims must be subject to review under section 503(b) of the Bankruptcy Code. Such a finding would be inconsistent with the sound logic and rationale underlying the *Adelphia* and *Lehman* decisions. As noted in *Lehman*, "[s]ection 503(b) is not a straitjacket, and the provisions of that section that directly govern the allowance of administrative claims do not control the plan process and are not inconsistent with more the more [sic] liberal treatment provided in [a] [p]lan." *Lehman*, 2013 WL 587343 at *4.

117. Here, just as in *Lehman*, the fatal flaw in the UST Objection is the "embedded assumption that the administrative claim formulation of Section 503(b) functions as a trump card that extends across the Bankruptcy Code to block the formulation of a plan that proposes independent grounds for granting comparable payment rights." *Lehman*, 2013 WL 587343, at *3 ("There is no basis for such a contention."). Further, the UST Objection ignores both the significant leeway granted to plan proponents under section 1123(b)(6) to include in plans any appropriate provision not inconsistent with the applicable provisions of the Bankruptcy Code, and the authority and discretion of the Court to approve payments in connection with a plan as being reasonable under section 1129(a)(4), as demonstrated most directly in *Adelphia* and *Lehman*.

118. Sections II.A.3 and II.A.4 of the Plan properly provide for payment of the Fee/Expense Claims subject to review for reasonableness as required by section 1129(a)(4) of the Bankruptcy Code and in accordance with this district's decisions in *Adelphia* and *Lehman*. Accordingly, the UST Objection should be overruled.

2. The UST's objection to the Plan's injunction provision should be overruled.

119. The UST argues that the Plan contains "non-debtor third party releases and an injunction provision that . . . are overly broad." UST Objection at 1. Section XI.D of the Plan (the "Injunction Provision") provides, in relevant part, as follows:

> Except as expressly provided in this Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, or as agreed to by a Holder of a Claim or Interest and the Plan Administrator (on behalf of a Debtor), all Entities (other than the Debtors) who have held, hold or may hold Claims against or Interests in any or all of the Debtors (whether proof of such Claims or Interests has been Filed or not), along with their respective present or former employees, agents, officers, directors or principals, are permanently enjoined, on and after the Effective Date, solely with respect to any Claims or Interests that are treated pursuant to this Plan, from (i) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action, or other proceeding of any kind (including, without limitation,

> any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Protected Parties or the property of the Debtors, (ii) enforcing, levying, attaching (including, without limitation, any prejudgment attachment), collecting, or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree, or order against the Protected Parties or the property of any of the Debtors, (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Protected Parties or the property of any of the Debtors, (iv) asserting any right of setoff, directly or indirectly, against any obligation due the Protected Parties or the property of any of the Debtors, except as contemplated or allowed by this Plan; (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan; and (vi) taking any actions to interfere with the implementation or consummation of this Plan.

Plan, § XI.D at 63-64 (emphasis added). "Protected Parties" is defined in the Plan as "the Debtors and, solely with respect to acts or omissions subsequent to the applicable Petition Date, and with respect to the Claims of the Securities Plaintiffs solely with respect to acts or omissions subsequent to November 21, 2011, their respective officers, directors, managers, members, accountants, financial advisors, investment bankers, agents, restructuring advisors, attorneys, and representatives (solely in their capacity as officers, directors, managers, members, accountants, financial advisors, investment bankers, agents, restructuring advisors, attorneys, and representatives of the Debtors)." Plan, § I.A.129 (emphasis added).

120. Because the Chapter 11 Cases are liquidation cases, they do not enjoy the benefit of a discharge under section 1141 of the Bankruptcy Code or the related injunction under section 524 of the Bankruptcy Code. Accordingly, an injunction is critical to prevent interference with property of the Debtors and with the Debtors' representatives which would impede implementation of the Plan, prevent or impair Distributions, and undermine the very purpose of the Plan — the prompt and orderly distribution of payments to Holders of Allowed Claims and Allowed Interests in accordance with the priorities set forth in the Bankruptcy Code.

121. The Injunction Provision is carefully limited in scope to enjoin only Entities who are Holders, or who could have been Holders, of Claims and Interests from

pursuing any claims relating to the Claims and Interests treated by the Plan against the Debtors, property of the Debtors, and the Debtors' officers, directors, managers, members, accountants, financial advisors, investment bankers, agents, restructuring advisors, attorneys, and representatives, solely in their respective capacities relating to the Debtors, and only for postpetition acts or omissions. The Injunction Provision does not enjoin unrelated direct actions between third parties. Rather, it enjoins only actions of Holders of Claims and Interests treated by the Plan from otherwise pursuing Claims and Interests treated by the Plan against the Debtors, property of the Debtors, and the narrowly defined Protected Parties (other than the Debtors).[37]

122. As a threshold matter, and contrary to the UST Objection, at 19-20, the Court has subject matter jurisdiction to implement the Injunction Provision.

123. The United States Supreme Court held that a bankruptcy court has jurisdiction under section 105 to enjoin claims against a third party. *Celotex Corp. v. Edwards*, 514 U.S. 300, 309 (1995). Despite the seemingly expansive reach of *Celotex*, the Second Circuit has recognized that an injunction that does not "directly affect" a bankruptcy estate would exceed the bankruptcy court's subject matter jurisdiction. *In re Johns-Manville Corp. (Manville III)*, 517 F.3d 52, 68 (2008), rev'd on other grounds, *Travelers Indem. Co. v. Bailey*, 129 S.Ct. 2195 (2009), and remanded to 600 F.3d 135 (2d Cir. 2010).[38]

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[37] Notably, certain Protected Parties are indemnified by the Debtors pursuant to the Plan, the Debtors' corporate by-laws, articles of organization and/or agreements such that claims against such Protected Parties are essentially claims against the Debtors yet may be elevated to administrative priority status by virtue of the postpetition indemnification rights of the Protected Parties.

[38] In *Manville III*, the Second Circuit held that the bankruptcy court had exceeded its subject matter jurisdiction in enjoining non-derivative, or direct, third-party claims that had no effect on the res of the bankruptcy estate. *Manville III*, 517 F.3d at 68 (improperly enjoined claims were predicated on an independent duty that insurance company owed to the third parties, not to the debtors, so no claims against the bankruptcy estate were implicated). While the issue remains undecided by the Second Circuit, it "has at least suggested [that] third party claims that threaten to impact a debtor's reorganization through indemnity or contribution could justify a third party litigation injunction." *In re Fairpoint Commc'ns, Inc.*, 452 B.R. 21, 29 (S.D.N.Y. 2011) (holding that the bankruptcy court properly exercised its subject matter jurisdiction to enjoin third party claims against non-debtors that would create
(Cont.'d)

124. Here, the Injunction Provision enjoins only actions to enforce Claims and Interests that are treated pursuant to the Plan. *See* Plan § XI.D. Therefore, any such actions necessarily derive from Claims against and Interests in the Debtors. As the Injunction Provision does not attempt to enjoin any direct claims unrelated to the Claims and Interests treated under the Plan, the Court has subject matter jurisdiction with respect to the Injunction Provision.

125. Having established that the Court has subject matter jurisdiction to implement the Injunction Provision, the next inquiry is whether the Injunction Provision meets the standards set forth in *Metromedia*.[39] *In re Dreier LLP*, 429 B.R. 112, 132 (Bankr. S.D.N.Y. 2010). Examples of scenarios for approving nondebtor releases[40] in a plan of reorganization enunciated in *Metromedia* are:

- when the debtor receives substantial consideration from the released party;
- when the enjoined claims are "channeled" through a settlement fund rather than extinguished;
- when the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; and
- when the plan otherwise provides for the full payment of the enjoined claims.

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contingent obligations against the estate) (citing *In re Metromedia Fiber Network, Inc. (Metromedia)*, 416 F.3d 136, 142 (2d Cir. 2005)).

[39] Prior to *Metromedia*, bankruptcy cases in the Second Circuit held that a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's chapter 11 case. *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) (holding that "a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtors reorganization plan . . . ."). Courts in the Second Circuit have consistently recognized the bankruptcy court's authority to "issue injunctions enjoining creditors from suing third parties including officers and directors of the debtor in order to resolve finally all claims in connection with the estate and to give finality to a reorganization plan." *In re Ionosphere Clubs, Inc.*, 184 B.R. 648, 655 (S.D.N.Y. 1995) (affirming bankruptcy court's confirmation order, including injunction provision enjoining creditors from suing debtor-airline's officers and directors).

[40] Notably, the Plan does not contain any releases. However, because the Injunction Provision may have the same practical effect as a release, the Plan Proponents adhere to the standards for third party releases under a plan.

Metromedia, 416 F.3d at 142. The *Metromedia* court also stated that "nondebtor releases may also be tolerated if the affected creditors consent." *Id.* This has been interpreted to mean that creditors voting in favor of a plan that includes nondebtor releases consent to the release. *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 268 (Bankr. S.D.N.Y. 2007) (interpreting *Metromedia* and concluding that "those voting in favor of the Plan were on full notice that they would be granting the releases").

126. The Injunction Provision satisfies the relevant Metromedia scenarios as follows:

- this is not a case, like Metromedia, where an unrelated nondebtor third party is attempting to purchase a release by providing substantial monetary or other economic consideration to creditors under a plan; accordingly, this scenario is not relevant here;

- the enjoined claims are those actually treated under the Plan and not channeled to a settlement fund; the injunction is intended to protect Plan implementation so that the Holders of Claims and Interests treated by the Plan will in fact receive the Distributions contemplated by the Plan; while this is not a case involving a channeling injunction, the Injunction Provision is intended to protect the res created by the Plan from which Holders of Claims and Interests will be paid;

- many of the enjoined claims could give rise to postpetition indemnity claims by the Protected Parties against the Debtors, thereby elevating prepetition claims against the Debtors already being treated under the Plan to administrative priority status and undermining the priority distribution scheme contemplated by the Bankruptcy Code and otherwise effectuated by the Plan;

- the Plan provides for the payment of the enjoined claims to the full extent of the funds generated through the liquidation of the Debtors under the Plan; as noted above, the enjoined claims are only those claims with respect to Claims and Interests treated by the Plan.

127. Further satisfying *Metromedia*, affected creditors have consented to the Injunction Provision by voting overwhelmingly in favor of confirmation of the Plan. *See* Tabulation Affidavit.

128. Injunction and release provisions substantially similar to the Injunction Provision have been approved in several recent cases in this district. *See, e.g.*, *In re Lehman Bros. Holding Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Dec. 6, 2011), Docket No. 23023 (confirmation order approving plan containing injunction provision substantially similar to the Injunction Provision); *In re Terrestar Networks Inc.*, No. 10-15446 (Bankr. S.D.N.Y. Feb. 15, 2012), Docket No. 922 (confirmation order approving plan containing release and injunction provisions similar to the Injunction Provision). *Cf.*, *In re Oldco M Corp. (f/k/a Metaldyne Corporation)*, No. 09-13412 (Bankr. S.D.N.Y. Feb. 23, 2010), Docket No. 1384 (confirmation order approving third party releases effective as to creditors voting in favor of the plan); *In re Old Carco LLC (f/k/a Chrysler LLC)*, No. 09-50002 (Bankr. S.D.N.Y. Apr. 23, 2010), Docket No. 6875 (same).

129. To summarize: (a) the enjoined claims, if permitted to proceed, would interfere with consummation of the Plan and issuance of Distributions to Holders of Allowed Claims and Allowed Interests under the Plan; (b) the injunction is limited in scope to Claims and Interests treated under the Plan; (c) the injunction protects only the Debtors, property of the Debtors, and the Protected Parties (other than the Debtors) solely in their capacities as officers, directors, managers, members, accountants, financial advisors, investment bankers, agents, restructuring advisors, attorneys, and representatives of the Debtors; (d) with regard to the Protected Parties (other than the Debtors), the injunction only enjoins their acts or omissions subsequent to the applicable Petition Date;[41] (e) absent the injunction, certain claims that might be asserted against the Protected Parties would give rise to claims for indemnity against the

[41] With respect to Claims of the Securities Plaintiffs, the injunction only enjoins the acts or omissions of the Protected Parties (other than the Debtors) subsequent to November 21, 2011.

Debtors and would transform prepetition Claims to administrative priority claims, thus undermining the priority distribution scheme contemplated by the Bankruptcy Code and effectuated by the Plan; and (f) the affected creditors have consented to the Injunction Provision by voting overwhelmingly in favor of the Plan.

130. In light of all of the foregoing, the UST Objection to the Injunction Provision should be overruled.

D. The USA Objection is meritless for the same reasons set forth above regarding the UST Objection.

131. The USA Objection joins the UST's objection to the Injunction Provision contained in Section XI.D of the Plan. The USA Objection should be overruled for the same reasons set forth above with respect to the UST Objection. The United States also argues that the limitation of liability provision contained in Section 4.2 of the Plan Trust Agreement is similarly impermissible under *Metromedia*.

132. Section 4.2 of the Plan Trust Agreement provides certain protection to trustees of the Plan Trust:

> None of the Trustees, their designees or professionals engaged by or on behalf of the Trustees, or any duly designated agent or representative of the Trustees shall be liable for the act or omission of any other agent or representative of the Trustees, nor shall any Trustee be liable for any act taken, suffered or omitted in his capacity as Trustee, unless it is ultimately determined by Final Order that such Trustee's acts or omissions constituted gross negligence, willful misconduct or criminal conduct. In no event shall a Trustee be liable or responsible for special, punitive, indirect, consequential or incidental loss or damages of any kind whatsoever to any Person (including, without limitation, lost profits), even if the Trustee has been advised of the likelihood of such loss or damage.

133. The above provision limiting the liability of the Plan Trustees and their designees, professionals, agents, and representatives, are all future looking provisions that relate solely to acts or omissions that might arise following the Effective Date in connection with carrying out the implementation of the Plan, and are not the type of third party release for pre-

Effective Date claims with which the *Metromedia* court and other courts have concerned themselves in connection with chapter 11 plans. Such a provision is not uncommon, sets forth a portion of the economic bargain going forward among the Plan Trustees and the Debtors, and is intended to encourage qualified professionals to accept roles as Plan Trustees (and the role of representative or agent of the Plan Trustees). The USA Objection to this provision is entirely misplaced, and should be overruled.

V. THE REVISED INTERCO SETTLEMENT IS FAIR AND EQUITABLE AND IN THE BEST INTERESTS OF THE DEBTORS' ESTATES.

134. Section 1123(b) of the Bankruptcy Code gives a plan proponent the authority to include various types of discretionary provisions in a plan. Among other things, section 1123(b) states that a plan may "provide for the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." *See* 11 U.S.C. § 1123(b)(3)(A).[42]

135. In accordance with section 1123(b)(3)(A), the Plan incorporates a settlement which resolves all Intercompany Claims between Debtors. The Original Interco Settlement was set forth in Section IV.A of the Original Disclosure Statement and incorporated by reference into the Original Plan. *See* Original Plan § III.C; Original Disclosure Statement § IV.A. Although no objection to the Original Interco Settlement was filed, JPMorgan had expressed its view that the Original Plan should not be confirmed because of the Original Interco Settlement. *See* Docket No. 1111-1 § VII.F.2. On February 27, 2013, the Court ordered the Creditor Co-Proponents and JPMorgan to submit to the Mediation before Judge Peck, and on March 4, 2013, the parties met with Judge Peck. Ultimately, the Mediation was successful and

[42] Section 1123(b) also permits a plan to impair or leave unimpaired any class of claims or interests and to provide for the assumption or rejection of executory contracts. *See* 11 U.S.C. §§ 1123(b)(1), (2). The Plan takes advantage of both of these discretionary provisions: Claims in Classes 1 and 2 are unimpaired; all other Claims and Interest are impaired; Executory Contracts identified in Exhibit VIII.E.1 to the Plan will be assumed; and all other Executory Contracts will be rejected. *See* Plan §§ III.A, VIII.A.

the parties agreed to the terms of a settlement which included the Revised Interco Settlement and other adjustments to the Original Plan and Original Disclosure Statement. In connection with the Mediation Settlement, JPMorgan agreed not to object to the Plan and to vote to accept the Plan.

A. Summary of the Revised Interco Settlement

136. Section IV.A of the Disclosure Statement contains three tables. The first table (the "A/R Table") shows inter-Debtor accounts receivable. The second table (the "A/P Table") shows inter-Debtor accounts payable. The third table (the "Reconciliation Table") estimates the value of each Intercompany Claim based on the Debtors' accounts receivable and accounts payable information in the A/R Table and the A/P Table and nets out competing receivables and payables such that as between any two Debtors, there is at most one Intercompany Claim.[43]

137. Under the Revised Interco Settlement, all Intercompany Claims in the Reconciliation Table are Allowed in the amounts set forth in the table, except that with respect to Holdings Ltd.'s $1,886,930,980 Intercompany Claims against Finance USA, Holdings Ltd.'s right to receive Distributions on account of $275 million of such Claims will be subordinated to the rights of the Holders of Allowed Class 5B Liquidity Facility Unsecured Claims to receive Distributions until such Class 5B Claims are paid in full. *See* Disclosure Statement § IV.A. All Distributions that would otherwise be made to Holdings Ltd. on account of its Intercompany Claims against Finance USA in the absence of this subordination will be made to the Holders of Allowed Class 5B Claims.

[43] There are Intercompany Claims between each pair of Debtors except between MFG Capital and MFG Market Services. *See* Reconciliation Table.

B. The Revised Interco Settlement is fair and equitable and in the best interests of the Debtors' estates under the Second Circuit's *Iridium* standard.

138. In the Second Circuit, courts generally apply the same standard of approval for plan settlements under section 1123(b) as they do settlements pursuant to Bankruptcy Rule 9019: "Irrespective of whether the claim is compromised as part of the plan or pursuant to a separate motion, the standards for approval of the compromise are the same. The settlement must be fair and equitable and in the best interests of the estate." *In re Best Prods. Co.*, 177 B.R. 791, 794 n.5 (S.D.N.Y. 1995); *see also In re Charter Commc'ns*, 419 B.R. 221, 252 (Bankr. S.D.N.Y. 2009) ("To the extent that a Plan includes a settlement, the settlement is to be judged in accordance with the law applicable to the approval of a settlement under Rule 9019 . . .").

139. The Second Circuit Court of Appeals in *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), found that seven factors (now commonly referred to as the "*Iridium* factors") must be evaluated to determine whether a settlement is fair and equitable and in the best interests of the estate. *Id.* at 462. The *Iridium* factors are:

i. the balance between the litigation's possibility of success and the settlement's future benefits;

ii. the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment;

iii. the paramount interests of creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement;

iv. whether other parties in interest support the settlement;

v. the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement;

vi. the nature and breadth of releases to be obtained by officers and directors; and

vii. the extent to which the settlement is the product of arm's length bargaining.

Id.; *see also In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 640-45 (Bankr. S.D.N.Y. 2012) (applying the *Iridium* factors to a settlement under Rule 9019); *Charter*, 419 B.R. at 252 (applying the *Iridium* factors to a plan settlement).

140. In evaluating the *Iridium* factors, a court need not conclude that the settlement in question is the best possible settlement; rather, it must merely determine whether the settlement falls above the "lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983); *In re Best Prods. Co.*, 68 F.3d 26, 33 (2d Cir. 1995); *Charter*, 419 B.R. at 257.

141. Based on the *Iridium* factors, the Revised Interco Settlement falls well above the lowest point in the range of reasonableness, and thus, the Court should approve the Revised Interco Settlement, as incorporated into the Plan.

1. Litigating the Intercompany Claims would be complex, protracted, and uncertain, and would significantly delay resolution of the Chapter 11 Cases.

142. As described in Section IV.A of the Disclosure Statement, each of the Debtors has potential Intercompany Claims against other Debtors. The A/R Table, A/P Table, and Reconciliation Table contained in Section IV.A of the Disclosure Statement indicate that the total value of Intercompany Claims could be as high as $2.28 billion. *See* Disclosure Statement § IV.A (A/R Table showing $2,278,480,285 in accounts receivable and A/P Table showing $2,281,047,946 in accounts payable[44]).

[44] The difference between the two numbers is explained by two factors. First, not all of the Debtors filed chapter 11 petitions on the same date, so the accounts receivable and accounts payable information in the tables is not all from the same date. Second, there may be minor discrepancies or errors in the Debtors' records.

143. The Reconciliation Table estimates the value of each Intercompany Claim based on the various Debtors' accounts receivable and accounts payable information and nets out competing Intercompany Claims such that as between any two Debtors, there is at most one Intercompany Claim. As shown in the Reconciliation Table, there are at least fourteen potential Intercompany Claims with an aggregate value of over $2.23 billion.

144. In the absence of the Revised Interco Settlement, each of these fourteen Claims would need to be resolved through the claims reconciliation process. The Chapter 11 Trustee currently represents each of the six Debtors, whose interests, except with respect to the Intercompany Claims, are generally aligned. The Chapter 11 Trustee cannot represent Debtors on opposite sides of an Intercompany Claim, so resolving the fourteen Intercompany Claims would require the appointment of six separate representatives,[45] one for each Debtor's estate. At best, the appointment of separate representatives for each Debtor's estate would substantially increase the administrative costs of these Chapter 11 Cases, and at worst, it would create an administrative nightmare that threatens to unravel the Plan and eliminate the benefits that the estates have derived thus far from the appointment of a single Chapter 11 Trustee.

145. Assuming that the Debtors could overcome the hurdles involved with the appointment of separate representatives for each estate, litigation of the Intercompany Claims would be time-consuming and expensive. In particular, the A/R Table shows that Holdings Ltd. has $1,886,930,980 in potential Intercompany Claims against the estate of Finance USA and Finance USA has $255,378,116 in potential Intercompany Claims against the estate of MFG Holdings USA. The sheer size of these Claims practically guarantees that any litigation

[45] Presumably, these representatives would be separate chapter 11 trustees or other parties in interest with derivative standing under *In re STN Enterprises*, 779 F.2d 901 (2d Cir. 1985).

surrounding their validity would be complex and protracted and would delay resolution of the Chapter 11 Cases. In contrast, the Revised Interco Settlement resolves these Claims, and all other Intercompany Claims, without any additional cost and without any additional delay. Thus, *Iridium* factors (i) and (ii) weigh heavily in favor of the Revised Interco Settlement.

2. The Revised Interco Settlement has the support of a substantial majority of creditors, as well as the support of other parties in interest.

146. A substantial majority of creditors in each Class have voted in favor of the Plan, which includes the Revised Interco Settlement. *See* Tabulation Affidavit. Furthermore, no party in interest has objected to the Revised Interco Settlement, and the Chapter 11 Trustee affirmatively supports the Revised Interco Settlement. The fact that Holders of Allowed Claims — the parties most affected by the Plan and the Revised Interco Settlement — overwhelmingly support the Plan is the best evidence that the Revised Interco Settlement is in the paramount interests of creditors. The Revised Interco Settlement obviates the need for protracted litigation of $2.2 billion in Intercompany Claims and facilitates confirmation of the Plan in a timely fashion. Thus, *Iridium* factors (iii) and (iv) clearly favor approval of the Revised Interco Settlement.

3. The parties supporting the Revised Interco Settlement were represented by competent and experienced counsel, and the Revised Interco Settlement was the product of arm's length bargaining.

147. On February 27, 2013, the Court ordered the Creditor Co-Proponents and JPMorgan to submit to the Mediation before Judge Peck to attempt to resolve the parties' conflict regarding the Original Interco Settlement. The parties were each represented by competent and experienced counsel, and the dispute was mediated by a federal bankruptcy judge with over 35 years of experience as a bankruptcy attorney and judge. The Mediation proved successful, and the parties agreed to the general terms of the Revised Interco Settlement at the

Mediation. In the week that followed, the parties continued to negotiate the details of the Revised Interco Settlement, and ultimately, the parties agreed to the terms of the Mediation Settlement. Accordingly, *Iridium* factors (v) and (vii) favor approval of the Revised Interco Settlement.

4. The Revised Interco Settlement does not grant releases to any officers or directors.

148. The Revised Interco Settlement does not grant releases to any officers or directors. *See* Disclosure Statement § IV.A. Thus, *Iridium* factor (vi) favors approval of the Revised Interco Settlement.

VI. CONCLUSION

149. As set forth herein, the Plan satisfies the requirements of section 1129 of the Bankruptcy Code, all outstanding objections to confirmation of the Plan should be overruled, and the Revised Interco Settlement is fair and equitable and in the best interests of the Debtors' estates. The Court should therefore approve the Revised Interco Settlement and confirm the Plan.

Dated: April 2, 2013
New York, New York

Respectfully submitted,

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