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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.	:	**(Jointly Administered)**

PLAN ADMINISTRATOR'S OMNIBUS REPLY TO (I) THE RESPONSES TO THE TWENTY-NINTH OMNIBUS CLAIMS OBJECTION AND (II) THE RESPONSE OF FRANK NEWELL TO THE ELEVENTH OMNIBUS CLAIMS OBJECTION

MF Global Holdings Ltd. ("**Holdings Ltd.**" or the "**Plan Administrator**"), the Plan Administrator under the *Second 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.* (the "**Second Amended and Restated Plan**")[1] [Docket No. 1382], hereby files this omnibus reply (the "**Reply**") with respect to (1) the responses to the *Twenty*

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Second Amended and Restated Plan.

Ninth Omnibus Objection of Plan Administrator Seeking to Disallow Certain Non-Debtor Employee Claims (the "**29th Objection**") [Docket No. 1557], including: (A) the *Response of James J. McHugh in Opposition to the Twenty-Ninth Omnibus Objection of Plan Administrator Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**McHugh Response**") [Docket No. 1605]; (B) the *Omnibus Response of Employee Claimants to Twenty Ninth Omnibus Objection* the (the "**WARN Response**") [Docket No. 1608]; (C) the *Response of William Kelly in Opposition to the Twenty-Ninth Omnibus Objection of Plan Administrator Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**Kelly Response**") [Docket No. 1610]; and (D) the *Response of Paul Patrello in Opposition to the Twenty-Ninth Omnibus Objection of Plan Administrator Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**Patrello Response**") [Docket No. 1611]; and (2) the response of Frank Newell (the "**Newell Response**", and collectively with the McHugh Response, the WARN Response, the Kelly Response and the Patrello Response, the "**Responses**") [Docket No. 1375] to the *Eleventh Omnibus Objection of Plan Proponents Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**11th Objection**" and together with the 29th Objection, the "**Objections**") [Docket No 1161]. In support of the Reply, the Plan Administrator submits the affidavit of Laurie R. Ferber (the "**Ferber Affidavit**"), attached hereto as Exhibit A, and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Objections present the proof necessary to rebut the *prima facie* validity of the proofs of claim and therefore placed the burden back on the claimants to establish their claims against the Debtors by a preponderance of the evidence. The scant and unsubstantiated allegations in the Responses that Holdings USA and/or Holdings Ltd. were joint employers or otherwise liable to the claimants for amounts allegedly owed to them in connection with their

employment by MF Global Inc. ("**MFGI")** fails to satisfy this burden. Accordingly, the proofs of claim should be disallowed and expunged from the Debtors' claims register in their entirety.

ADDITIONAL BACKGROUND

I. MF GLOBAL HOLDINGS USA

2. As detailed in the Ferber Affidavit, prior to the initial bankruptcy petition date, MF Global Holdings USA Inc. ("**Holdings USA**") served as the holding company for the majority of the US subsidiaries of Holdings Ltd. and provided administrative and support services in connection with the needs of Holdings Ltd. and its domestic subsidiaries. One of those administrative and support services was a human resources function. As would be typical of a human resources function for a parent company with several operating subsidiaries, its services included development, maintenance and administration of general work policies, employee health and welfare programs (*e.g.*, medical insurance, disability insurance programs), 401(k) benefits, worker's compensation, tuition reimbursement programs, employee handbooks, which covered such topics as policies and procedures for taking time off, establishing a dress code, as well as issuance of payroll.

3. Holdings USA also assured that MFGI complied with applicable state and federal employment law, by, among other things, issuing tax forms, including W-2s, issuing offer and termination letters, and maintaining employment records.

4. What Holdings USA *did not do,* however, is more illustrative than what it did do:

A. Holdings USA did not determine an Employee/Claimant's work schedule. Although Holdings USA maintained the policies that determined that a regular full-time employee was to generally work forty hours per week, the employees' named in the

Objections (collectively, the "**Employees/Claimants**")[2] actual daily work schedule was set and approved by the employee's respective manager or other senior management of the employee's department at MFGI. Holdings USA played no role in determining the employee's actual schedule to fulfill their duties as MFGI employees. (*See* Ferber Affidavit at ¶ 8).

B. Holdings USA did not control an employee's ability to take leave or vacation. An Employee/Claimant requested time off from his MFGI manager. Holdings USA did not participate in the decision-making of whether the Employee/Claimant's request was granted. Holdings USA merely established and maintained the policies that governed the amount of vacation or leave time to which an Employee/Claimant might be entitled. It was clear under the applicable vacation policy that an Employee/Claimant was required to seek the prior agreement of their MFGI manager. The policy did not provide for any participation by Holdings USA in approving vacation requests. (*See* Ferber Affidavit at ¶ 9).

C. Holdings USA did not hire and/or fire individual employees, including the Employees/Claimants. When making decisions regarding hiring and/or firing employees at MFGI, the Employees/Claimants' MFGI managers and/or the senior management of the Employee/Claimant's department would manage the interview process and make the individual hiring and/or firing decisions for employment positions at MFGI. Holdings USA would provide some guidelines for the process and provide some necessary administrative support including paperwork but the operative decision of whether an Employee/Claimant was hired or fired was

[2] Only three employees subject to the 29th Objection filed a response. The WARN Response, however, purports to represent all of the employees despite the fact that it did not file a statement pursuant to Bankruptcy Rule 2019. Notwithstanding the fact that only three employees properly responded to the 29th Objection, and without waiving the Plan Administrator's right to seek entry of an order against any claimant who failed to timely respond, this Reply addresses the arguments raised in the employee's responses, as well as the WARN Response.

reserved for their respective MFGI manager or senior management of the employee's department. (*See* Ferber Affidavit at ¶ 10).[3]

D. Holdings USA did not determine an Employee/Claimant's pay.

Holdings USA did not determine an individual employee's salary, entitlement to increases or decrease in pay or commissions. Although Holdings USA worked with senior management to determine categories of employment and ranges of salaries, bonuses and commissions for the Employees/Claimants, an Employee/Claimant's starting salary, raises, bonuses or commissions were determined by management of their respective MFGI business area. (*See* Ferber Affidavit at ¶ 11).

5. **Holdings Ltd. did not provide any services to the Employees/Claimants.** As the holding company and direct parent of Holdings USA, Holdings Ltd. did not have a direct operational role and was removed from decision-making as it concerned employees' daily activities. (*See* Ferber Affidavit at ¶ 12). None of the Responses even assert, as they do for Holdings USA, that Holdings Ltd. issued them administrative notices or paperwork associated with their employment. In short, there was no employment connection between the Employees/Claimants and Holdings Ltd.

II. THE RESPONSES

6. The respondents filed the Responses to two different omnibus claims objections, but given the similarity of the issues in the Responses the Plan Administrator will address them on an omnibus basis. Detailed below are the bases and allegations in the Responses.

[3] The mass termination of the Employees/Claimants following the filing of the Chapter 11 Cases and the SIPA Case was driven by the SIPA Trustee.

A. The WARN Response

7. Klehr Harrison Harvey Branzburg, LLP ("**Klehr Harrison**") filed the WARN Response allegedly on behalf of all employees even though the 29th Objection was only to the claims of twenty nine specified employees. Although devoid of facts in support, the WARN Response alleges that under Illinois and New York state law, in addition to any liability that MFGI may have, Holdings USA and Holdings Ltd. are joint employers of the Employees/Claimants. Therefore, the WARN Response asserts that Holdings USA and Holdings Ltd. are "jointly and severally liable for any wage and hour law violation[s] suffered by the Employees." In support, the WARN Response cites to the Illinois Wage Payment and Collection Act, New York Labor Law §198-c(2), Seventh Circuit and Second Circuit case law for the bases of the WARN Response.

B. The McHugh Response

8. Although the McHugh Response refers to administrative forms and letters to support the contention that Mr. McHugh was employed by Holdings USA and Holdings Ltd. it only references New York Business Corporation Law § 630 as a basis for liability. The lack of legal bases for the conclusory allegations in the McHugh Response is a sufficient reason to sustain the Objection as to the claim of Mr. McHugh. Notwithstanding the foregoing, for purposes of this Reply, the Plan Administrator presumes that the McHugh Response asserted the same bases for joint employer liability and state law violations of wage law in the McHugh Response as those contained in the WARN Response, each of which fails for the reasons stated below.

C. The Kelly and Patrello Responses

9. As with the McHugh Response, the Kelly and Patrello Responses only assert purported facts in support of the position that they were employed by Holdings USA but fail to provide the legal bases for a finding that they were employed by anyone but MFGI. The lack of legal bases for the conclusory allegations in the Kelly and Patrello Responses is a sufficient reason to sustain the Objection as to the claims of Mr. Kelly and Mr. Patrello. Notwithstanding the foregoing, for purposes of the Reply, the Plan Administrator presumes that the Kelly Response and the Patrello Response asserted the same bases for joint employer liability and state law violations of wage law in their responses as contained in the WARN Response, each of which fails for the reasons stated below.

D. The Newell Response

10. The Newell Response argues that Holdings Ltd. always considered MFGI employees as Holdings Ltd. employees and asserts alleged facts to support that contention. Based upon the foregoing, the Newell Response seeks to hold Holdings Ltd., as well as MFGI, liable for his claim. The Newell Response does not provide an actual legal basis to support his claim that Holdings Ltd. was in fact his employer, which alone is a sufficient basis to sustain the Objection as to his claim. Notwithstanding the foregoing, for purposes of the Reply, the Plan Administrator presumes that the Newell Response asserted the same bases for joint employer liability and state law violations of wage law in their responses as contained in the WARN Response, each of which fails for the reasons stated below.

11. For the reasons stated below, none of the Responses have satisfied the applicable standards to hold any entity other than MFGI liable with respect to the Employees/Claimants' claims.

STATUTORY STANDARD AND BURDEN OF PROOF

12. Courts of the Second Circuit hold that a proof of claim properly filed in accordance with the Bankruptcy Rules is *prima facie* evidence of the validity of the claim. *See In re Musicland Holding Corp.*, 362 B.R. 644, 651-52 (Bankr. S.D.N.Y. 2007); *Marangos v. Motors Liquidation Co. GUC Trust (In re Motors Liquidation Co.)*, 2013 U.S. Dist. LEXIS 4379, at *7 (S.D.N.Y. Jan. 10, 2013). This holding arises from the language of the statute itself, which states that a filed proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Moreover, section 502(b)(1) of the Bankruptcy Code provides, in relevant part, that a claim may not be allowed to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . ." 11 U.S.C. § 502(b)(1).

13. If an objection refuting at least one of the claim's essential allegations is asserted, the burden shifts to the claimant to demonstrate the validity of the claim. S*ee Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (B.A.P. 2d Cir. 2000) ("[T]he objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim. . . . Once the [trustee] offered the evidence refuting the allegations in the proof of claim, the burden shifted to the [claimant]."); *Motors Liquidation Co.* 2013 U.S. Dist. LEXIS 4379, at *7; *In re Oneida Ltd.*, 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009); *In re Adelphia Commc'ns Corp.*, No. 02-41729, 2007 Bankr. LEXIS 660 at *15 (Bankr. S.D.N.Y. Feb. 20, 2007); *In re Rockefeller Ctr. Props.*, 272 B.R. 524, 539 (Bankr. S.D.N.Y. 2000). Bankruptcy Rule 3001(f) provides that a proof of claim may be *prima facie* evidence of the validity of a claim if the proof of claim complies with the Bankruptcy Rules and sets forth the facts necessary to support the claim. *See In re Chain*, 255 B.R. 278, 280 (Bankr. D. Conn. 2000); *In re Marino*, 90 B.R. 25, 28 (Bankr. D. Conn. 1988); *Kahler v. FIRSTPLUS Fin., Inc. (In re FIRSTPLUS Fin., Inc.)*, 248 B.R.

60, 70 (Bankr. N.D. Tex. 2000); *In re N. Bay Gen. Hosp., Inc.*, 404 B.R. 443, 464 (Bankr. S.D. Tex. 2009). If the claimant does not allege a sufficient legal basis for the claim, however, the claim is not considered *prima facie* valid and the burden remains with the claimant to establish the validity of the claim. *See Chain*, 255 B.R. at 281; *Marino*, 90 B.R. at 28. *Best Payphones, Inc. v. Verizon N.Y., Inc. (In re Best Payphones. Inc.)*, 2006 U.S. Dist. LEXIS 10297, at *9 (S.D.N.Y. Mar. 14, 2006) ("it is clearly established law that the Rule 3001(f) presumption governs only the burden of production, and that the ultimate burden of proving the claim by a preponderance of the evidence remains with the claimant.").

14. Put succinctly,

> A proof of claim is prima facie evidence of the validity and amount of a claim, and the objector bears the initial burden of persuasion. The burden then shifts to the claimant if the objector produces evidence equal in force to the prima facie case which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. When the burden is shifted back to the claimant, he must then prove by a preponderance of the evidence that under applicable law the claim should be allowed.

Motors Liquidation Co. 2013 U.S. Dist. LEXIS 4379, at *7-8 (internal citations omitted).

15. As discussed below, none of the Responses show by a preponderance of the evidence that under applicable law their claims are valid against either Holdings USA or Holdings Ltd. as either their employer or as a joint employer under New York law or Illinois law. Accordingly, the Employees/Claimants' claims should be disallowed and expunged.

GENERAL REPLY TO THE RESPONSES

16. The Plan Administrator is not objecting to the amount of the Employees/Claimants' claims but is merely asserting that the Employees/Claimants have filed

their claims against the wrong debtor.[4] Prior to filing the Objection, the Plan Administrator's professionals and employees reviewed the Debtors' books and records, including the employee list (the "**10-27-11 Oracle List**") generated from the electronic employee database. The 10-27-11 Oracle List details for which entity the employees worked among the U.S. MF Global affiliates as of October 27, 2011.[5] According to the 10-27-11 Oracle List and the employee database, all of the Employees/Claimants are listed as employees of MFGI. (*See* Ferber Affidavit at ¶ 5).

17. In addition, for support on this issue, the Plan Administrator consulted with the professionals for James W. Giddens, the Securities Investor Protection Corporation appointed trustee (the "**SIPA Trustee**") of MFGI.[6] The SIPA Trustee, a fiduciary for the creditors of MFGI (including the employees of MFGI), confirmed in the SIPA Filings that the Employees/Claimants indeed were employees of MFGI and not the Debtors.

18. To provide clarity to the Court and the objectors, the Plan Administrator is willing to provide a copy of the relevant entries from the employee database or the 10-27-11 Oracle List to the Court, as well as the various objectors, for in-camera review and in redacted form, respectively, as the 10-27-11 Oracle List contains sensitive, confidential and personal information regarding each of the individual employees of the U.S. MF Global affiliates.

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[4]The proposed orders submitted with the Objections specifically reserves for later, among other things, objections to the amount of the claims.

[5] Included on the 10-27-11 Oracle List, among other things, are the name, country, job title and entity for which the employee worked. It is the employee database and the 10-27-11 Oracle List that define for which entity the employees actually worked, as opposed to letters the Employees/Claimants received or tax forms they were issued.

[6] The Plan Administrator incorporates by reference the Objection, the *Statement of the MFGI Trustee Regarding the Eleventh Omnibus Objection of Plan Proponents Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**First SIPA Statement**") [Docket No. 1427], the *Statement of the MFGI Trustee Regarding the Twenty-Ninth Omnibus Objection of Plan Administrator Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**Second SIPA Statement**") [Docket No. 1572] and the *Notice of Amended and Supplemented Exhibit A to the Statement of the MFGI Trustee Regarding the Twenty-Ninth Omnibus Objection of Plan Administrator Seeking to Disallow Certain Non-Debtor Employee Claims* (the "**SIPA Amendment**" and collectively with the First SIPA Statement and the Second SIPA Statement, the "**SIPA Filings**") [Docket No. 1598].

19. Additionally, the McHugh Response, the Kelly Response and the Patrello Response each admit that they were employees of MFGI and registered with the Financial Regulatory Authority as employees of MFGI. (*See* McHugh Response at ¶4, Kelly Response at ¶3, Patrello Response at ¶3).

I. NEITHER HOLDINGS USA NOR HOLDINGS LTD. EXERCISED SUFFICIENT CONTROL OVER THE EMPLOYEES/CLAIMANTS SUCH THAT UNDER NEW YORK LAW JOINT EMPLOYER LIABILITY WOULD BE APPROPRIATE

20. The U.S. Supreme Court determined that the appropriate analysis of whether an employer relationship exists is to determine the "economic realities" presented by the facts of each case, *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961). In analyzing the economic realities, the overarching concern is whether the alleged employer possessed the power to control the workers in question. *See Carter v. Dutchess Cmty Coll.*, 735 F.2d 8 (2d Cir. 1984). Under the economic realities test that has arisen from *Goldberg*, the relevant factors include "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Carter*, 735 F.2d at 12.

21. The Second Circuit, in analyzing the economic realities test, has developed several tests of its own, each with multiple factors, to determine whether the economic realities are such that an employer is a joint employer under New York law. More recently, the Second Circuit confirmed that no one test or rigid rule applies but rather that the totality of the circumstances should be considered to determine joint employer liability. In analyzing the different tests, the Second Circuit stated that

> [f]rom this precedent, we conclude that the various factors relied upon by this court (1) to examine the degree of formal control exercised over a worker, *see Carter v. Dutchess Cmty. Coll.*, 735 F.2d at 12; (2) to distinguish between independent contractors and employees, *see Brock v. Superior Care, Inc.*, 840 F.2d at 1058–59;

> and (3) to assess whether an entity that lacked formal control nevertheless exercised functional control over a worker, *see Zheng v. Liberty Apparel Co.*, 355 F.3d at 72, state no rigid rule for the identification of an [Fair Labor Standards Act] employer. To the contrary, as we noted in *Zheng*, they provide "a nonexclusive and overlapping set of factors" to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA. *Id.* at 75–76.

Barfield v. N.Y.C. Health and Hosps. Corp., 537 F.3d 132, 143 (2d Cir. 2007).

22. The first test, developed in *Carter*, 735 F.2d 8 -- a case concerning whether inmates acting as teaching assistants were employees of the community college such that they were entitled to minimum wage -- considers whether the economic realities test can be applied such that more than one entity (the prison and the community college) is an employee's employer, rejecting the "control" factor as the most important of the factors. *Carter*, 735 F.2d at 12. In addition, the Second Circuit rejected the holding that "ultimate control" was determinative in favor of an analysis into the "true economic reality". *Id*. at 13-14.

23. The second test, developed in *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988) -- a case regarding whether nurses were independent contractors or actual employees of a health care service that offered the nurses' services to individuals, hospitals and nursing homes -- considers the circumstances of an employee/employer relationship instead of an independent contractor/employer relationship. This test includes the following five factors:

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Brock, 840 F.2d at 1058-59.

24. Finally, the test in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003) -- a case concerning whether garment manufactures who hired contractors were "joint employers" -- established six factors for the Court to consider when determining whether functional control existed even though formal control did not. The *Zheng* factors are

> (1) whether [the garment manufacturer]'s premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the garment manufacturer]'s process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [garment manufacturer] or [its] agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for [the garment manufacturer].

Zheng 355 F.3d at 72.

25. Many of the Second Circuit's factors are inapplicable in this case as they apply in discrete circumstances. However, whatever factors apply, neither they nor the economic realities test itself can be met by the unsubstantiated, conclusory allegations in the Responses. Moreover, the factors that are relevant to the Debtor's cases clearly support that MFGI was the employer for each of the Employees/Claimants and that Holdings Ltd. and Holdings USA did not exercise sufficient control for joint employer liability under New York law.

26. First, neither Holdings Ltd. nor Holdings USA decided whether each of the Employees/Claimants were hired or fired. (*See* Ferber Affidavit at ¶ 10). The MFGI managers of the Employees/Claimants and/or senior management of the employees department made the decision whether to hire or fire them. After the MFGI managers made their decision, Holdings USA would initiate any necessary human resources steps required for the hiring or firing of an

employee. This included the collection and retention of the necessary tax and insurance forms, the enrollment in health care plans and other functions typically conducted by a support entity.

27. Significantly, with one exception, all of the direct managers of the Employees/Claimants were also *MFGI employees*. (*See* Ferber Affidavit at ¶ 5). The lone exception among the Employees/Claimants was the Chief Financial Officer of MFGI, who was the top financial employee of MFGI.

28. Holdings USA did not control the Employees/Claimants work schedules or whether and when they could take leave. The Employees/Claimants' daily work schedule was set, approved and monitored by the Employees/Claimants' managers at MFGI. Additionally, when and whether an Employee/Claimant could take leave or vacation time was determined by their MFGI manager. Although, Holdings USA maintained the work hour policies, such policies governed only the minimum amount of time an employee was to work in a given week. Consistent with its human resources function, Holdings USA merely set up and maintained the policies that governed the amount of vacation or leave time to which an Employee/Claimant might be entitled.

29. The Responses fail to offer any proof to even suggest that Holdings Ltd. and/or Holdings USA exercised control over the working conditions of the Employees/Claimants. The Responses instead attempt to suggest that receiving various employment notifications from Holdings USA, acting in its administrative capacity, served to meet the standard for exercising control over the workplace. In fact, the McHugh, Kelly, and Patrello Responses acknowledge that they were employed by MFGI, stating that they were registered with FINRA as an employee of MFGI. (*See* McHugh Response at ¶4, Kelly Response at ¶3, Patrello Response at ¶3). Mr. Newell filed a response to the First SIPA Statement, in which he indicated that he has an

identical claim against MFGI.[7] The Responses are an attempt by the respondents to recover twice on the same claim from multiple pockets instead of only MFGI.

30. In addition, the Debtors' books and records, as detailed in the 10-27-11 Oracle List and the employee database, along with the SIPA Filings show that the Employees/Claimants were not employees of any of the Debtors.

31. Therefore, when the economic realities test and the various factors in the Second Circuit's calculus are measured against the actual role of Holdings USA in the Employees/Claimants' employment relationship, it is clear that the Responses have not and cannot demonstrate by a preponderance of the evidence that Holdings USA (or Holdings Ltd.) sufficiently exerted formal control or functional control over the Employees/Claimants such that the economic realities justify a joint employer relationship.

II. THE RESPONSES FAIL TO ESTABLISH A JOINT EMPLOYER RELATIONSHIP SUCH THAT ILLINOIS LABOR LAW WOULD APPLY TO THE DEBTORS

32. The Responses also assert that MFGI and the Debtors are joint employers of the Employees/Claimants under Illinois state law. None of the Responses, however, actually provide any authority or proof supporting a finding of joint employer status but rely instead on *ipse dixit.*

33. In Illinois, the courts have eschewed a formal test of adding up various factors to determine if, under the economic realities test, a joint employer relationship exists, stating "[a] score of 5 to 3 decides a baseball game, but this regulation does not work that way." *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 407 (7th Cir. 2007). Instead, the courts of the Seventh Circuit look to the circumstances of the whole activity as opposed to isolated factors.

[7] *See Response to the Statement of the MFGI Trustee Regarding the Eleventh Omnibus Objection of Plan Proponents Seeking to Disallow Certain Non-Debtor Employee Claims* [Docket No. 1439]. In addition to Mr. Newell, all Employees/Claimants filed identical claims against MFGI.

See Bastian v. Apt. Inv. & Mgmt Co., No. 07 C 2069, 2008 WL 4671763 at *2 (N.D. Ill. Oct. 21, 2008); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

34. The Seventh Circuit recognizes that the factors that other circuits, including the Second Circuit, have used to analyze the amount of control an employer exercised over an employee were relevant to the determination of a joint employer relationship. *Reyes*, 495 F.3d at 407.

35. As stated in ¶ 4 A - D, and ¶ 5, above, neither Holdings USA nor Holdings Ltd. exercised control over the employees such that the "economic realities" test can be met by the Responses. Accordingly, the Objections should be sustained.

III. NEW YORK LABOR LAW § 198-C DOES NOT APPLY TO THE EMPLOYEES/CLAIMANTS

36. The Responses argue that New York Labor Law § 198-c(2) provides an independent basis for which to pay their claims. According to the WARN Response, section 198-c(2) requires the Debtors "to pay the promised benefits absent a statutory exception." *See WARN Response* at 10. This statute actually provides only that the failure to pay the promised benefits (described as reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay) will result in a misdemeanor against a corporation or its president, secretary, treasurer or officers unless there is a statutory exception. The relevant statutory exception is in New York Labor Law § 198-c(3) itself, which states that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of nine hundred dollars a week."

37. As detailed in the employee database, as well as the Employees/Claimants' claims, all of the Employees/Claimants earned more than $900 per week based on the definition of "wages" in New York Labor Law § 190(1), which states "'[w]ages' means the earnings of an

employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." New York Labor Law § 190(1). Therefore, New York Labor Law § 198-c does not apply to the Employee/Claimants.

IV. MR. MCHUGH CANNOT HOLD ANY PARTY JOINTLY LIABLE FOR HIS WAGES UNDER NEW YORK BUSINESS CORPORATION LAW SECTION 630 AS HE DID NOT PROVIDE PROPER NOTICE TO AN APPROPRIATE PARTY

38. Mr. McHugh makes a further leap that Holdings Ltd. is also liable for his claims pursuant to New York Business Corporation Law § 630. He asserts that under that statute Holdings Ltd. is one of the ten largest shareholders of his employer and therefore liable to him for his claims. Mr. McHugh's claim fails, however, unless the Court finds first that Holdings USA is either Mr. McHugh's employer or his joint employer. The sole shareholder of MFGI, Mr. McHugh's admitted employer, is Holdings USA. As detailed below, the statute does not provide for "shareholder of a shareholder" liability, which is what would need to occur for Holdings Ltd. (the sole shareholder of Holdings USA) to be liable under New York Business Corporation Law § 630, but merely relates to the liability of the ten largest shareholders of the employee's employer.

39. New York Business Corporation Law § 630 provides that

> (a) The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every corporation (other than an investment company registered as such under an act of congress entitled "Investment Company Act of 1940"), no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under this section. Such notice shall be given within one hundred and eighty days after termination of such services, except that if, within such period, the laborer,

> servant or employee demands an examination of the record of shareholders under paragraph (b) of section 624 (Books and records; right of inspection, prima facie evidence), such notice may be given within sixty days after he has been given the opportunity to examine the record of shareholders. An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.

40. In his response to the 29th Objection, Mr. McHugh represents that

> [o]n January 17, 2012, Mr. McHugh, through counsel, gave notice to MF Global Holdings, Ltd. that, pursuant to New York Business Corporation Law § 630, Mr. McHugh intended to hold MF Global Holdings, Ltd. jointly and severally liable for the wages MF Global Holdings USA, Ltd. owes to Mr. McHugh.

McHugh Response at 5.

41. As established above, Holdings USA was neither Mr. McHugh's employer nor did it exercise sufficient control such that joint employer liability is appropriate. Without more, Mr. McHugh's claim under New York Business Corporation Law § 630 fails because the sole shareholder of his employer was Holdings USA and there is no evidence to support a finding that this entity was put on notice as required by the statute.

42. From his statements, it appears that Mr. McHugh only put Holdings Ltd. on notice pursuant to NYBCL § 630. Instead, Mr. McHugh was required to put Holdings USA on notice of his intent to hold it liable for the wages owed to him by MFGI because Holdings USA is the sole shareholder of MFGI. Providing notice to Holdings Ltd., as the sole shareholder of Holdings USA, was ineffectual notice that Holdings USA would be liable for the unpaid services. Because the deadline has already passed for Mr. McHugh to put Holdings USA on notice properly he cannot do so now.

SPECIFIC REPLIES TO THE RESPONSES

I. KLEHR HARRISON CANNOT FILE A RESPONSE ON BEHALF OF ALL OF THE EMPLOYEES/CLAIMANTS, AND EVEN IF IT COULD, THE WARN RESPONSE FAILS TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE CLAIMS ARE VALID

43. Klehr Harrison, purporting to act on behalf of *all* of the employees/claimants of MF Global, filed the WARN Response to the 29th Objection claiming that they are "Proposed Class Counsel for Employee/Claimants". For the reasons stated below, Klehr Harrison cannot file a response on behalf of all of the employees/claimants of the Debtors, or even just the Employees/Claimants subject to the Objections. Even if Klehr Harrison could, the WARN Response fails to rebut the Objection.

44. First, this Court issued its *Memorandum Opinion and Order Appointing Interim Counsel in Certain Consolidated WARN Act Class Actions and Dismissing a Duplicative WARN Act Class Action* [Docket No. 395] on January 30, 2012, appointing Outten & Golden LLP interim counsel in the WARN adversary proceedings, *not Klehr Harrison.*

45. Second, Klehr Harrison has not filed a statement, as required by Bankruptcy Rule 2019, of the members of its group or their holdings in the case. In addition, nothing on the face of, or attached to, the WARN Response provides evidence that the Employees/Claimants previously authorized Klehr Harrison to file the WARN Response on their behalf. In fact, three of the Employees/Claimants (Messrs. McHugh, Kelly and Patrello) filed their own responses through their own counsel.

46. Lastly, and most importantly, even if Klehr Harrison represented the Employees/Claimants, the documentation provided by Klehr Harrison as evidence to rebut the Objection does not pertain to any of the actual Employees/Claimants. To show that Holdings USA or Holdings Ltd. are liable to the Employees/Claimants, the WARN Response must prove

by a preponderance of the evidence that there is a legal basis for the Employees/Claimants' claims against Holdings USA or Holdings Ltd. The WARN Response provided *no* evidence for any of the Employees/Claimants' claims. Instead, the exhibits attached to the WARN Response pertain to other employees of MFGI who were named plaintiffs or members of the proposed class of plaintiffs in the WARN Act adversary proceeding against the Debtors and MFGI (which this Court dismissed twice already). Not only does the attachment of these documents fail to address the actual Employee/Claimant's subject to the 29th Objection, it further demonstrates that Klehr Harrison does not actually represent any of the Employees/Claimants.

47. The Objections were not general objections to all employee claims. Instead, they raised specific issues as to certain claims, namely that the Employees/Claimants listed on the exhibit to the Objection were employees of MFGI based on the Debtors' books and records and employee functions. Instead, the WARN Response merely apes the failed arguments it put forth in the WARN adversary proceeding, which this Court dismissed with prejudice on August 8, 2013 and is a transparent backdoor attempt to re-litigate the WARN issues the Court already decided against them directly.[8]

[8] This Court issued the *Memorandum Opinion and Order Granting Defendants' Motion to Dismiss the Second Amended Complaint* Case No. 11-02880-mg [Docket No. 76]. The Plan Administrator incorporates by reference the Court's reasoning and holding for granting the Debtors' motion to dismiss as they apply to the WARN Response instead of rehashing those arguments here.

CONCLUSION

WHEREFORE, the Objections refuted critical portions of the Employees/Claimants' claims, thereby shifting the burden to the Employees/Claimants to establish by a preponderance of the evidence that there is a legal basis for their claims against the Debtors. Without more, the Responses have failed to establish such a legal basis. Therefore, for the reasons stated above, the Plan Administrator respectfully requests entry of an order, substantially in the form of the proposed order attached to the Objections and any other and further relief as the Court deems proper and just.

Dated: November 14, 2013
New York, New York

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Exhibit A

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Counsel for MF Global Holdings Ltd.,
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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.	:	**(Jointly Administered)**

AFFIDAVIT OF LAURIE R. FERBER IN SUPPORT OF THE PLAN ADMINISTRATOR'S OMNIBUS REPLY TO (I) THE RESPONSES TO THE TWENTY-NINTH OMNIBUS CLAIMS OBJECTION AND (II) THE RESPONSE OF FRANK NEWELL TO THE ELEVENTH OMNIBUS CLAIMS OBJECTION

I, Laurie R. Ferber, pursuant to 28 U.S.C. § 1746, hereby declare that the following is true to the best of my knowledge, information and belief:

1. I have been the general counsel and executive vice president of Holdings Ltd. [1] since 2009. I was also general counsel and a director of MFGI until the commencement of its SIPA liquidation proceeding. Prior to the Second Amended and Restated Plan going effective, I

[1] Capitalized terms not otherwise defined herein shall the meaning ascribed to them in the *Plan Administrator's Omnibus Reply to (I) the Responses to the Twenty-Ninth Omnibus Claims Objection and (II) the Response of Frank Newell to the Eleventh Omnibus Claims Objection.*

was a director of Holdings USA. I am currently the executive vice president and general counsel of the Plan Administrator and each of the Debtors.

2. The Plan Administrator authorized me to submit this affidavit in support of the *Plan Administrator's Omnibus Reply to (I) the Responses to the Twenty-Ninth Omnibus Claims Objection and (II) the Response of Frank Newell to the Eleventh Omnibus Claims Objection.*

3. As a result of my tenure with Holdings Ltd., Holdings USA and MFGI, my review of relevant documents, my discussions with relevant current and former employees and the Plan Administrator's various professionals, I am generally familiar with the organization and management structure of Holdings Ltd., Holdings USA and MFGI, their business affairs, and books and records, as well as the current wind-down efforts for the Debtors.

4. Except as otherwise indicated, the statements set forth in this Affidavit are based upon my personal knowledge, my review of relevant documents, the Debtors' books and records, information supplied or verified by current and former employees of Holdings Ltd., Holdings USA and MFGI, and various professionals retained by the Plan Administrator, or my opinion based upon experience, expertise, knowledge, and information concerning the operations of Holdings Ltd., Holdings USA and MFGI. If called upon to testify, I would testify competently to the facts set forth herein.

5. I, along with the Plan Administrator's professionals and employees reviewed the Debtors' books and records, including the 10-27-11 Oracle List generated from the electronic employee database. The 10-27-11 Oracle List details for which entity the employees worked among the U.S. MF Global affiliates as of October 27, 2011. According to the 10-27-11 Oracle List and the employee database, all of the employees subject to the 29th Objection and Frank Newell were listed as employees of MFGI. A review of the 10-27-11 Oracle List and the

employee database showed that their managers were employees of MFGI, except in one case. The only exception is the Chief Financial Officer of MFGI, Ms. Christine Serwinski, who was the most senior financial person at MFGI. Ms. Serwinski did not report, however, to anyone at MFGI or the Debtors.

6. Prior to the initial bankruptcy petition date, Holdings USA served as the holding company for the majority of the US subsidiaries of Holdings Ltd. and provided administrative and support services in connection with the needs of Holdings Ltd. and its domestic subsidiaries. One of those administrative and support services was a human resources function. As would be typical of a human resources function for a parent company with several operating subsidiaries, its services included development, maintenance and administration of general work policies, employee health and welfare programs (*e.g.*, medical insurance, disability insurance programs), 401(k) benefits, worker's compensation, tuition reimbursement programs, employee handbooks, which covered such topics as policies and procedures for taking time off, establishing a dress code, as well as issuance of payroll.

7. Holdings USA also assured that MFGI complied with applicable state and federal employment law, by, among other things, issuing tax forms, including W-2s, issuing offer and termination letters, and maintaining employment records.

8. Although Holdings USA maintained the policies that determined that a regular full-time employee was to generally work forty hours per week, the actual daily work schedule of the employees of MFGI was set and approved by their manager or other senior managers of the employee's department at MFGI. Holdings USA played no role in determining the employee's actual schedule to fulfill their duties as MFGI employees.

9. Employees of MFGI requested time off from their MFGI manager. Holdings USA did not participate in the decision-making of whether an employee's request for time off was granted. Holdings USA merely established and maintained the policies that governed the amount of vacation or leave time to which an employee might be entitled. Under the applicable vacation policy, an MFGI employee was required to seek the prior agreement of their MFGI manager. The policy did not provide for any participation by Holdings USA in approving leave requests.

10. When making decisions regarding hiring and/or firing employees at MFGI, MFGI managers and/or senior management of the employee's department would manage the interview process and make the individual hiring and/or firing decisions for employment positions at MFGI. Holdings USA would provide some guidelines for the process and provide some necessary administrative support, including paperwork, but the operative decision of whether an employee was hired or fired was reserved for the MFGI manager or senior management of the employee's department.

11. Holdings USA did not determine an individual employee's salary or entitlement to increases or decrease in pay and commissions. Although Holdings USA worked with senior management to determine categories of employment and ranges of salaries, bonuses and commissions for the employees of MFGI, an employee's starting salary, raises, bonuses or commissions were determined by management of their respective MFGI business area.

12. As the holding company and direct parent of Holdings USA, Holdings Ltd. did not have a direct operational role and was removed from decision-making as it concerned employees' daily activities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of November, 2013

/s/ Laurie R. Ferber
Laurie R. Ferber