

ENTWISTLE & CAPPUCCI LLP
280 Park Avenue, 26th Floor West
New York, New York 10017
Telephone: (212) 894-7200
Facsimile: (212) 894-7272

BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604

*Interim Co-Lead Counsel in the
Commodity Customer Class Action*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

MF GLOBAL HOLDINGS, LTD., *et al.*,

Debtor.

Chapter 11
Case No. 11-15059 (MG)
Jointly Administered

In re:

MF GLOBAL INC.,

Debtor.

Case No. 11-2790 (MG) SIPA

**CUSTOMER REPRESENTATIVES' LIMITED OBJECTION AND RESERVATION
OF RIGHTS CONCERNING STIPULATION AND ORDER TO LIFT
THE AUTOMATIC STAY TO PERMIT PAYMENTS OF DEFENSE
COSTS UNDER CERTAIN INSURANCE POLICIES**

Interim customer representatives (the "Customer Representatives")¹ in the ongoing class action against certain former officers and directors of MF Global Inc. ("MFGI" or the "Company") entitled *Deangelis v. Corzine, et. al.*, 11-cv-07866-VM (S.D.N.Y.) (the "Customer

¹ The Customer Representatives are led by Paradigm Global Fund I Ltd. and Kay P. Tee, LLC.

Class Action”) hereby submit this limited objection and reservation of rights concerning the stipulation and order (the “Stipulation and Order”) by and between James W. Giddens, Trustee for the SIPA Liquidation of MFGI (the “SIPA Trustee”); Louis J. Freeh, Chapter 11 Trustee for MF Global Holdings, Ltd. (the “Chapter 11 Trustee”, with the SIPA Trustee, the “Trustees”); and MFG Assurance Company Limited, U.S. Specialty Insurance Company, and XL Specialty Insurance Company (the “Insurers”), and respectfully state as follows:

1. On April 25, 2012, the Court modified the automatic stay under 11 U.S.C. § 362(a), to the extent applicable, to permit insurers to advance and/or make payments for defense costs (the “Defense Payments”) to, among others, the named individual defendants in the Customer Class Action up to a “soft cap” of \$30 million “subject to further adjustment” either by agreement of the Trustees and Insurers or by further order of the Court. *See* ECF No. 652 ¶¶ 1-3. The Court did so over objections by, among others, the Customer Representatives. *See* ECF Nos. 416, 484. The Customer Representatives argued at the time that it was manifestly unjust to permit unsupervised Defense Payments to the primary culprits of the defalcation of customer property at MFGI from insurance policies that may be the primary sources of funds to close the shortfall in property available to repay customer-victims. *See* ECF No. 416 ¶ 25, 484 ¶¶ 28-29.

2. The Customer Representatives were not part of any discussions among the parties that led to the Stipulation and Order seeking to raise the soft cap to \$40 million, which would thereby permit unsupervised Defense Payments up to an amount exceeding 10% of the total policies available to close the shortfall, which remains more than \$300 million (assuming the pending settlements are approved including, among others, the settlement among the Customer Representatives, the SIPA Trustee, and JPMorgan Chase Bank, N.A.).

3. The Customer Representatives understand the reasoning in the Court's April 10, 2012 Memorandum Opinion Lifting Automatic Stay to Permit Payments of Defense Costs Under Certain Insurance Policies (the "Opinion") (*see* ECF No. 619), but continue to believe, as they did when they filed their original objections in February 2012, that it is unjust for Defense Payments to the primary wrongdoers to subtract from policies that should be applied to repay customers. Customers have been deprived of their property for more than 19 months and their interests, respectfully, should be balanced against the putative contractual rights of the wrongdoers to receive a free defense. Moreover, the Court's reasoning that "the estates will actually benefit from a vigorous defense by the Individual Insureds" (*see* Opinion at 26) is less true where, as now, both Trustees are suing certain of the individuals (the SIPA Trustee through an assignment to the Customer Representatives).

4. The unsupervised Defense Payments are amassing at an alarming rate. Since April 2012, submitted claims for Defendant Payments have totaled more than \$20 million (from \$8.3 million in April 2012 (*see* ECF No. 619 at 7) to "approaching" \$30 million as of May 2013 (*see* ECF No. 1466 at 3)) and, if the Court approves the Stipulation, the payments will rise to exceed 10% of all available policy limits. This is particularly troublesome with respect to the errors and omissions policy that directly insures MFGI for the claims made by its customers and is being needlessly eroded by Defense Payments for the individual defendants rather than being applied to satisfy customer claims from the shortfall. Respectfully, an incremental cap is largely meaningless if the parties can continuously seek to raise it at a direct cost to the victims of MFGI's defalcations, and the Insurers' putative commitment to "monitor[] and review[]" invoices provides insufficient control over the escalating fees. The only answer is a hard cap on Defense Payments.

5. Accordingly, the Customer Representatives respectfully request that the Court modify the Stipulation and Order to reflect the following:

- (i) The \$40 million figure sought by the Stipulation should be a “hard” cap that represents the limit of Defense Payments, absent the presence of future exceptional circumstances; and
- (ii) Counsel for the Customer Representatives should be added to paragraph 6 of the Stipulation which provides for written notice to the Trustees, Insurers, and the creditors’ committee concerning Defense Payments, including amount to date and remaining available limits of the policies.

6. To the extent that the Court is inclined to approve the Stipulation over this objection, the Customer Representatives respectfully submit that the Court should reserve its consideration of the matter until after the second-round mediations sessions in the Customer Class Action currently scheduled for June 17 to 21 – or to allow the Customer Representatives to renew their objection at that time – to permit the Court and parties to better estimate the potential for substantial future Defense Payments and to contemplate a procedure for closer controls over such payments, if necessary.

7. The Customer Representatives reserve their rights to supplement this Objection and to join in and make any further or additional arguments at the hearing on the Stipulation.

CONCLUSION

The Customer Representatives respectfully request that the Court approve the Stipulation and Order subject to paragraphs 5-6 above, as the Court deems appropriate.

Respectfully Submitted,

Dated: June 6, 2013

ENTWISTLE & CAPPUCCI LLP

/s/ Andrew J. Entwistle
Andrew J. Entwistle
280 Park Avenue, 26th Floor West
New York, New York 10017
Telephone: (212) 894-7200
Facsimile: (212) 894-7272

BERGER & MONTAGUE, P.C.

/s/ Merrill G. Davidoff
Merrill G. Davidoff
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-4604

Interim Co-Lead Counsel in the Customer Class Action