UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
MF GLOBAL HOLDINGS, LTD.; MF GLOBAL FINANCE USA, INC., *et al*.,	:	Case No. 11-15059 (MG) Case No. 11-15058 (MG)
	:	(Jointly Administered)
Debtors.	:	
TODD THIELMANN, PIERRE-YVAN DESPAROIS, NATALIA SIVOVA, SANDY GLOVER-BOWLES, ARTON SINA, and SCOTT L. KISCH, Individually, and on behalf of All Other Similarly Situated Former Employees,	:	
Plaintiffs,	:	
	:	Adv. Pro. No. 11-02880 (MG)
v.	:	
MF GLOBAL HOLDINGS, LTD, MF GLOBAL HOLDINGS USA, INC., MF GLOBAL FINANCE USA, INC.; *et al.*,	:	
Defendants.	:	

PLAINTIFFS' REPLY IN SUPPORT OF CLASS CERTIFICATION AND RELATED RELIEF

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I. SUMMARY

Defendants cast their response to class certification as an "Opposition," but their arguments actually support certification. They deny responsibility for terminating a group of employees they claim were employed by MFGI. (Opp. 1). By asserting this defense, Defendants concede there is an issue that neatly divides the entire group of proposed class members into two groups. They contend one group was associated with themselves (the "Holdings group"), and the other group was associated with MFGI (the "MFGI group").

Defendants do not contest certification sought by Mr. Kisch on behalf of the Holdings group. (Opp. 23, n.12). They recognize their defense impacts only the MFGI group members and none of the Holdings group members. This highlights the fact that each of the groups are discrete, their class representatives are typical of, and adequate to represent, their group, and that, overall, there are no individual issues in this case that predominate over the common ones.

In other words, Defendants do not deny that each group, on its own, meets all the other requirements for certification, outside of their merits defense regarding the MFGI group and a plainly erroneous argument that the employer of that group is not subject to common proof. Defendants baselessly reject the division of the class into subclasses to thwart a simple, clean and fair litigation of the merits. The purported issues with class certification raised by Defendants are merely a byproduct of their rejection of subdivision of the class which undermines the objectives of judicial economy and fairness which Rule 23 promotes.

Ironically, the division of the class into MFGI and Holdings subclasses is not only consistent with Defendants' own view of the case, commonsense and routine class action practice, it confers a benefit on Defendants. From the outset, they have attempted to defeat the claims of the MFGI group in one fell swoop. They cannot deny that certifying that group's

claims allows them to try to do so. Without a class, Defendants face having to defend dozens if not hundreds of individual claims. Defendants simply do not have a plausible reason to deny certification. They do not suggest that Plaintiffs' Complaint fails to state a claim for injury in fact, nor do they suggest it has some jurisdictional flaw. Defendants answered the operative complaint and do not raise any such defenses in opposition to certification.

Rather Defendants argue, in the main, that the MFGI group's claims are futile based on a yet-to-be-litigated defense, that subclasses must be rejected based on this, and that the entire class cannot be certified if the MFGI group is commingled into it. That Defendants must contrive a device to inject the alleged strengths of its defense into Plaintiffs' motion for certification may be due to the well-settled rule of law set forth in cases which both parties cite. Those cases state that "merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites … are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* —— *U.S.* ——, 133 S.Ct. 1184, 1194–95, 185 L.Ed.2d 308 (2013) *citing Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2556, n.6 (a court has no "'authority to conduct a preliminary inquiry into the merits of a suit'" at class certification unless it is necessary "to determine the propriety of certification").

To circumvent this instruction, Defendants strain to drive their "futility" argument as a wedge to destroy commonality. But this argument rests entirely on an improper determination of the merits and is unavailing at this stage. *Myers v. Hertz Corp.*, 624 F.3d 537, 549 (2d Cir. 2010) ("whether the constituent issues that bear on [Defendants'] ultimate liability are *provable in common"* is the Court's task at the Rule 23 stage, not resolving liability) (emphasis added).

Defendants repeat their defense early and often in the hope that, through pure repetition,

it will attain an eminence that it otherwise lacks.[1] It is unclear whether Defendants mean to merely lay the groundwork for their merits defense for summary judgment or are injecting the merits into Plaintiffs' class certification motion as an attempt to have the merits, or some factual disputes bearing on them, decided now, before Plaintiff have had benefit of full discovery. Either way, any attempt to turn class certification into a mini-trial on the merits would be improper. *See, e.g., Lewis Tree Serv., Inc. v. Lucent Techs.*, 211 F.R.D. 228, 231 (S.D.N.Y.2002) ("A motion for class certification should not ... become a mini-trial on the merits"); *Jacob v. Duane Reade, Inc.*, 289 F.R.D. 408, 414 (S.D.N.Y.) *on reconsideration in part*, 293 F.R.D. 578 (S.D.N.Y. 2013) *aff'd*, 602 F. App'x 3 (2d Cir. 2015) ("a premature inquiry into the merits should not serve as the *sine qua non* of a putative class's certification").

In any event, the fact remains that their mantra, that most of the class were "MFGI employees," hinges on the conclusion that MFGI was an organization capable of having employees. Defendants hope that the more their mantra is repeated, the more hardened the idea will become that MFGI is a self-sufficient business that could operate on its own. Meanwhile, Defendants insist that Holdings was merely a captive paymaster and administrative services provider. The evidence presented in Plaintiffs' opening brief debunked both these concepts. Discovery had revealed the exact opposite of Defendants' claims. MFGI had corporate form on paper, but little or no corporeal form as an organization unto itself. MFGI was more of a shell, consisting of a corporate certificate, a bookkeeping designation used to account for the money passing through it for financial, tax and other legal purposes, and a corporate designation for securities registration – all valid and necessary, perhaps. It apparently served MF Global for legal purposes, and thus MF Global called it one of its "legal entities." But the people who

[1] Defendants refer to the MFGI group as "MFGI employees" 24 times, and once refer to them as "his employees," him being the SIPA Trustee.

served customers with broker dealer services and the executives who controlled them all had an employment relationship with another legal entity, Holdings. A legal entity can merely be abstract thing, a shell, that when lifted, does not necessarily reveal a full-fledged organization that belongs to it. When lifted, the MFGI label revealed no employees with a labor relationship tied to it. Peeled back, the Holdings label reveals the entire MF Global workforce, including those who provided broker dealer services. They all had a direct labor relationship with Holdings, and that was only one aspect of the Holdings organization.

Plaintiffs, in their opening brief, showed that the broker dealer organization belonged to Holdings USA because it controlled and staffed it, although for some legal purposes it used the MFGI name. Thus, "employees of MFGI" is a misnomer. In reality they were the employees of Holdings USA who did the broker dealer work.

Defendants have not responded to this evidence which takes away the "futility" sand they wish to mix into gears of a simple class certification. The merits can only be adjudicated fairly if the two employee groups, not just a few individuals, are allowed to square off against the Defendants as a certified class and on a clean slate.

II. CREATING SUBCLASSES WOULD BE A PROPER EXERCISE OF DISCRETION

Free-standing arguments on the merits are impermissible at this stage. *See, e.g., In re Sanofi-Aventis Sec. Litig.*, 293 F.R.D. 449, 453 (S.D.N.Y. 2013) ("[C]ourts are not permitted to engage in 'free-ranging merits inquiries at the certification stage.'") *citing Wal–Mart Stores v. Dukes,* 131 S.Ct. at 2551; *Amgen* 133 S. Ct. at 1194-95. As set forth in Plaintiffs' opening brief and above, once the class is divided into subgroups, there is no legitimate dispute that class certification can be granted as a whole.[2] Subgroups cure any perceived ills of non-alignment

[2] Defendants contend that whether the MFGI group was employed by Defendants will be

between the representatives and those they represent.

With no Rule 23 issue to contest, Defendants invent one. They do so by disregarding the concept of subgroups, reimagining the class as an undifferentiated mass for all purposes, and arguing that their defense creates a rift in that class. They claim that, under this scenario, the defense defeats commonality, typicality, adequacy and predominance. (Opp. 19-22.)

Defendants' entire opposition to class certification thus boils down to their self-created construct in which the class is not sub-grouped. But Defendants did not rebut Plaintiffs' showing that subgroups are routine and favored. Defendants argue that the Court has the discretion not to certify subgroups and to knock out the class on this basis. They argue the Court "need not exercise its discretion to carve out and certify a futile subclass of plaintiffs with no viable claims led by class representatives with no viable claims."

But the discretion to deny subclasses is not exactly free. While a Court ordinarily has wide latitude when exercising its discretion, "[a]buse of discretion can be found more readily on appeals from the denial of class status than in other areas, for the courts have built a body of case law with respect to class action status." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). And, "[t]he Second Circuit has emphasized that Rule 23 should be given liberal … construction, and it seems beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification." *Flores v. Anjost Corp.*, 284 F.R.D. 112, 122 (S.D.N.Y. 2012) (citation omitted).

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determined based on subjective beliefs, which are not subject to common proof. (Opp. 23-24). But Plaintiffs presented objective evidence on their motion demonstrating that whether Defendants were the employer of the MFGI group will be determined by common evidence, including evidence that Holdings entered into employment agreements with that group. Moreover, the purported subjective evidence Defendants cite is actually evidence relevant to determination of whether Defendants were a single employer or had a policy of terminating their employment letter agreements with the class members. This is not individualized proof. It is common evidence that can prove the case of the group as a whole.

The law requires the Court to exercise its discretion so as not to defeat certification in the face of appropriate subclasses proposed by a plaintiff. *See Casale v. Kelly*, 257 F.R.D. 396, 411 (S.D.N.Y. 2009) ("Divisions within a portion of the claims advanced by a proposed class *require* the Court to designate case-management subclasses rather than to deny class certification entirely.") (emphasis added); *see also Boucher v. Syracuse Univ.*, 164 F.3d 113, 118-19 (2d Cir. 1999) (holding that after finding conflicts, lower court "should have certified two sub-classes … rather than certifying only one class and excluding from that class members of the second").

It would be an abuse of discretion, therefore, if the Court denied certification based on the denial of subclasses, particularly where that denial would be based on the merits.

III. DEFENDANTS' FUTILITY ARGUMENT IS PREMATURE AND BASELESS

As mentioned above, in presenting their arguments for adequacy, commonality, typicality, and predominance, Plaintiffs have presented strong evidence that Holdings USA was at least *an* (if not *the*) employer of the MFGI group employees (and the Holdings employees). Defendants do not refute this evidence. Rather, they appeal to single employer law to look for arguments that would place the responsibility for the WARN events on MFGI and not the Defendants. Not only does this require an irrelevant inquiry into the merits, but it is also premature because of the stage of discovery. Even if the issue were ripe, Defendants are wrong on the law. Citing several cases, they pluck out the de facto control factor of the five factor DOL test for single employer. De facto control places liability on entities, such as parents or others, who are responsible for the decisionmaking that gave rise to the violation of the WARN Act. *See Pearson v. Component Tech Corp.*, 247 F3d 471, 503-04 (3d Cir. 2001). Defendants take this to mean employment is defined only by control. They argue that if the MFGI Trustee controlled the layoffs of the MFGI group, then MFGI is their only employer for WARN Act

purposes. That however much Holdings may have been the employer of the MFGI group *before* the SIPA liquidation, all that matters is who controlled the terminations when they occurred.

Defendants have misread the cases. Whomever may have controlled a termination, it does not displace the WARN liability of the immediate employer, invariably the operating organization whose name was on the checks, who administered and controlled the business's labor relations. The cases all show that that nominal employer is subject to the WARN Act violation in the first instance, even if it was controlled by others. The only question raised by single employer law is whether the intervenor, the parent, or other entity that "made the decision" to terminate the employees is also liable. The employer status of the operating organization that stops issuing its paychecks has never been in doubt under the WARN Act

The evidence clearly shows that Holdings was the nominal employer, the operating organization, and the controlling entity all at once. It was not merely a captive or a payroll service. Holdings issued employment letters for the MFGI group to sign. Holdings ran the broker dealer like any company runs one of its department. MFGI had no independence. Holdings' CEO Jon Corzine was its CEO. Holdings was its administration. Holdings' treasury controlled its accounts. This not just integration; it left little if anything to the exclusive purview of MFGI. If MFGI had independent authority on paper, it appears never to have exercised it. (N.B.: corporate formation and governance documents have yet to be produced in discovery and may shed light on this) (*see* below).

It is instructive that Defendants rely on *Murray v. Miner*, 74 F.3d 402, 405 (2d Cir. 1996), and several WARN Act single employer cases. Defendants appear to acknowledge that the single employer paradigm applies, as Plaintiffs have long contended.[3] As *Murray* states, "the

[3] Discovery also revealed a direct employer relationship between the MFGI group and Holdings.

policy underlying the single employer doctrine is the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship." Moreover, such "indicia of interrelatedness justifies joint responsibility for acts of immediate employer." *Id.* Here, Holdings was that immediate employer. Among other things, it had the labor relationship with the employees and controlled and profited from their work.

Thus, the SIPA Trustee came upon a single employer enterprise.[4] While the Defendants contend the SIPA Trustee controlled the MGFI group, they do not say how he gained that control. Unexplained is how the MFGI group suddenly became solely Mr. Giddens' employees, such that he alone had the authority to terminate them from MF Global. All they can point to is the possibility that the Trustee may have relied on Defendants' own characterization of which entity was the employer and that Holdings let the Trustee participate in telling these employees they were terminated.

It is true, the SIPA Trustee determined whom he did not want to hire and may have told them so. But that is not the same as terminating them. It was up to Holdings to discontinue their payroll and benefits, unless, of course, Holdings wished to keep them. In that case, Holdings could not bill back MFGI's account. Nevertheless, Holdings chose to continue paying some. Although it could, Holding simply chose not to continue its relationship with the MFGI group. The Trustee discontinued the policy of reimbursement. He did not terminate the MFGI group

[4] Although the single employer issue is not the being decided at the Class certification stage, Plaintiffs note that Defendants' Opposition continues to focus solely – and erroneously – on the date of the layoff/termination for establishing WARN Act liability. This is insufficient to determine WARN Act liability. While it is correct that the layoff/termination is the event that ultimately triggers a WARN Act violation, it is also correct that a Court must look at the time frame – at least 60 (sixty) days prior to that (the "snap-shot date") – to determine whether the failure to give sufficient WARN Act notice violates the Act. *See* 29 U.S.C. § 2102(b)(2)(A). The snap-shot date can be critical for establishing jurisdiction, affirmative defenses, and single employer liability. *See Childress v. Darby Lumber*, 126 F. Supp. 2d 1310 (D. Mont. 2001).

himself. Prior to the SIPA Trustee's arrival, MGFI never overrode Holdings' control over its relationship with the MFGI group. (Connolly Dep., 306: 306:11-14) (Q: Did you ever take orders from any executive at MFGI before Giddens took his role as the SIPA trustee? A: No). When the SIPA Trustee arrived, his objective was not to terminate the MFGI group's relationship with Holdings, rather it was to notify those who were "formerly Inc. employees" that "their services would not be necessary and [the SIPA Trustee] would not offer them employment." (Kobak Dep., 134:20-136:7). It was not his objective to "terminate employment agreements between employees and entities other than MFGI." (*Id*., 137:6-18).

IV. PLAINTIFFS WOULD BE PREJUDICED IF MERITS ISSUES ARE DECIDED

Full discovery would be necessary to clearly mark the boundaries of employer authority between the MF Global affiliates and the SIPA Trustee for WARN Act. That is made clear in *Guippone v. BH S & B Holdings LLC*, 737 F.3d 221, 228 (2d Cir. 2013) where employees sought to subject both the parent and nominal employer to liability. There, the District Court granted summary judgment to the parent company finding that the subsidiary's Chief Restructuring Officer had decided to carry out the terminations at the subsidiary and merely sought the authorization from the parent. The Court held the parent's approval of that request did not make it a single employer with its subsidiary. Reversing, the Second Circuit found that under the governing structure set forth in the parent's LLC operating agreement, the parent's authorization could be considered its direction, and it remanded the case.

Here, Plaintiffs requested from Defendants their board minutes and corporate operating documents, but were denied them on the basis that these materials were outside the scope of class certification discovery and motion practice. On that same basis, Defendants also refused to provide complete documents and testimony on many other topics. Plaintiffs also limited their

document requests and questions based on the stage of the proceeding. Without an examination of these documents and related testimony, it is impossible for the Plaintiffs to fully present their single employer case. The dates for merits discovery or dispositive motions have not yet been set. Merits questions can only be determined after complete, appropriate discovery and briefing.

V. THE VACATION CLAIMS SETTLEMENT IS INADMISSIBLE

Finally, Defendants seek to use evidence that the SIPA Trustee released funds to pay for the vacation claims of the MFGI group to prove MFGI was their employer. This is improper because it violates the express terms of the settlement agreement, which the Court approved. *See Icahn v. Todtman, Nachamie, Spizz & Johns, P.C.*, 2002 WL 362788, at *4 (S.D.N.Y. Mar. 6, 2002) (terms of parties stipulation precluded use of evidence of settlement in related case). Regardless, this evidence is irrelevant. MF Global created a financial accounting mechanism by which it could see how much money it was making or losing when it put its funds into its various revenue centers and legal entities. When bankruptcy was declared, it was impossible for the employees to know which entity held their vacation funds. Only by filing multiple proofs of claim on a precautionary basis could they ensure a recovery wherever the funds happened to turn up. Any creditor would do the same. The employees submitted their claims as creditors and settled with the MFGI as creditors would do with any custodian. The settlement of wages held by a custodian does not make the custodian the employer. Creditors seeking wages held in a bankruptcy should not be penalized with unfair inferences that cripple their ability to pursue unrelated valuable claims. That Defendants must strain to do this shows they have no real evidence showing that MFGI, and not Holdings, employed them.

CONCLUSION

For the foregoing reasons as well as those set forth in Plaintiffs' moving papers, the motion should be granted.

Dated: August 14, 2015
New York, New York

Respectfully submitted,

/s/ Jack A. Raisner

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