

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 11-15059(MG)

4 Adv. Case No. 11-02790(MG)

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6 In the Matter of:

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8 MF GLOBAL HOLDINGS LTD.,

9

10 Debtor.

11 - - - - - x

12 In the Matter of:

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14 MF GLOBAL, INC.

15

16 Debtor.

17 - - - - - x

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19 U.S. Bankruptcy Court

20 One Bowling Green

21 New York, New York

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23 May 19, 2014

24 2:01 PM

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1 B E F O R E :
2 HON MARTIN GLENN
3 U.S. BANKRUPTCY JUDGE
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1 Hearing re: Adversary proceeding: doc# 7822, 7823 Hearing
2 RE: Order signed on 4/29/2014 Scheduling Briefing and
3 Argument Re Lifting of Stay Permitting Advancement of
4 Additional Insurance Proceeds. (related document(s) 7821).

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6 Hearing re: Doc# 1862 Hearing RE: Order signed on 4/29/2014
7 Scheduling Briefing and Argument Re Lifting of Stay
8 Permitting Advance of Additional Insurance Proceeds.
9 (related document(s) 1861).

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25 Transcribed by: Dawn South

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P R O C E E D I N G S

THE COURT: All right, please be seated. All right, we're here in MF Global Holdings Limited, 11-15059 and MF Global Inc., 11-02790.

All right, who's going to begin?

MR. AUFSES: Thank you, Your Honor.

Good afternoon, Your Honor, I'm Arthur Aufses of Kramer Levin Naftalis & Frankel, I represent Bradley Abelou, and I'm hear speaking today for the 14 individual insureds who brought the motion.

We really appreciate Your Honor's framing the motion as you have, because we --

THE COURT: I'm sure you all saw this morning the Second Circuit issued its order --

MR. AUFSES: We did and --

THE COURT: -- dismissing the appeal as moot.

MR. AUFSES: -- and I was going mention that to you but Your Honor has seen it.

I believe that by framing the motion as the Court has we'll be able to get to the heart of the issues more promptly than we might have been able to otherwise, and having framed the motion that way we're asked the Court to do two things.

First as to the E&O policies of MF Global we're asking the Court to lift the stay to permit the defense cost

1 to be advanced and any settlement amounts or judgment to be
2 indemnified in the ordinary course.

3 But second because neither MFGH nor MFGI has any
4 interest at the present time in the D&O policies we believe
5 that the stay does not apply to the D&O policies and that
6 the time is right for the Detour confirm that those policies
7 are not property of either MFGH or MFGI.

8 Now there are a number of reasons why we have made
9 these requests and we've put them in our two letter briefs
10 and I think we've adequately responded in those papers to
11 the points that the plaintiffs have made, but let me
12 underscore a few of the key reasons for our request.

13 First, these policies, both the D&O and the E&O,
14 are contracts and our clients are the intended beneficiaries
15 of those contracts.

16 Those contracts provide them with rights and the
17 rights that they have under those contracts are intended to
18 kick in in precisely the situation that our clients now find
19 themselves in. Namely a situation in which the company has
20 failed, indemnification is needed, and lawsuits have been
21 brought.

22 And let me take a step back. The point has been
23 lost I think in everything else that's gone around
24 surrounding MF Global, but I think it's worth recalling that
25 in 2010 the company was failing, it had posted losses

1 steadily, it was then facing ratings agency downgrades, it
2 needed to be turned around, and that's why Mr. Corzine was
3 brought to the company by the board, that's why Mr. Corzine
4 brought to the company the senior management team that it
5 did, including my client.

6 THE COURT: So why didn't you turn around the
7 company with justified taking \$1.6 billion of customer
8 funds?

9 MR. AUFSES: Your Honor, he -- nobody, none of
10 these -- none of these senior officers took any money.

11 THE COURT: Permitting the use of \$1.6 billion of
12 customer funds for purposes for which they were not
13 permitted.

14 MR. AUFSES: And that's what -- that's what
15 remains to be proved in the litigation that we're defending.
16 And exactly the problem here is that the plaintiffs have
17 assumed that liability is going to be established. And as
18 Your Honor has recognized every one of these insureds is
19 entitled to a defense and is entitled to have that defense
20 advanced by the insurance policies.

21 THE COURT: One thing that was not clear to me in
22 reading the letter briefs is whether MFGI has filed a claim
23 on the E&O policies. I think it was in the customer
24 representative's letter, I think they referred to the fact
25 that there's now a \$548 million shortfall because of the

1 order approved by this Court and then approved by the
2 District Court permitting the use of general estate property
3 to satisfy the unpaid portion of the commodity customer
4 claims, but it was -- it is unclear to me whether a claim
5 was made against the E&O, when it was made, and I'll ask
6 Mr. Kobak or others on his side as to what the status of
7 that is. But you agree that a claim has been made?

8 MR. AUFSES: My understanding is that a claim has
9 been made.

10 THE COURT: And it's also true that the E&O policy
11 has no priority of payments provision, correct?

12 MR. AUFSES: No, that's not accurate, Your Honor.

13 THE COURT: That's not accurate?

14 MR. AUFSES: No. No, and this is a --

15 THE COURT: Where is that? I certainly know the
16 D&O policies had a priority payment provision, but never
17 seen a priority payment provision in the E&O policies, and I
18 thought in my opinion in April of 2012 I think I referred to
19 the priority payments provision in the D&O, but I didn't --

20 MR. AUFSES: There's --

21 THE COURT: -- did not see one in the E&O
22 policies.

23 MR. AUFSES: There's a mention of it, Your Honor,
24 in the letter that was submitted on behalf of --

25 THE COURT: I don't want it in letters, I want to

1 know where in the policy --

2 MR. AUFSES: Okay. It's section --

3 THE COURT: Point me to the policy language.

4 MR. AUFSES: It's Section 5.8 of the E&O policies
5 which says that the insurer shall advance defense cost
6 incurred to the insured in respect of any claim prior to the
7 final resolution of the claim.

8 THE COURT: That's not a priority payments
9 provision.

10 MR. AUFSES: Well, but it's a priority --

11 THE COURT: It's not a priority payments
12 provision. Come on.

13 MR. AUFSES: Not --

14 THE COURT: Don't mislead the Court.

15 MR. AUFSES: I'm not meaning to --

16 THE COURT: You know what a priority payments
17 provision is.

18 MR. AUFSES: I do, Your Honor, but --

19 THE COURT: And that's not one is it?

20 MR. AUFSES: -- but that -- that --

21 THE COURT: Do you have any case authority that
22 say what you just read to me is a priority payments
23 provision?

24 MR. AUFSES: I'm not suggesting that it's --

25 THE COURT: Are you -- do you have any authority

1 -- you've made the statement to me that that's a priority
2 payment provision. Do you have any case authority
3 whatsoever that supports your contention that what you read
4 to me is a priority payments provision?

5 MR. AUFSES: I do not, Your Honor.

6 THE COURT: Okay. You know, if you stick to what
7 are the facts and the law you'll do better than if you
8 attempt to mislead me by arguing something that is not in
9 the policy and that you have no case support for.

10 MR. AUFSES: Your Honor, let me -- let me come
11 back to the point that I was starting to make.

12 The turn around did not succeed, lawsuits had been
13 brought, claims had been filed, now is the time that these
14 policies, both the D&O and --

15 THE COURT: Do you dispute -- whether or not any
16 of the individual defendants are legally culpable do you
17 dispute that \$1.6 billion of what was supposed to be
18 segregated customer funds or not held in segregation and
19 were used for some other purpose?

20 MR. AUFSES: I do not dispute that, Your Honor,
21 no.

22 THE COURT: Okay.

23 MR. AUFSES: What is in dispute is where it went,
24 for what purposes, and how much of it came back in what
25 circumstances and when.

1 There's no dispute, Your Honor, about what these
2 contracts say, the insurance policies, and with particular
3 respect to the D&O policies what's most important is that
4 the policy language is clear as to the priority of payments
5 provision, and what's also clear is that the circumstances
6 in which the entities, MFGH and MFGI, will have coverage are
7 very limited. Those consist only of securities claims and
8 potential reimbursement for indemnification payments.

9 Since Your Honor ruled on this issue in 2012 it's
10 even more clear than it was then that there will not be
11 securities claims because those claims have now been
12 subordinated under the confirmed plan of liquidation, the
13 plan of liquidation contains a plan injunction that bars
14 security holders from bringing claims, and the statute of
15 limitations on all such security claims has now expired.

16 Similarly two years ago both trustees indicated
17 that they would not be providing advancement or
18 indemnification.

19 Two years have now passed, no advancement or
20 indemnification has been made, there's a two and a half
21 million dollar deductible on any request for reimbursement
22 for indemnification, and as a result it's even less likely
23 now than it was then that any indemnification or advancement
24 will be paid out to the insureds.

25 As a result it -- the circumstances in which the

1 entities could obtain any coverage under the D&O policy have
2 been eliminated, and as a result MFGH and MFGI have no
3 interest at all in those policies, and it's for those
4 reasons that we ask that the Court confirm that those
5 policies are not property of the estate.

6 In the -- in the face of these points the
7 plaintiffs make, as you saw in their letters, a number of
8 statements, but I think before I address any of them
9 individually I want to focus on the background to those
10 statements and I want to make two points in particular.

11 First is that there's just no question that the
12 statements, even if not intended, have the effect of
13 obtaining for the plaintiffs a tactical advantage in the
14 litigation, and --

15 THE COURT: I fully understand the argument and I
16 addressed that in the initial opinion when Sapere was
17 seeking to deny the insureds insurance coverage. So I mean
18 if you want to make -- I fully -- that's why we're here
19 today, okay?

20 MR. AUFSES: That's right. That's right.

21 THE COURT: But if you want to argue that further
22 go ahead, but --

23 MR. AUFSES: The second point, and maybe more
24 important, is that the assumption behind their responses is
25 that liability is a foregone conclusion. That is the

1 assumption that the money must be preserved because all of
2 these defendants will be found liable. And as Your Honor
3 recognized in the prior -- in the prior proceedings that's
4 not so.

5 THE COURT: Isn't -- am I correct that for MFGI or
6 to the extent -- well MFGI could recover against the E&O
7 policy -- policies without any determination in the pending
8 District Court actions of the liability of the individual
9 officers and directors?

10 MR. AUFSES: I'll defer to the -- to the E&O
11 insurer's lawyers on that.

12 THE COURT: Can you answer my question?

13 MR. AUFSES: My understanding is that there would
14 need to be an adjudication that --

15 THE COURT: Whether there has to be an
16 adjudication -- I do have questions of MFGI's counsel and
17 also of the insurer's counsel, and that's a point that's not
18 addressed in the letters.

19 MR. AUFSES: Right.

20 THE COURT: But -- and that is the issue of if
21 there has to be an adjudication in what forum does that take
22 place? Because it seemed to me hypothetically, for example,
23 that Mr. Corzine could be determined not to be liable in the
24 pending civil actions in the District Court but MFGI could
25 still recover under the E&O policies because it could

1 establish the grounds for its entitlement to recover. So
2 it's not one or the other.

3 The individual defendants -- do you disagree with
4 that that the individual -- in all -- you know, it's more
5 likely that the individuals, if they're found liable, that
6 the debtor could recover on the E&O policy, but that's not a
7 prerequisite to the debtors recovering under the E&O. Do
8 you agree with that?

9 MR. AUFSES: Your Honor, I don't know the answer
10 to that. My understanding --

11 THE COURT: But do you have any -- let me ask you
12 this then. Do you have any authority that the only way the
13 debtors could recover under the E&O policies is if there's a
14 determination of liability in the pending District Court
15 action against the officers and directors?

16 MR. AUFSES: I don't, Your Honor. The extent of
17 my knowledge or understanding is that there are two levels
18 of issues. One is whether there is covered loss under the
19 policy, but also as I understand it the E&O carriers have
20 asserted certain coverage defenses and that both of those
21 issues will have to be resolved, and we have not had any
22 visibility into -- into those issues.

23 To underscore my point, Your Honor, that the --
24 there is no basis for the assumption that liability is a
25 foregone conclusion here I point to the fact that on the

1 motions to dismiss --

2 THE COURT: I agree with you.

3 MR. AUFSES: But I think though it bears on other
4 issues, Your Honor.

5 To just note again that as part of the motions to
6 dismiss almost half of the defendants who had been
7 originally named have been dismissed, others who were named
8 in multiple cases --

9 THE COURT: Coverage doesn't depend on whether
10 your clients ultimately prevail or not.

11 MR. AUFSES: We agree on that. Let me -- let me
12 turn then to --

13 THE COURT: But the issue that I'm -- and I want
14 to put aside the D&O policies for a minute because I do have
15 questions for the other side, because it does seem to me
16 that -- because look, in my initial decision I left open the
17 question of whether -- I said policies were property of the
18 estate, policy proceeds I didn't resolve.

19 As to the D&O policies now, despite
20 Mr. Entwistle's letter about it, it did seem to me that the
21 -- in light of the confirmed plan that I don't understand
22 what the argument is that policy proceeds on the D&O
23 policies are property of the estate. That can lead to one
24 result with respect to the D&O policies.

25 With respect to the E&O policies, particularly in

1 light of the fact that there has been a claim against the
2 E&O insureds and there is no priority payments that while
3 there's no determination of anybody's liability at this
4 point that the proceeds of the E&O policies very likely are
5 property of the estate, shared. How shared, we'll -- you
6 know, will have to be determined, but it's not as if you
7 have an unencumbered right to recover against the E&O
8 policies.

9 And where -- I'm not saying anything I haven't
10 said before from the bench, but I was fairly shocked before
11 discovery had even commenced in the District Court actions
12 the defendants had already spent in excess of \$30 million
13 for defense costs, an astounding number to me. And am I
14 correct that there's what \$120 million of E&O coverage for
15 the policy period for which the acts or events allegedly
16 occurred? That was the starting number?

17 MR. AUFSES: I think the starting number was 150-
18 Your Honor.

19 THE COURT: Was it? I thought it was 120- --

20 MR. AUFSES: I thought it was --

21 THE COURT: -- on E&O.

22 MR. AUFSES: -- 150- with 225- of D&O.

23 THE COURT: Okay.

24 MR. AUFSES: That was -- my understanding was that
25 that was the starting number.

1 But let me address the issue of cost, because I
2 understand it's been on your mind and everyone else's.

3 First that 30 million as of June 2013 --

4 THE COURT: It's now in excess of 40 million.

5 MR. AUFSES: Yes, but as Ms. Ahari will tell you
6 16- of that is attributable to the regulatory

7 investigations. So that leaves 27- that's attributable to
8 this civil litigation, the --

9 THE COURT: The regulatory investigation includes
10 the CFTC action against Mr. Corzine?

11 MR. AUFSES: No, the 16- includes the
12 investigations and --

13 THE COURT: But not to the CFTC action against
14 Mr. Corzine.

15 MR. AUFSES: That's right, but there were many
16 other people who were investigated as part of that -- as
17 part of that regulatory proceeding, and I think it's
18 important to note that only two were named as defendants in
19 the CFTC action, and those two people are now defending that
20 lawsuit and a number of others.

21 THE COURT: Yeah, I am -- I'll tell you I haven't
22 made up my mind about any of this really, but I'm
23 particularly sensitive in there was the letter from the
24 counsel for those who were not -- on behalf of those who
25 were not defendants in any of the actions and I'm

1 particularly sensitive to their outstanding fees and whether
2 those should be paid.

3 MR. AUFSES: Uh-huh.

4 THE COURT: I separate that and maybe analytically
5 you would say I shouldn't, but I sort of view that
6 differently than I do the issue of a blank check for those
7 who are defendants in the pending litigation.

8 MR. AUFSES: And let me address -- let me try to
9 address the various points that Your Honor made.

10 First on the amount of the expenses. I'm -- I
11 think that the Court should separate out the amount that was
12 spent on regulatory matters from the amount that's being
13 spent in the civil litigation. And so the amount that's
14 being spent in the civil litigation to date is about
15 27 million, that's for 26 individual insureds over two and a
16 half years.

17 But compare that to what the plaintiffs have been
18 spending, and I think that there is now some very useful
19 evidence for the Court to look at in order to get
20 perspective on the defendants' spend.

21 As of the end of January of 2014, that's three
22 months ago already, the customer plaintiffs load star, which
23 they submitted to the District Court as part of a fee
24 application, was over 22 million, and that included the work
25 of 15 different law firms, 9 of whom had been brought into

1 the matter specifically to review, so the application said,
2 almost 2 million documents. So that's the scope of the work
3 that was being -- that was required by the customers in just
4 one of the cases. We're having to defend five cases, each
5 of which is a very big case in its own right.

6 So then what has to be added, again for
7 perspective sake, Your Honor, and I want to be clear, I'm
8 not criticizing, all I'm suggesting is that the Court needs
9 to look at that to make a fair assessment of the spending by
10 the defendants.

11 So that's 22 million by the customer plaintiffs on
12 one case.

13 Based on the fee applications that we've seen from
14 the SIPA trustee's counsel it looks like over \$9 million was
15 spent on preparing the trustee's report and on --

16 THE COURT: That's required by statute.

17 MR. AUFSES: I understand, but that was part of
18 the case investigation that became part of the -- part of
19 the plaint that we've had to respond to. And then on top of
20 that amount there was \$4 million that was identified as
21 investigating potential affirmative claims. I don't know
22 exactly what went into that, but my hunch is that that had
23 to do with research of the kinds -- into the kinds of claims
24 that might have been brought.

25 And then add on to that the money that was spent

1 by counsel for the Chapter 11 trustee in bringing his own
2 claim, the money that's now being spent by the plan
3 administrator, the money that's now being spent by the
4 lawyers for the securities plaintiffs, and obviously the
5 CFTC lawyers are probably not billing in the same way, but
6 their creating substantial work for two of the -- two of the
7 named defendants.

8 So when it's looked at that way, Your Honor, I
9 believe that the -- the total spend by the defendants really
10 is reasonable.

11 And there can't be a complaint about your billing
12 rates. The billing rates on both sides are comparable and
13 we agreed to a reduction in our rates.

14 The complaint can't be about the time that matters
15 take. Again, the load star of the customers shows that the
16 work that goes into these kind of cases takes time.

17 What's really being challenged is our -- is our
18 litigation strategy, but that's nothing that the policy
19 permits the plaintiffs to drive. It's the job of the
20 insurers to review our strategy and we do that with them.

21 So that's another reason why, Your Honor, there is
22 not a blank check here. The policies are very clear that
23 the only amounts that can be paid out are reasonable
24 expenses.

25 Ms. Ahari has told you on several occasions how

1 the carriers go about reviewing our bills, and what they
2 review with us is not just waste, sending too many people to
3 a meeting, putting too much time into a particular
4 conference call, but they also review with us our strategy.

5 So there is a break on the spend, and as we've
6 told you and I won't belabor the point, we really have done
7 everything that we can to keep the expenses down.

8 And I won't speak for others, I'll just speak for
9 myself, I know how much time my office spent on the answer
10 to the customer complaint. It was 575 paragraphs long, but
11 I didn't draft that from scratch because another one of the
12 firms in the case had prepared a draft, a template, and it
13 flagged the places where it might have to be tweaked to
14 reflect the different situation that my client is in. And
15 that's the kind of approach that we have taken with respect
16 to every drafting project that we've had and every research
17 project that we've had in the case.

18 So when -- when the plan administrator says, well,
19 if they do have procedures they can't be very effective I'm
20 hear to tell you that that's wrong, they have been effective
21 from the very beginning of the case until today.

22 A couple of other issues that -- that were raised
23 in the plaintiffs' papers.

24 One was the suggestion that we haven't established
25 with evidence the prejudice that our clients are facing as a

1 result of not having their defense costs covered and paid
2 for by the insurance. The fact is that when you have a
3 contract and it promises to pay you your defense costs and
4 those defense costs are not paid that's prejudice. Your
5 Honor recognized it in 2012, Allied Digital and Downy and
6 many other cases have recognized it, that is prejudice.

7 And when they suggest that oh, let's have an
8 evidentiary hearing to establish whether there really has
9 been prejudice for the same reason there's no basis for that
10 and only seven weeks ago another Bankruptcy Court in the
11 case, In re: Hoku Corporation dismissed that kind of
12 suggestion in a sentence simply saying that it wasn't
13 persuasive, and it's just not because legal prejudice has
14 certainly been established.

15 Then the request was made that there be additional
16 reporting to Your Honor, and cases were cited suggesting
17 that routinely the Bankruptcy Courts impose such reporting
18 requirements. Well, Your Honor, probably has already but
19 I'll just -- looked at those cases already, but I'll just
20 point out that those cases were both consensual reporting
21 arrangements that were agreed to by the defendants, so they
22 certainly weren't imposed by the Court in either case, and
23 in any event the request is being made as to not only the
24 E&O but as to the D&O in which as we've said these entities
25 have no interest at all.

1 And finally I'd point out that there is reporting
2 that's been going on as a result of a stipulation that was
3 entered into at the beginning of the case.

4 We agree that as Your Honor pointed out as to the
5 E&O both the individual insureds and the entities have a
6 stake. So we certainly have no objection to continuing the
7 reporting arrangements that have been in place, but with
8 respect to the E&O only and not with respect to the D&O.

9 And then, Your Honor, the accusation was made
10 about the way we've conducted ourselves in the mediation and
11 in other letters there were accusations about the issues
12 that we've raised in the litigation. Let me first touch on
13 the litigation.

14 We clearly, as I think became apparent when we
15 were before Your Honor on the decommissioning motion, we
16 clearly have a disagreement with the SIPA trustee about how
17 he has to discharge his discovery obligations. That's an
18 issue that we're working on --

19 THE COURT: I received the --

20 MR. AUFSES: Right.

21 THE COURT: -- status report and reviewed it
22 today.

23 MR. AUFSES: Exactly, and we're meeting again on
24 Wednesday to try to continue that discussion, but I'm not
25 going to -- I'm not going to candy-coat it, we may be back

1 before either Your Honor or more likely I believe the
2 District Court over that point, but that cannot be the basis
3 for trying to keep us from getting our contractual right to
4 attorneys' fees honored.

5 The concern that we have here is that what the --
6 what the trustees are doing because they are liquidating
7 entities is just trying to dump -- literally dump data on us
8 and then as a result -- and as part of that shift is cost of
9 shifting through all that data on us, and then to make it a
10 double whammy, deprive us of the legal fees that we need to
11 hire lawyers and temps and experts to go through all that
12 material, and that is I admit a very fundamental problem
13 that we have that informs the statements that you've seen
14 and that is going to have to be worked out.

15 But then to turn to the mediation. Unlike --

16 THE COURT: You know, I really don't want to hear
17 about the mediation.

18 MR. AUFSES: Okay.

19 THE COURT: It's -- I don't -- I read what's in
20 the letters about it, I've certainly read the few things
21 that Judge Muraro (ph) has said in his opinions about the
22 conduct of the litigation, but it would be -- it would be
23 inappropriate to get into what has or has not happened in
24 the mediations.

25 MR. AUFSES: That's fine.

1 THE COURT: I guess it's before Judge Weinstein --
2 or retired Judge Weinstein.

3 MR. AUFSES: That's fine, and all I'll say on that
4 is that our offer stands. We consent to Your Honor's
5 calling Judge Weinstein if you have any questions.

6 THE COURT: I don't -- I don't -- I'm not getting
7 in the middle of a mediation.

8 MR. AUFSES: Uh-huh. That's fine, Your Honor.

9 Then let me just -- let me just close by pointing
10 to Judge Muraro's decision in which he noted that one of the
11 problems that we face was being put in the position of
12 having to respond to claims such as trespass to chattels,
13 aiding and abetting a breach of bailment, a RICO claim that
14 he specifically -- that he specifically directed at the very
15 outset was a problem, and we then had -- we then faced for
16 months and months and had to prepare a motion to dismiss to
17 respond to it.

18 THE COURT: The defendants filed a motion to
19 dismiss every count of every complaint, Judge Muraro ruled,
20 I read his lengthy opinions, I'm familiar with what Judge
21 Muraro has said in his opinions.

22 MR. AUFSES: Your Honor, let me just make two
23 points about that.

24 One is as Your Honor knows as well as anyone a
25 company can fail without any individual having acted in bad

1 faith or outside the realm of the business judgment rule.
2 That was the point that we were making in the motion to
3 dismiss.

4 THE COURT: I can't remember whether this was
5 precisely Judge Muraro's words but he sort of suggested that
6 you were suspending disbelief when you suggested that
7 \$1.6 billion evaporated in about a week without anybody
8 having any knowledge or responsibility about it, and that
9 all -- you know, Judge Muraro will -- in his proceedings
10 will resolve all those issues. He withdrew the reference to
11 the one case that still was before me, completely
12 appropriate that he did so, and you know, it'll be in the
13 District Court where all of that gets resolved.

14 MR. AUFSES: I agree. And the issue in that case
15 is going to be how things look from the standpoint of each
16 individual over the course, not just of those couple of
17 weeks but the prior months.

18 And the only thing I would ask Your Honor to do,
19 because you just said that you've read the decisions, I'd
20 urge you to read our papers, because in the papers I think
21 you will see -- you may disagree -- but you will see that
22 what we were doing was --

23 THE COURT: I got enough to read. I've read the
24 opinions of Judge Muraro as written.

25 MR. AUFSES: But the -- I would just -- I would

1 just close by saying, Your Honor, that the papers show the
2 basis for making the motion and also show the way we were
3 able to coordinate the work by submitting one omnibus brief
4 with then very small separate five-page briefs that were
5 addressed to the individual issues that were -- that each
6 individual defendant faced.

7 THE COURT: Okay.

8 MR. AUFSES: If Your Honor has no other questions
9 for --

10 THE COURT: I may have after I hear from the other
11 side, but let me see if anybody on your side --

12 MR. AUFSES: I'd be grateful if you gave me a
13 couple minutes at the end, Your Honor.

14 THE COURT: Absolutely.

15 MR. AUFSES: Thank you.

16 MR. KAY: Good afternoon, Your Honor, Harris Kay,
17 I'm from Henderson & Lyman.

18 I represent two individuals who were party to the
19 Sapere litigation, Christy Vavra and Tim Mundt. I also
20 represent three individual insureds, Jason Chenoweth,
21 Marilyn Cleeff, and Janice Greene, who were never named in
22 any action but who nonetheless had incurred fees with my
23 firm.

24 Your Honor mentioned my letter in a question to
25 Mr. Aufses, I don't have much more to add. Obviously we

1 agree with the position of the --

2 THE COURT: What's the -- can you tell me -- and I
3 know it's not just your clients because I know there were
4 others --

5 MR. KAY: Yes, Your Honor.

6 THE COURT: -- that fall in this category --
7 what's the total amount of attorneys' fees and costs that
8 are owed to the lawyers who represented -- who represent
9 individuals who either never were or are no longer
10 defendants in the civil actions?

11 MR. KAY: I mean I can tell you my numbers with
12 some precision. My understanding is that's on the order of
13 around three million outstanding to my --

14 THE COURT: For all? I understand I'm not holding
15 you to -- you think it's around three million for all of
16 those who are -- were never or are not now defendants in the
17 civil actions?

18 MR. KAY: That is owed, yes, Your Honor, I believe
19 so.

20 THE COURT: Okay.

21 MR. KAY: And I think Ms. Ahari could probably
22 confirm that number or one of the other counsel for the
23 insurers.

24 And as we set forth in our letter we are a bit
25 differently situated mostly because there's no ongoing work

1 to be done with the exception of possibly being called as a
2 witness, which we very well might be, one or more of us, but
3 as a general rule the litigation as parties certainly has
4 concluded for our clients, never started for others, and
5 most of our firms are carrying large balances and have been
6 for some period of time. That period of time varies. Some
7 ended very early, others ended much more recently. I
8 believe Mr. Klenya (ph), Mr. Stockman (ph), and Ms. Surinski
9 (ph) were recently dismissed as parties, and so a number of
10 the fees were incurred on their behalf in order to go to the
11 end, to grant the motions to dismiss. Others like three of
12 my clients were never named but were called --

13 THE COURT: I'm sensitive --

14 MR. KAY: Yes, Your Honor.

15 THE COURT: -- I don't know where I'm coming out
16 on this yet. I understand -- I read your letter, I'm very
17 sensitive to the issue of those who are -- you know, the
18 meter has pretty much stopped. It doesn't mean that there
19 won't be issues if they're deposed, but for now the meter
20 has stopped.

21 MR. KAY: Correct, Your Honor.

22 And also I think I just wanted to note to purposes
23 of cost, because the issue of the amount of the fees we were
24 grouped together with everyone that the fees were
25 unreasonable, and I would just suggest that again we are

1 somewhat uniquely situated. The three buckets that our
2 client group fall in are those that were either dismissed by
3 the Court, dismissed voluntarily, or were never named.

4 THE COURT: Right.

5 MR. KAY: And I believe, and I think that the
6 bills and the records would reflect that the work that we
7 did to keep our clients out, to get them dismissed, to
8 negotiate dismissals with prejudice, whatever the
9 circumstances are a testament to the reasonableness of the
10 fees that we incurred as well as all of the parties. I
11 can't speak to anyone else's, I can speak to our group, and
12 I wanted to bring that to the Court's attention --

13 THE COURT: Okay. Thank you.

14 MR. KAY: -- as well as we did in our letter.

15 THE COURT: All right.

16 MR. KAY: Thank you, Your Honor.

17 THE COURT: Anybody else representing -- anybody
18 else representing any of the officers, director, employees
19 of any of the debtors want to be heard?

20 All right, let me hear from insurer's counsel.

21 MR. DOODY: Good afternoon, Your Honor, Stephen
22 Doody from Allen & Overy on behalf of MFG Assurance.

23 And I think that counsel for the D&Os covered most
24 of the points that needed to be covered. I appreciate that
25 Your Honor has asked some questions. I'm not sure --

1 THE COURT: You know, I must say, I read your
2 letter and I don't understand it, but that's, you know, a
3 different issue I guess. I read all of the letters quite
4 carefully and I honestly am not sure what it is you're
5 arguing.

6 You represent the E&O, at least the primary level
7 of the E&O insureds, right?

8 MR. DOODY: We do, Your Honor. We also have the
9 excess policies, so --

10 THE COURT: Okay. And MFGI has now filed a claim
11 against the E&O; is that correct?

12 MR. DOODY: Yes, Your Honor. I don't have --

13 THE COURT: How much?

14 MR. DOODY: How much is the claim?

15 THE COURT: Yeah.

16 MR. DOODY: I don't know off the top of my head.

17 THE COURT: Is it the 548 million that I read in
18 one -- in Mr. Entwistle's letter or some different --

19 MR. DOODY: That may be correct, I don't know.

20 THE COURT: Okay. So tell me, nobody has
21 addressed this in any letter briefs, what is the procedure
22 by which the E&O insurers will determine whether the
23 debtors' claims against the E&O policies should be -- and
24 I'm not sure what the term would be -- allowed, paid, what's
25 the procedure? There is no litigation or arbitration by the

1 debtors against the E&O carriers at this point; is that
2 correct?

3 MR. DOODY: There is not, Your Honor.

4 THE COURT: Okay. And what is the procedure by
5 which those claims will be determined by the E&O insurers?

6 MR. DOODY: Those -- I believe there's one claim,
7 Your Honor, by the --

8 THE COURT: Okay. What's -- tell me how that
9 claim will be determined by the E&O insurers.

10 MR. DOODY: And to be clear that one claim is part
11 of what we are calling the single claim, the single claim
12 being -- because under the policies the individual claims
13 that are brought out of the same occurrences become one
14 claim, and so the need is for the E&O carrier to determine
15 all those claims as one. And so what the carrier is doing
16 is watching the litigation that --

17 THE COURT: But there is no litigation by MFGI
18 against the insurers, and let me ask this, because I asked
19 Mr. Aufses this. Is there a requirement in the policy? I
20 didn't see any requirement that -- because there is entity
21 coverage under the E&O policies, correct?

22 MR. DOODY: Yes, they are -- they are insureds.

23 THE COURT: Okay. And I didn't see a requirement
24 that MFGI commenced a litigation or an arbitration against
25 the E&O carriers in order to recover on the policy is there?

1 MR. DOODY: That's not that requirement, Your
2 Honor.

3 THE COURT: Okay. So in the absence of such a
4 requirement what is the procedure by which the E&O insurers
5 determine whether to allow or approve all or a portion of
6 the claim of MFGI?

7 MR. DOODY: The policy provides that the loss
8 could be -- this is not a -- is not the issue -- but defense
9 costs, settlements, awards, judgments. So there could be a
10 settlement, there could be an award, when there's an award,
11 and the award we're looking to, Your Honor, is in the MDL
12 where things have been consolidated, it being again a single
13 occurrence.

14 THE COURT: There is no claim -- I don't know why
15 you're having trouble with my question.

16 You acknowledge there's no requirement that MFGI
17 commence a litigation or an arbitration against the E&O
18 insurers in order to recover on its claim, and in the
19 absence of such a litigation or an arbitration I want to
20 know how the insurers will determine whether to allow the
21 claim in the absence of litigation or arbitration.

22 MR. DOODY: What I'm trying to say, Your Honor, is
23 that because it's a single occurrence and we're looking at
24 all of the events together that -- the litigation -- again,
25 not litigation against MFGA, but the litigation that's

1 ongoing in the MDL that has those number of cases -- that
2 will bring to the surface the facts and circumstances of the
3 underlying events --

4 THE COURT: So what you're telling me is that the
5 fact that MFGI has filed a claim with the insurer, the
6 insurers have no intention of doing anything with the MFGI
7 claim until the litigation in the District Court reaches a
8 conclusion?

9 MR. DOODY: I don't think that's quite right, and
10 I appreciate Your Honor doesn't want to talk about the
11 mediation, but that is a possibility that it could be
12 settled in the mediation.

13 THE COURT: Well there could -- look, do you agree
14 that MFGI may be able -- may be entitled to recover on the
15 E&O policies without any determination of liability against
16 Mr. Corzine?

17 MR. DOODY: I believe it is theoretically possible
18 that the entity itself could have culpability and therefore
19 we would have to look at it in that sense. But the entity
20 acts through its directors and officers so we're again
21 looking to the facts created in respect of those officers
22 and directors --

23 THE COURT: Yes, but my specific question was do
24 you agree that MFGI can recover under the E&O policies even
25 if Mr. Corzine prevails in the pending actions in the

1 District Court?

2 MR. DOODY: I believe it's theoretically possible
3 that the entity itself could -- well it could be a claim by
4 the entity on the policy without Mr. Corzine being found
5 culpable.

6 THE COURT: And that would be true if
7 Mr. Steenkamp if no -- if he is found not to be liable,
8 correct?

9 MR. DOODY: Yes, Your Honor.

10 THE COURT: All right. So I come back to you,
11 what, if anything, are the E&O carriers doing today,
12 tomorrow, next week, next month to determine whether MFGI is
13 entitled to recover on the E&O policies?

14 MR. DOODY: The carrier, MFGA, is monitoring the
15 MDL litigation to see the underlying facts and is
16 participating in the mediation for the purpose of dealing
17 with the possible settlement as well.

18 THE COURT: Go ahead with your argument.

19 MR. DOODY: As I said, Your Honor, I don't have
20 much more to say, just adding to some of the comments of
21 prior counsel with respect to the defense costs.

22 I can say that on behalf of MFG Assurance that
23 there is a triple check process for it. I just want to make
24 that point.

25 I think I've also made the point in the letter

1 that -- and I appreciate Your Honor's well aware of it that
2 initially this motion was about the extension, I think we're
3 past that in terms of dealing with the second letter.

4 THE COURT: I'm sorry, I don't understand that,
5 because one of the things when I read the correspondence I
6 thought the only thing I was being asked today is whether to
7 approve the long dormant stipulation to increase advancement
8 of fees and expenses by \$10 million, that's in reply letters
9 that Mr. Aufses submitted, that's what I understood I was
10 being asked today. I was told, well, something else is
11 going to be coming, but the only thing that it seemed to me
12 that was before me today was whether to increase the cap --
13 what I've described as a soft cap -- to \$40 million.

14 MR. DOODY: I think that -- apparently I
15 misunderstood Your Honor. I thought you were taking the
16 point that the payment of the \$10 million would still leave
17 parties who have now been let out of the case there's still
18 some --

19 THE COURT: I'm very concerned about that.

20 MR. DOODY: Yes. So that's what I thought where
21 we had gotten to on that point. And I appreciate --

22 THE COURT: It may be that that issue, if I don't
23 resolve it today, could be resolved consensually.

24 You know, earlier in the case there was a
25 consensual resolution not as to the -- you know, the fees

1 and expenses specifically covered by this policy period, I
2 think it related to an earlier policy period and other
3 litigation, so it's certainly -- I think I'd have to --
4 depending on what the outcome of today's proceeding is I
5 think I'd have to -- would want to approve it, but I think
6 it may be in everybody's best interest to sort of clear the
7 decks as to those who are no longer, you know, where the
8 fees were incurred in connection with investigations, et
9 cetera, are no longer parties to the pending actions, if
10 they were at any point, but I'm not resolving -- I don't
11 know, we'll see, I want to hear some more about that.

12 I'm sensitive to the issues of counsel in those
13 cases, and I do -- and I know you represent the E&O and I'm
14 going hear about the D&O from both sides, because I think
15 the issues are somewhat different as to the D&O.

16 Let me see if I have other questions for you.

17 You agree that there's no priority payments
18 provision in the E&O policies?

19 MR. DOODY: In the technical sense of it, yes,
20 Your Honor.

21 THE COURT: No, don't play games with me.

22 MR. DOODY: Your Honor, I --

23 THE COURT: Is there -- look, you know what a
24 priority payments provision is, you're an insurance lawyer.
25 You know what a priority payments provision in a insurance

1 contract is; isn't that true?

2 MR. DOODY: I do, Your Honor.

3 THE COURT: And there is no such provision in the
4 E&O policies, correct?

5 MR. DOODY: That's correct, Your Honor.

6 THE COURT: So don't fence and make arguments that
7 you can't support for facts or the law.

8 MR. DOODY: All right.

9 THE COURT: You do yourself no good.

10 MR. DOODY: What I'm -- the point I'm trying to
11 make, Your Honor, is that there is the advance of defense
12 costs and I think that -- because it specifically says you
13 advance them prior to recognition of loss, that's the
14 significant point.

15 THE COURT: So what I'm faced with today with
16 respect to the E&O policies, and it was not the case at the
17 time of the April 2012 decision, because at that point MFGI
18 had not filed a claim against the E&O policies. I think
19 that's referenced in my opinion. It may have been
20 anticipated but there was no claim. Now there's a claim for
21 somewhere in the neighborhood of 500 -- approximately
22 \$550 million.

23 The policies -- at least my readings of the
24 policies -- don't require MFGI to actually commence a
25 litigation or arbitration in order to recover. They may

1 have to if the insurer simply stonewall, but there's no
2 requirement in the policies. That's why I inquire of you
3 what is the procedure or procedures that MFGA is following
4 to determine whether the claim filed by MFGI should be
5 allowed and paid.

6 So what I -- what it seems to me is there are
7 conflicting claims against the E&O policies. Claims for
8 defense costs by the officers and directors and a claim by
9 MFGI for approximately \$550 million.

10 Can you tell me what is the -- was it 150- or
11 120 million coverage for the policy year?

12 MR. DOODY: This was 120 million of policies that
13 were primary in excess from MFGA but there are 3 -- actually
14 I'm not sure -- there's \$30 million of excess coverage above
15 the MFGA policies.

16 THE COURT: Okay. And how much has been used so
17 far?

18 MR. DOODY: On the -- I'm sorry -- the E&O
19 policies only?

20 THE COURT: Yeah. Did I read somewhere that the
21 primary has been exhausted now or not and you're into the
22 excess?

23 MR. DOODY: I think we're now into the excess for
24 maybe a million or two, I don't have a hard number for Your
25 Honor. Actually I take that back there's also to the extent

1 that -- to the extent that the policy has been exhausted
2 with payments actually made Your Honor appreciates that
3 there are payments backed up and so that -- so that will
4 probably put us maybe five or six into the second layer.

5 THE COURT: You follow the bills that have been
6 submitted or paid, approximately how much insurance on the
7 E&O policies would be remaining?

8 MR. DOODY: The first layer was 7 and a half, so
9 we're at about 13-, 14-, so we're -- let's say we're 13- or
10 14- from the 150-.

11 THE COURT: Okay. So I mean look, no secret, my
12 concern is -- is that -- I understand there's been no -- and
13 this I have a disagree with on the other side of the table
14 -- there's been no determination of any liability under the
15 policies in favor of MFGI. They say that the amount of
16 their loss is approximately 550 million, I'm not making any
17 determination about that, but there's certainly been -- you
18 know, not every loss is covered by the insurance, but let's
19 assume for sake of discussion that that was their loss. I'm
20 obviously concerned that there's -- you know, there was
21 150 million of E&O insurance, the argument is they have --
22 the entity has no coverage under D&O, there's not enough to
23 go around. That's what my concern is.

24 All right, anything else you want to say now?

25 MR. DOODY: Only the minor comment that I

1 appreciate Your Honor is not interested in the mediation,
2 but if you do come to that point we also consent.

3 THE COURT: I don't want to know about the
4 mediation, I don't inquire about mediation.

5 MR. DOODY: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MS. AHARI: Good afternoon, Your Honor, Leslie
8 Ahari of Troutman Sanders on behalf of the D&O insurers,
9 U.S. Specialty and XL Specialty.

10 I can give the Court some hard numbers. I'm kind
11 of the numbers person --

12 THE COURT: Okay.

13 MS. AHARI: -- so I can --

14 THE COURT: So the D&O has paid out more so far
15 than the E&O has paid. I read something about that.

16 MS. AHARI: That's correct. The total amount
17 that's been paid to date is \$29.8 million. Of that amount
18 the D&O has paid \$22.2 million and the E&O has paid
19 \$7.6 million.

20 THE COURT: I left it -- in the earlier decision I
21 left it to the insurers to work out how the split was going
22 to be done. Is there a degree formula or --

23 MS. AHARI: There is, it's complicated, but
24 essentially for -- for the lawsuits and is investigations
25 that are covered under both the D&O and the E&O the

1 allocation is 59 percent to the D&O and 41 percent to the
2 E&O, and that was based on the total limits provided by each
3 policy. And incidentally the total E&O coverage is
4 \$157.5 million.

5 THE COURT: Thank you.

6 MS. AHARI: The outstanding amounts as of the end
7 of April, the total amount outstanding is about
8 \$13.7 million, and based on the allocation -- and I'm sorry,
9 I just should mention, for the securities class action
10 that's not covered under the E&O, that's only a D&O claim.
11 So certain of the lawsuits are only covered under the D&O.

12 So for the outstanding amounts approximately
13 8.6- would be paid by the D&O and approximately 5.1- by the
14 E&O, and a relatively small amount from the fiduciary policy
15 that has very limited applicability here.

16 THE COURT: Any lawsuits actually raise those
17 fiduciary issues?

18 MS. AHARI: One, sir.

19 THE COURT: Okay.

20 MS. AHARI: So if -- if the total amount that's
21 outstanding is paid the total payments under the D&O tower
22 would be about \$30.7 million and the total amount paid under
23 the E&O would be about 12.7-.

24 THE COURT: Okay. So my -- with respect to the
25 D&O I wonder if you could address this issue of whether any

1 of the debtors, and I guess there would be MFGH, has -- in
2 your view do they have any argument that policy proceeds are
3 property of the estate?

4 MS. AHARI: I don't believe so, Your Honor. To my
5 knowledge there has been no indemnification of any of the
6 individual insureds in this case.

7 THE COURT: I think my knowledge is that's
8 correct.

9 MS. AHARI: Okay.

10 THE COURT: I'll hear otherwise, but I don't think
11 there was.

12 MS. AHARI: Okay. If they did make a claim they
13 would have to pay the \$2.5 million retention before the
14 insurance would even kick in.

15 THE COURT: Right.

16 MS. AHARI: So I mean for that reason it sounds as
17 a practical matter that it's unlikely to occur. No
18 securities claim has been filed against MFGH to my
19 knowledge, so you know, we haven't received any claims under
20 the D&O policy that would be covered for the entity.

21 To --

22 THE COURT: I take it then you agree that either
23 in your view no stay is in place, that was what you argued
24 initially, I think -- when I say initially back in --
25 leading to the April 2012 decision -- or for clarity the

1 stay should be lifted with respect to the D&O policies, you
2 agree with that?

3 MS. AHARI: Your Honor, as I artfully phrased it
4 in my initial motion the D&O carriers took no position as to
5 whether the proceeds were property of the estate, but we
6 said that, you know, in any event the stay should be lifted,
7 and that's how the Court decided the initial motion.

8 THE COURT: All right.

9 MS. AHARI: To respond, the Court had asked
10 Mr. Kay the amount that was owed to the individuals that
11 fall into the category who are either no longer defendants
12 in the litigation or who were never defendants.

13 Mr. Kay's letter was written on behalf of 25
14 individuals. There are an additional 13 that were not part
15 of his letter, and simply because it's mostly people who
16 were never part of the litigation, they're not watching
17 these proceedings in the Bankruptcy Court, so they're not
18 paying attention as closely as some of the others are.

19 THE COURT: But their lawyers probably are.

20 MS. AHARI: Correct.

21 So -- so Mr. Kay's -- the group that joined
22 Mr. Kay's letter they are owed approximately \$2.9 million.
23 The additional 13 out there are owed approximately 835,000.
24 And in addition, you know, part of -- part of what we have
25 going on is that we have a number of experts and consultants

1 and Deloitte and Jams (ph) who haven't been paid either.
2 Those various groups are owed a little over \$1.1 million,
3 and virtually all of those were retained on a joint basis
4 among all of the defendants.

5 THE COURT: May I ask you, with respect to the
6 individuals covered by Mr. Kay's letter and the additional
7 13 individuals what is your position with respect to D&O
8 coverage versus E&O -- in terms of the defense costs versus
9 E&O coverage?

10 MS. AHARI: I'm sorry, I don't understand your so.
11 I mean how would it be split between the two policies or --

12 THE COURT: Yes. Is -- let me see if I can ask it
13 a different way.

14 Do you agree that there is D&O coverage with
15 respect to some or all of the fees incurred by the 25
16 individuals on whose behalf Mr. Kay wrote or the 13
17 individuals -- additional individuals that you've
18 identified?

19 So you said it was 2.9 million unpaid for
20 Mr. Kay's -- for the 25 and 835,000 for the other 13, and I
21 appreciate knowing those numbers. My question is, is all or
22 a portion of that in your view reimbursable from D&O
23 insurance?

24 MS. AHARI: I can give you the numbers.

25 THE COURT: Okay.

1 MS. AHARI: For the 25 who are part of the
2 Henderson & Lyman letter --

3 THE COURT: Yes.

4 MS. AHARI: -- approximately 1.3- is payable under
5 the D&O.

6 THE COURT: Yes.

7 MS. AHARI: And approximately 1.6- is payable
8 under the E&O. And for the additional 13 approximately
9 600,000 would be under the D&O and 238,000 under the E&O.

10 THE COURT: Okay. What else do you want to tell
11 me?

12 MS. AHARI: So those are the numbers.

13 THE COURT: Okay.

14 MS. AHARI: Okay. With respect to the E&O
15 policies and the questions that the Court had with respect
16 to the claim by MFGI, I mean as a practical matter there are
17 significant coverage issues with respect to that claim.

18 As I understand the Court's question it's a
19 question of process, how does that get resolved?

20 THE COURT: Right.

21 MS. AHARI: I mean frankly I mean, you know, there
22 can be claims and you don't necessarily need an adjudication
23 order to resolve a claim under an insurance policy.

24 THE COURT: Oh, you mean you don't have to pursue
25 an insurance company ever to recover from then?

1 (Laughter)

2 MS. AHARI: Correct. Correct. And we actually
3 don't encourage that either.

4 (Laughter)

5 MS. AHARI: We do try to resolve claims.

6 As a practical matter that same -- the same
7 proceeds that are the subject of the MFGI claim under the
8 E&O policy are of the same proceeds that are at issue in
9 connection with the claims against the individual
10 defendants.

11 The Court doesn't want to talk about the
12 mediation, but that's what's being discussed in the
13 mediation, and the process is continuing, the mediation is
14 continuing. Yes, it's slow, it's frustratingly slow for
15 everybody, but it is continuing.

16 So I mean ideally you would prefer not to get
17 involved in coverage litigation over the MFGI claim for
18 coverage under the policies, and that ideally, you know,
19 it'll be part of a global mediation and a global settlement.

20 So in terms of moving things forward --

21 THE COURT: I'm all in favor of everything being
22 resolved in a global mediation. I really -- make no mistake
23 about it, okay, I just don't think it's appropriate for me
24 to get involved in the details of, you know, who says
25 somebody is taking a hard position. That's my only comment.

1 I'm all in favor of the mediation.

2 MS. AHARI: No, understood, but that's -- I mean
3 that's kind of the circumstances where we find ourselves
4 today. The process is continuing. Everybody is fighting
5 over the same money. You know, you can't give it out twice.

6 THE COURT: Well not everybody is fighting about
7 -- with respect to the E&O policy the individuals on the one
8 hand and the debtor entities on the other are fights over
9 the same pot of money, and if it were determined that the
10 losses exceed \$150 million there's not enough insurance to
11 go around.

12 With respect to the D&O policies, because of your
13 argument, which seems to me to have some traction with me,
14 that the debtors -- the policy proceeds are not property of
15 the estate. Once that's -- once -- if I were to determine
16 that, I think I made that clear in my initial opinion, if
17 the debtors have no interest in proceeds as property of the
18 estate it's not for me to control what defense costs are
19 being expended from the D&O policies. Okay.

20 My problem comes around with Mr. Doody's clients,
21 the E&O policies as to which there is entity coverage, there
22 is no priority payments provision, they are fighting about a
23 pot that may or may not be enough, and that's what -- that's
24 what's on my mind, okay? It may make it -- I don't know if
25 it makes it easier or harder for you, but -- because you're

1 representing the D&O carriers, and I understand and I think
2 I commented on this, I didn't know the precise line up, but
3 I said in the earlier opinion that many of the insurers
4 overlap, they're in both towers.

5 MS. AHARI: Correct.

6 THE COURT: Anything else you wanted to add?

7 MS. AHARI: No, Your Honor.

8 THE COURT: Okay. Thank you very much.

9 MS. AHARI: Thank you.

10 Mr. Kobak, are you going to --

11 MR. KOBAK: Good afternoon, Your Honor, James
12 Kobak, Hughes Hubbard & Reed for the SIPC Trustee.

13 Your Honor, first of all it was --

14 THE COURT: Is it MFGI that filed the claim
15 against the E&O?

16 MR. KOBAK: We filed the claim against the E&O.
17 We did it originally back at the time -- I can't remember if
18 it was before your decision or afterwards, but it was right
19 around the time of the Sapere issue.

20 Subsequent to that we filed additional letters
21 providing more information and asking some of the same
22 questions Your Honor asked about, you know, why we have a
23 claim, when are you going to act on your claim, and we've
24 never been able to get a real answer to that.

25 THE COURT: I haven't had an answer about it today

1 either.

2 MR. KOBAK: No, they didn't, Your Honor. And
3 again, like everyone else we were hoping that would be
4 addressed in the mediation.

5 As far as I'm aware I don't know what others --

6 THE COURT: I don't want to know what went on in
7 mediation.

8 MR. KOBAK: Well, I -- as far as we know -- I know
9 -- as far as we're concerned there's really nothing
10 happening at this point in the mediation.

11 The proceeding today has been useful because
12 frankly we didn't have the information about these costs,
13 what they were for, what different groups have been paid,
14 exactly how the defendants -- how the insurers were whacking
15 up the defense costs, and that's very helpful to us.

16 I understood that today's proceeding was really
17 about Mr. Aufses' request to have the soft cap increased
18 from 30 million to 40 million. We were reluctant, but we
19 agreed long ago to that and we haven't changed our position.

20 I think if we're going to go beyond that we would
21 like an opportunity to fully brief and address the question
22 of ownership of the policy -- policy proceeds and also have
23 some say in how defense costs ought to be allocated between
24 the two policies. Because if it turns out that we have
25 claims to proceeds under the E&O policy but not under the

1 D&O policy or not as good a claim under the D&O policy we
2 obviously would have an interest in which policy was funding
3 some of those costs. And we might not have the only
4 relevant interest, but it would certainly be something to be
5 weighed.

6 So I think if Your Honor is prepared to address
7 the issue of going beyond the soft cap either on the ground
8 that there's no jurisdiction over the policy proceeds in the
9 case of the one policy or in response to a request to raise
10 the limit or not have a limit with respect to the E&O I
11 respectfully think we'd like to have a change fully to
12 address it.

13 THE COURT: Well look, when I entered the order
14 scheduling today's hearing with no decision yet from the
15 Second Circuit I said that was what -- when the proposed
16 stipulation was presented to me some time ago I said I
17 wasn't going to do anything until the Second Circuit
18 decided. I scheduled this hearing and lo and behold the
19 Second Circuit decided it today.

20 I'm certainly -- I didn't say that the Court was
21 going to decide today whether -- or I didn't have the
22 parties to address whether proceeds from the D&O policy are
23 property of the estate, it doesn't seem that they are, but
24 that issue -- I didn't specifically tell the parties to
25 address the issue.

1 I'm not all that anxious to have this keep coming
2 back either, but nevertheless.

3 MR. KOBAK: I would like to respond --

4 THE COURT: Could you --

5 MR. KOBAK: Yeah.

6 THE COURT: What do you believe the procedure is
7 supposed to be with E&O carriers for determining whether to
8 allow all or a portion of the MFGI claim?

9 MR. KOBAK: We submitted a claim, we've
10 subsequently supplemented it, we provided a lot of
11 information. We thought -- we think that we've complied
12 with the procedures under the policy, it's not very clear
13 what that procedure is, but we've certainly provided
14 information, tried to specify what our claim is. It's
15 clearly a claim that's far above the maximum policy limits
16 no matter how you calculate it, and we -- so I think we've
17 done everything that we could do.

18 We have not gotten a clear answer from the
19 insurer, we were hoping this is something we could settle or
20 mediate along with everything else and not have to start a
21 coverage action or a declaratory judgment action, and we'd
22 still like to resolve it out of court and not spend more of
23 the estate's money pursuing things like this if we can, but
24 it may be that we have no alternative if we can't get a
25 clear answer.

1 THE COURT: Sounds to me you're not going to get
2 an answer until all litigation is over is what I was hearing
3 Mr. Doody say. There's certainly nothing in the policies to
4 suggest that that's the appropriate procedure.

5 New York has a -- New York State law has a rather
6 limited view of bad faith actions against insurance
7 companies unlike some other states, but New York is quite
8 restrictive about that, but I didn't see anything in the
9 policies that says that the insurers are entitled to wait
10 till everything is resolved.

11 I mean it did seem to me the questions I asked
12 hypothetically of the other side that you -- MFGI may be
13 entitled to recover under the policies even if Mr. Corzine
14 or any of the other individual defendants are found not to
15 be liable.

16 MR. KOBAK: That's certainly our view, Your Honor,
17 and that's certainly the position -- we've taken the
18 position that there's already a covered loss under this
19 policy and it can't reasonably be disputed.

20 THE COURT: Well the fact that you have a
21 548 million shortfall doesn't mean you have a covered loss.

22 MR. KOBAK: Well we think we do have a covered
23 loss within the wording of the policy.

24 I do want to respond to the comment that was made
25 about trying to bury the defendants in documents.

1 I think as Your Honor knows the reason that we
2 made the motion that we made was to reduce cost to the
3 estate. We're talking about systems that the estate has no
4 real need for anymore given the progress that we've made in
5 the liquidation. It really had nothing to do -- we don't
6 think that the information on those systems or a lot of the
7 information that the defendants have asked us for are of any
8 relevance. So it's not a question of trying to bury them in
9 things.

10 THE COURT: So why don't you all go to Judge
11 Francis, and I'm not going to -- I have made this clear --
12 I'm not going regulate the scope of discovery in the
13 District Court actions. My understanding is that Judge
14 Francis is doing that, and I think I indicated before one of
15 the other hearings judge -- and I haven't spoken to Judge
16 Francis in quite some time now. I did at the time of the
17 issue about the decommissioning the computer systems and I
18 disclosed that to everybody, and you know, I sent Judge
19 Francis a copy of the order that I entered when I entered
20 it.

21 And, you know, if one side or the other thinks
22 that there's too much or not enough discovery in the
23 District Court action that's who you ought to be talking to.

24 And by denying without prejudice your motion to
25 decommission the computer systems I wasn't suggesting for a

1 moment that decommissioning those systems was not fully
2 appropriate in the circumstances. That's why I directed you
3 meet and confer and try and resolve all of those issues.
4 And, you know, Judge Francis is quite expert in dealing with
5 electronic discovery, okay? And that's who you ought to be
6 going to see.

7 I'm not going to interfere in any way. The only
8 thing that I may do or reserve the right to do in slightly
9 different circumstances, I did it in ResCap with respect to
10 discovery from ResCap by FHFA, I made clear that, you know,
11 it wasn't going to be the debtor that paid for the
12 discovery, and I cited that opinion when I --

13 MR. KOBAK: Yes.

14 THE COURT: -- you know, previously ruled.

15 You know, the clock I set on decommissioning the
16 -- on discovery is running rapidly, and I'm glad you've got
17 another -- that you've met and you've got another meeting
18 scheduled, but you better get on with it.

19 MR. KOBAK: Well, Your Honor, we have standing
20 offers, we've talked to them many times, come down, we'll
21 show -- give you demonstrations, we'll talk to your people.
22 On our side we want to do everything we can to turn off
23 these expenses if we can.

24 THE COURT: The other side of that is they
25 shouldn't be starved from being able to pay their experts

1 and consultants for doing that. Okay.

2 In the one part of this, you know, particularly
3 now that Mr. Giddens' claims against officers and directors
4 has been assigned to the customer representative, you know,
5 I tried to make clear before I was not going to let the
6 plaintiffs in the District Court litigation tie the
7 defendants' hands behind their backs by saying they
8 shouldn't be, you know, permitted to be -- to have advanced
9 or reimbursed costs -- attorneys' and costs.

10 Clearly put, you know, they have to have experts
11 to work and consult with respect to ESI, and under the
12 policies I believe they're entitled to that. Now which
13 tower pays may be a different issue.

14 MR. KOBAK: Yeah, the problem I think, Your Honor,
15 is that until today even today we have very little insight
16 into what they have spent money on, what they propose to
17 spend money on --

18 THE COURT: Well you don't get to -- you don't get
19 to review their fee applications, and I don't want to review
20 them.

21 MR. KOBAK: But it would be very helpful to us to
22 know what's being spent on the E&O side, what's being spent
23 on the D&O side --

24 THE COURT: Well, Ms. Ahari gave you a lot of
25 figures.

1 MR. KOBAK: -- how they're proposing to spend
2 things -- to split things in the future. Without getting
3 into what they may be spending for it would be very useful
4 for us to know that.

5 And as I've said, if we could have -- if they want
6 to go forward and lift the cap or have a more generous cap I
7 think we ought to just have an opportunity to fully address
8 that. Both our rights under the policy and how the expenses
9 ought to be allocated.

10 THE COURT: In my earlier opinion I left it to the
11 E&O insurers and the D&O insurers to work out how
12 advancement or reimbursement was going to be split.
13 Ms. Ahari has provided some explanation of not how they
14 arrived at that formula, but what they've -- what they've --
15 how its worked so far. What you're not entitled to do is
16 obtain attorney/client privileged information with respect
17 to what each of the firms --

18 MR. KOBAK: No, I --

19 THE COURT: -- has done.

20 MR. KOBAK: -- I appreciate that, but I think we
21 would -- we should be heard on should the allocation be
22 60/40, should it be 70/30, should it be 80/20, what's an
23 appropriate thing giving due regard to all the interests
24 that are at stake in those policies.

25 THE COURT: Okay. What else do you want to say?

1 MR. KOBAK: I have nothing else, Your Honor --

2 THE COURT: Okay.

3 MR. KOBAK: -- unless you have questions.

4 THE COURT: None from me.

5 MR. KOBAK: Thank you.

6 THE COURT: Mr. Bennett?

7 MR. BENNETT: Good afternoon, Your Honor.

8 THE COURT: You have to make your appearance,
9 Mr. Bennett.

10 MR. BENNETT: Good afternoon, Your Honor, Bruce
11 Bennett of Jones Day on behalf of MFGH and its subsidiaries.

12 This is a little bit more complicated I think than
13 -- than it's already been described so let me add a little
14 complication and then propose how I think this should come
15 out.

16 First of all with respect to the E&O policy it's
17 not only MFGI that has submitted a claim -- what we call a
18 claim -- MFGH did as well.

19 THE COURT: That wasn't clear to me from the
20 correspondence, again.

21 MR. BENNETT: Okay. So that has happened. And --

22 THE COURT: How much is your claim for?

23 MR. BENNETT: It's the same -- it's essentially
24 the same order of magnitude as the claim that was asserted
25 by MFGI. And we fully understand that there can't be

1 duplication and at the end of the day that has to be worked
2 out.

3 THE COURT: That's on the E&O policy.

4 MR. BENNETT: That's on the E&O policy.

5 Now a couple of comments with respect to this.

6 As I think Your Honor detected from Mr. Kobak's
7 remarks about earlier we've never gotten a response to those
8 claims other than to say we need more information in order
9 to make a determination.

10 There was one very interesting point that was made
11 today by counsel for the insurance carriers on the E&O side.
12 He said that they believe they've received one claim,
13 because all these things arise out of the same transactions
14 and occurrences.

15 And so what I think is happening is they've
16 received one claim and they've elected to process and pay
17 parts of it and they've elected not to process the other
18 part at all, and frankly I think that's a big problem.

19 THE COURT: The part that they've agreed to
20 process is the advancement of legal fees by the individual
21 officers and directors.

22 MR. BENNETT: That's correct. That's what it
23 sounds like to me is going on.

24 THE COURT: You know, but -- you know, the way I
25 read the policies they don't have to determine whether the

1 officers and directors are liable on the claims that have
2 been asserted against them for the officers and directors to
3 be entitled to advancement or reimbursement. Whereas the
4 entities in order to be entitled to reimbursement doesn't
5 have to be a determination -- not through litigation or
6 arbitration necessarily -- but a determination is required
7 to provide coverage. This is not a question of advancement
8 or reimbursement of legal fees.

9 MR. BENNETT: Okay. First of all to -- there's a
10 couple steps to this.

11 To the insurance company the two claims are just
12 claims under the policy. Fees are covered and losses are
13 covered. The two companies --

14 THE COURT: Losses from certain -- for certain
15 reasons are covered.

16 MR. BENNETT: Losses as defined.

17 THE COURT: Not losses -- and the fact that, you
18 know, MFGI could have lost a billion dollars, just because
19 it lost a billion dollars that wouldn't provide coverage
20 under the policies.

21 MR. BENNETT: I'm not arguing we don't have to
22 meet the requirements of the policy. There are requirements
23 applicable to losses, they are requirements applicable to
24 losses that are fees. By the way fees are losses, they're
25 just a separate kind.

1 So people who submit claims under the E&O policy
2 that are claims for fees are making a claim for a certain
3 kind of loss, the other insureds, MFGI and MFGH, are also
4 making a different claim for loss that also has
5 requirements.

6 For better or for worse the insurance companies
7 decided we're going figure out whether these claims for fees
8 meet the requirements, but we're intentionally not making
9 any determination with respect to whether or not these other
10 claims meet the requirements, we're going wait and see what
11 happens in litigation frankly on other claims.

12 Okay. I think there's a problem there, and
13 frankly I think something in one of the insurers I think
14 paper where is they stated that the insurance companies
15 admit they have an obligation to look at all the claims and
16 make reserves as appropriate, and here they've said we've
17 got one claim, they're treating it as one claim, they're
18 progressing and paying one part of it, and they're frankly
19 not processing the other part.

20 So I don't think we should deal with E&O today
21 because I learned some information sitting here, but I think
22 you may be getting a motion from the insureds, MFGI and
23 MFGI, or some form of complaint or something to deal with
24 this particular issue, because I think facts are starting to
25 come out and I think frankly there is no basis for the E&O

1 policy to making any payments to anybody right now because
2 they sound like they stood up here and admitted they've got
3 all these claims, they don't know enough to make an
4 appropriate reserve for the claims by MFGH and MFGI because
5 they're waiting for outcomes, and if they can't make an
6 appropriate reserve they can't be making payments on
7 competing losses.

8 So while I --

9 THE COURT: I didn't understand them to make that
10 argument.

11 MR. BENNETT: Well frankly we should have it
12 framed by pleadings and see exactly what argument they're
13 making and we will hopefully have the benefit of the
14 transcript of today's hearing as part of that.

15 THE COURT: Well, I think my decision in April
16 2012 resolved the issue as far as I'm concerned of whether
17 the insureds -- the individual insureds are entitled to
18 advancement or reimbursement of defense costs.

19 You may disagree, the time to appeal that decision
20 has long since run, there was an appeal, it's now -- it was
21 affirmed in the District Court and dismissed by the Second
22 Circuit today.

23 Okay. The individual defendants don't wait until
24 the end of the litigation to find out whether they're going
25 get advancement or reimbursement of defense costs and you're

1 just wrong. I may -- you know, I may be wrong --

2 MR. BENNETT: Your Honor, I'm not disagree with
3 your ruling, I'm not talking about the litigation that the
4 insureds are in. From the E&O tower perspective there are
5 just multiple claims that have been asserted against that
6 tower that two of which are not in litigation.

7 THE COURT: No but defense costs stand differently
8 under the policies than do reimbursement of other losses.

9 MR. BENNETT: Not this -- the -- certainly under
10 the policy defense costs to an insured who is defending a
11 claim by another that is also covered, those insurance --
12 those (indiscernible - 01:22:36) claims stand differently
13 than the covered events that are being litigated.

14 This is different. You have -- a whole bunch of
15 insureds have already submitted claims, two of them, MFGI
16 and MFGH, aren't in any litigation anywhere, they've just
17 said to the insurance company tell us if we're covered or
18 not and they've said we don't know yet. That's all they've
19 said.

20 So this is not -- I agree with you if the only
21 claim MFGI had here was if they -- if MFGI succeeded against
22 the individuals, the individuals would turn around to the
23 E&O policy and get money to pay the ultimate claim. I agree
24 with you, those stand -- the fee claim in that litigation
25 stands differently than the liability claim, and that policy

1 does say that, but here we have multiple claims, one that's
2 -- one subset of the claim is fees, the other subset of the
3 claim is losses by other insureds that are not fees, and
4 these all stand together.

5 THE COURT: They don't.

6 MR. BENNETT: Okay.

7 THE COURT: They don't. As simple as that. You
8 can disagree with me --

9 MR. BENNETT: Well, I don't think you decided that
10 issue previously --

11 THE COURT: -- they don't.

12 MR. BENNETT: -- and we may lose it the next time,
13 but I think we need to look at that and carefully examine it
14 because --

15 THE COURT: I think I decided that issue already.

16 MR. BENNETT: Okay.

17 Your Honor, with respect to the claims that the --
18 in the D&O policy it's also more complicated because --

19 THE COURT: Well, I want to know what -- I've
20 asked everybody else so I'll ask you the same thing. Are
21 proceeds of the D&O policies property of the debtor?

22 MR. BENNETT: I was about to add the complicating
23 factor which is that the insureds have filed indemnification
24 claims against many of the --

25 THE COURT: And you've not paid a penny and you're

1 not going to pay a penny.

2 MR. BENNETT: Well, if the --

3 THE COURT: If and when -- if you pay a penny on
4 indemnification claims, fine, you have a claim under the
5 D&O. Are you going pay any of the indemnification claims?

6 MR. BENNETT: Your Honor, I hope not. We intend
7 to object to them, but there remains today the possibility
8 that we will. So what I'm saying is it's not entirely -- it
9 is clear that the arguments were made for you --

10 THE COURT: Every dollar that they get reimbursed
11 on their defense costs from the policies is \$1 less on
12 indemnity claims.

13 MR. BENNETT: I agree with -- I agree with that as
14 well, but I'm still dealing with unliquidated multiple
15 indemnification claims, and they'll be coming to you
16 relatively shortly so we'll see how they get sorted out.
17 But they are not quite at the procedural stage that exists
18 with respect to the securities claims.

19 THE COURT: Okay. Other than potential indemnity
20 claims or defense costs from the officers and directors are
21 policy proceeds from the D&O policies property of the
22 estates?

23 MR. BENNETT: They're not except for that point,
24 Your Honor.

25 THE COURT: Okay.

1 MR. BENNETT: But that point is still alive.

2 THE COURT: So to the extent that they are able to
3 recover defense costs from the D&O policies dollar for
4 dollar it reduces or eliminates any potential indemnity
5 claim, correct?

6 MR. BENNETT: That's correct.

7 THE COURT: Okay. So the estate is not harmed at
8 all when the officers and directors are permitted to recover
9 their defense costs under the policies, correct?

10 MR. BENNETT: That's not necessarily true, because
11 where the situation we sit currently is that they continue
12 to recover under the policies run out and then turn around
13 and say to the company we still want more.

14 THE COURT: It's 225 million of D&O --

15 MR. BENNETT: It's a long way away, but it is not
16 a --

17 THE COURT: Okay.

18 MR. BENNETT: -- it is not something that that's
19 been completely resolved.

20 THE COURT: All right, let's be real, okay?

21 MR. BENNETT: I'm hope -- Your Honor, given that
22 44 million has been spent already and discovery hasn't even
23 really started yet I'm trying to stay real.

24 I want to make one other point about this whole
25 process.

1 First of all the point has been made that this is
2 about whether the attorneys' fees are reasonable, and under
3 these policies that are supposed to be paid are reasonable
4 fees.

5 I know Your Honor doesn't want to be looking at
6 these bills, but I didn't -- in all of the discussion about
7 all of the careful process that's been going on the here I
8 didn't hear that a single insured is getting these bills and
9 understanding what's happening to their policies. There are
10 -- there are --

11 THE COURT: You know, I'm going interrupt you with
12 a little story, because when I was in practice I had the
13 very unenviable circumstance of representing the two most
14 senior officers of a company with what they thought was a
15 lot of D&O insurance, and because one of the insurers in the
16 tower became insolvent and there was no drop-down clause in
17 the policies and there were a whole slew of insureds
18 represented by others the case reached the point where other
19 than a \$20 million gap caused by this insolvency there was
20 no insurance with raging litigation still going on.

21 And so for individual officers and directors they
22 ought to be careful before they take too much comfort in the
23 fact that they think there's a lot of insurance, because you
24 could find yourself in a position of not having any
25 insurance or having too much of it exhausted and then new

1 judgments entered. So no one should think that, you know,
2 when the Court says no blank check that doesn't affect each
3 and every one of the individuals.

4 Having been through that that doesn't affect my
5 decision here, because that wasn't, you know, that was
6 consistent with the law, but everybody ought to be real
7 about it what the potential sequences of blowing through
8 lots of insurance are.

9 Go ahead, Mr. Bennett.

10 MR. BENNETT: Your Honor, I don't have anything
11 more. I too understood that we were talking about the
12 \$10 million. I know it's not enough anymore and another
13 request is coming.

14 Your Honor, our position at the last time was that
15 we had inherited a position supporting the \$10 million
16 increase but we said it should be a hard cap this time.

17 THE COURT: I'm not imposing a hard cap.

18 MR. BENNETT: I understand that.

19 THE COURT: I don't even have authority to impose
20 a hard cap.

21 MR. BENNETT: But we believe that for the good of
22 this case and if anyone thinks a settlement is ever going to
23 be possible using predominantly insurance something has to
24 be done.

25 Thank you, Your Honor.

1 THE COURT: Thank you. Anybody else wish to be
2 heard?

3 MR. ENTWISTLE: Good afternoon, Your Honor, Andrew
4 Entwistle, Entwistle & Cappucci for the customers. I'll try
5 and be brief and just hit a couple points.

6 THE COURT: Could you tell me what is your claim
7 on the D&O? I read your letter and I don't understand what
8 the customers' claim on the D&O policy is.

9 MR. ENTWISTLE: The customers can claims that are
10 in the -- really in the District Court and not here.

11 THE COURT: I know that, but --

12 MR. ENTWISTLE: And they're claims that --

13 THE COURT: -- what's the claim under the D&O?

14 MR. ENTWISTLE: We've got claims that have been
15 assigned that we believe go against individuals that are
16 covered claims, both assigned and direct claims. We think
17 they're covered. We agree with Your Honor that other than
18 the indemnification issue, which you've spoken about at
19 length, that the proceeds of the D&O are not --

20 THE COURT: All right.

21 MR. ENTWISTLE: -- are not property of the estate,
22 though the policies are.

23 On the E&O of course we come down on the same side
24 as the Court. We believe those proceeds are property of the
25 estate. We're obviously --

1 THE COURT: Well they may be. Right now there's,
2 you know -- there's no -- you said in your letter, you used
3 the 548.5 million I think was the figure you used, no one
4 has disputed it, it's somewhere in that neighborhood. The
5 fact that the debtors are out that much money doesn't mean
6 that that's a covered loss. Do you agree with that? It may
7 be one important step but it's not the determinative fact.

8 MR. ENTWISTLE: To the extent that the
9 determination that Your Honor made regarding the amount of
10 the shortfall in the prior proceedings does not in and of
11 itself constitute a finding that that amount of shortfall or
12 loss is in fact a covered loss.

13 THE COURT: Okay.

14 MR. ENTWISTLE: However we're making the point
15 that number one the loss -- the amount of the loss has been
16 determined subject to possible future claw back from other
17 sources, but it's never going to get all the way down here.
18 Certainly it's always going to dwarf the E&O and likely the
19 D&O as well combined; number one.

20 And number two it's our view that it does in fact
21 meet the requirements of a covered loss under the policy and
22 that's the policy that's been taken in the demand letter
23 that was sent by MFGI recently to the carriers. It's the
24 position they've never responded to, and in that regard
25 that's the issue.

1 Your Honor is right, I've done a lot of coverage
2 work on behalf of carriers, I've looked at it on the other
3 side. When you're dealing with E&O coverage there doesn't
4 need to be any adjudication out of any liability by anyone.
5 On the one hand if you've got insureds that need to have a
6 defense cost advance you advance them. You're right that
7 the language that was quoted is not a priority of payments
8 clause. The use of the word prior simply means it's a
9 temporal reference, it just means you're going to advance
10 defense costs until there's ultimately an adjudication one
11 way or the other. It just sort of defines the scope of the
12 advance, it's not priority at all. Your Honor is completely
13 correct about that.

14 And when we deal with E&O once the claim is made,
15 you know, as long as it's a covered loss there's an absolute
16 obligation to indemnify the covered loss. That's the whole
17 purpose of E&O coverage.

18 So while there is yet a final adjudication
19 anywhere that it is a covered loss we also don't have a
20 response from the carriers that it isn't a covered loss, and
21 I suspect that quickly if that doesn't happen one way or the
22 other that we're going end up back before Your Honor
23 litigating that coverage issue in this court to the extent
24 they raise a coverage defense so that we can get the -- you
25 know, we can stop the wasting of these policies and get the

1 proceeds allocated appropriately.

2 THE COURT: Well you say wasting of policies, but
3 the individual officers and directors, people who are not
4 defendants, there was insurance in place to protect them and
5 they were insureds, they're entitled to coverage under the
6 policies.

7 With respect to the E&O policies where there are
8 competing claims and the proceed -- the policies are
9 probably not going to be enough that's the issue I struggle
10 with with respect to the E&O policies.

11 With respect to the D&O policies I understand
12 Mr. Bennett's argument today, I don't have a lot of -- it's
13 not gaining a lot of traction with me, but I'm not deciding
14 the issue today.

15 Okay. The point I made that every dollar
16 reimbursed for advancement -- or pay for advancement or
17 reimbursement of legal fees under the D&O policies dollar
18 for dollar is that much less of potential claim for
19 indemnity.

20 So I don't see any harm to MFGH when defense costs
21 are advanced or reimbursed under the D&O policies.

22 MR. ENTWISTLE: I think that's right, Your Honor.

23 On the E&O piece though I think one point Mr.
24 Bennett eluded to with regard to the fact that at a minimum
25 there are competing claims there for what limited coverage

1 there is remaining under the E&O policy. The carrier has
2 made a determination and Your Honor aptly observed that
3 they're the same carriers on both towers. Those carriers
4 have somehow come up with a formula of 60/40, you know,
5 roughly in terms of allocation. Their obviously do so at
6 their peril subject to the ultimate resolution of where
7 those policy appropriates are appropriately paid,
8 understanding that there is no real priority of payment,
9 there's a competition for the same dollars.

10 But I think that our sort of larger point related
11 to the E&O coverage is that from our point of view the
12 issues related to the need to indemnify what we believe is a
13 covered loss are really right for adjudication here. Not
14 today obviously. But if they are not resolved --

15 THE COURT: Be careful -- careful what you ask
16 for, because --

17 MR. ENTWISTLE: Well, if they're not resolved
18 outside --

19 THE COURT: What do the policies provide for in
20 the event of a dispute between the insures and the insureds
21 -- insurer and the insureds for resolving such issues, do
22 you know?

23 MR. ENTWISTLE: We're going to have to litigate
24 the issue, Your Honor.

25 THE COURT: And what do the policies provide,

1 arbitration?

2 MR. ENTWISTLE: I believe it's litigation, I don't
3 believe it's arbitration.

4 THE COURT: Okay.

5 MR. ENTWISTLE: And so I think we may end up, you
6 know, back here before Your Honor addressing those issues in
7 the not too distant future, but --

8 THE COURT: May I ask you this, Mr. Entwistle?

9 MR. ENTWISTLE: Yes.

10 THE COURT: What is your -- putting on your
11 practical hat -- what's your view with respect to the
12 3.735 million to the 38 individuals who are not now
13 defendants in any of the pending civil litigation and who
14 incurred lawyers' fees and expenses in connection with --

15 MR. ENTWISTLE: I'm glad you asked, Your Honor. I
16 think that those should be paid. I have no objection to
17 those being paid on behalf of the customers, I think they
18 should be -- should be paid.

19 You know, as part of whatever Your Honor does with
20 the soft cap here I think those more than any should be
21 paid. Most of those folks were never sued, the few that
22 were sued have now been dismissed regardless of the merit or
23 lack of merit of those claims, they're all out of the case
24 here, they're clearly not the core parties, they were never
25 core parties here for the most part and I think that, you

1 know, that their expenses should be -- certainly be
2 reimbursed, you know, and paid. I don't think that should
3 be an issue. And to the extent that wasn't clear from our
4 letter it should be clear here. We're not, you know,
5 holding that back at all.

6 On the issue of the fees and expenses, you know,
7 obviously they do need to be advanced, there is a coverage
8 right under the policies, there's a right to advance two
9 covered persons here under both policies, but we -- you
10 know, we had pointed out before that we think there should
11 be something else in the process. We don't -- obviously we
12 can't say --

13 THE COURT: It isn't going to be you deciding
14 that.

15 MR. ENTWISTLE: -- anybody else and we don't want
16 us to be us even if it could be, but --

17 THE COURT: Well you probably wanted it to be.

18 MR. ENTWISTLE: Well, I don't really want it.
19 Your Honor, I think we can pretty much see what they're
20 doing, right, I mean it's -- you know, we're confronting
21 motions and applications and whatnot on a fairly regular
22 basis, we understand where they -- the trajectory of the
23 case is, but I think that having a TPA in place or something
24 like that to assure that we put some brakes on and it isn't
25 a blank check here, especially on the D&O -- on the E&O side

1 would be a good thing, and it's been done in lots of cases
2 and in lots of circumstances. It takes a burden off the
3 Court, I think to some extent it takes a burden off the
4 carriers, and I think it's a benefit actually to the
5 individual insureds themselves because it assures that the
6 maximum amount of policy proceeds will be available to
7 resolve this case at the end of the day when we get there
8 one way or the other in either circumstance.

9 And so I sort of would like to leave the Court
10 with that suggestion, especially understanding that we're
11 going to be apparently coming back for some other
12 application in short order. I'm not really sure why it's
13 been broken up into the stip -- the prior stip and then
14 knowing that we need --

15 THE COURT: Well it's been broken up because I,
16 you know, what was presented was a prior stipulation, I
17 refused to approve it at the time pending the decision of
18 the Second Circuit. They decided today and I have a
19 proposed stipulation in front of me that would increase the
20 cap by \$10 million. That's what's before me today, no one
21 else has filed any other motion. I have the correspondence,
22 but that's what I have before me.

23 MR. ENTWISTLE: And I think, Your Honor, just
24 again putting on my practical hat, I think that if we're
25 going to be addressing those issues here from what I heard

1 the \$10 million stip does not cover the individual -- the
2 individuals.

3 THE COURT: Look, I'm concerned -- it doesn't,
4 okay, it obviously -- I'll accept the representation that
5 the amounts that have been billed to the insurers exceed the
6 \$40 million.

7 I'm certainly also mindful of Mr. Aufses'
8 representations about how much of the 40 plus million was in
9 connection with investigations and how much since litigation
10 commenced, but the numbers -- the absolute numbers are
11 fairly staggering at this stage.

12 Anything else you want to add?

13 MR. ENTWISTLE: With regard to the individual --
14 the 3.7 million my only thought today was that, you know, we
15 would agree that if the request was deemed to be modified to
16 include that 3.7- then --

17 THE COURT: Well here's what I think --

18 MR. ENTWISTLE: -- it could be done.

19 THE COURT: -- so everybody -- I'm going to give
20 everybody a chance to address it is that I'm inclined to
21 approve the increase of \$10 million and cap but separately
22 approve the reimbursement of the 3.735 million to counsel
23 for the -- the individuals who are no longer -- either never
24 were, are no longer parties to the litigation.

25 MR. ENTEWISTLE: And we would agree to that, Your

1 Honor.

2 THE COURT: All right.

3 Mr. Kobak, what's your view on that last point?

4 We didn't discuss it when you were --

5 MR. KOBAK: Yes, we'd agree also, Your Honor.

6 THE COURT: Okay. Mr. Bennett?

7 MR. BENNETT: No objection.

8 THE COURT: Okay. Mr. Aufses, did you want to
9 respond?

10 MR. ENTWISTLE: I've got nothing else. Thank you,
11 Your Honor, for your time.

12 THE COURT: Thank you very much, Mr. Entwistle.

13 MR. AUFSES: We would just ask Your Honor that
14 would the Court then grant the full amount of the
15 outstanding bills which would be roughly 13 million?

16 THE COURT: No, what I've been asked to approve is
17 the \$10 million -- I've already -- if I do what I just
18 suggested I'm already increasing 10 million to
19 13.735 million. It may leave you a little short for now.

20 Look, I'm -- however you all got there I'm not
21 questioning it, but you've spent -- maybe I am -- you spent
22 a lot of money.

23 I thought when I set the 30 million cap I was
24 building in plenty of cushion if not get you to the end of
25 the day but get you very far, instead it got you to the

1 start of discovery, and you can argue all you want, I find
2 it -- I was startled when I heard it, I'm still startled by
3 it. But now you've gotten to the discovery in the ESI in
4 particular there you've got consultants, and you know, I
5 required that discovery of ESI from MFGI take place quickly
6 and I mean it. So you better work this out. And to the
7 extent you have disputes about the scope of discovery you
8 all go back to magistrate Judge Francis.

9 I've expressed my concern and I'm not resolving
10 the issue today about the E&O policies, I'm not anxious to
11 have this land back in my lap a month from now, so what I
12 expect Mr. Bennett and Mr. Kobak is that you're going to try
13 -- look, I'm approving an increase in the soft cap to
14 \$40 million, that's essentially the stipulation that I have
15 before me, with the modification that I'm approving the
16 additional payment that was approximately -- I don't know if
17 that was the exact figure -- 3.735 million to counsel for
18 fees and expenses for those who are not parties to the
19 pending litigation, you know, we'll work out the precise
20 number. But you need to try and see if you can work out a
21 stipulation that'll accomplish a couple of things.

22 It would be my strong preference, if possible, you
23 avoid having to come back here on another contested matter
24 about how much more should be approved for advancement or
25 reimbursement of attorneys' fees, costs, that includes

1 experts, et cetera. I think that you ought to be including
2 Ms. Ahari and Mr. Doody in these discussions about the
3 allocation between the two towers, and if you can't resolve
4 -- and you probably can't resolve it now -- that somehow you
5 build in a reservation of rights that makes clear that
6 whatever the split is now it's subject to whatever rights
7 the debtors have in arguing that the allocation was
8 inappropriate. Just a thought, I'm not putting it in the
9 language, but -- and you may or may not -- you really ought
10 to try and get that resolved, okay?

11 Judge Muraro and Judge Francis are going to have
12 very little patience with any of you if the argument is,
13 well, judge, we just don't have enough money to do the
14 discovery. Well, you know, work out what the discovery
15 should be.

16 I'm going to -- if necessary if another motion is
17 presented, whether it's a motion or cross-motions, I've
18 already said I have real doubts whether any of the proceeds
19 of the D&O policies are property of the estate, and in the
20 absence of that I don't have control over it and I don't
21 intend to assert control over it.

22 And I find it for the reasons I've already said
23 not persuasive that well if the debtor is paying indemnity
24 that's reimbursable under the policy and then the insureds
25 are saying, no, we want the payment from the insured.

1 So for today what I'm deciding is that
2 (indiscernible - 01:46:38) represent the stipulation with
3 the current date, the soft cap is increased by \$10 million,
4 modified to provide for payment to 38 -- counsel for the 38
5 individuals. Does that -- Ms. Ahari, I think you were the
6 one who told me that it was Mr. Kay represented 25 and there
7 were an additional 13. Is that -- are there stragglers
8 hanging out there?

9 MS. AHARI: There are the 25 in Mr. Kay's letter
10 plus the 13 --

11 THE COURT: Thirteen. That's what we're talking
12 about.

13 MS. AHARI: -- out there. Right.

14 THE COURT: Okay, all right.

15 MS. AHARI: So it's 2.8- plus about 800,000 on top
16 of it.

17 THE COURT: Okay. Well while you're up there let
18 me ask you this. The defendants are not going to have to
19 reveal attorney/client privilege information in any
20 discussions with the debtors and I've made that clear
21 before. Are you prepared with them or alone to discuss with
22 the debtors' counsel the allocation between E&O and D&O?

23 MS. AHARI: Just, you know, off the top of my head
24 I think we can discuss in general terms, you know, what's
25 potentially covered under the E&O versus the D&O versus

1 what's potentially covered under both.

2 THE COURT: Okay.

3 MS. AHARI: You know, so the numbers, I mean the
4 allocation only applies to defense costs that are
5 potentially covered under both policies.

6 THE COURT: Right.

7 MS. AHARI: So that's why, you know, as a
8 practical matter far more has been paid under the D&O than
9 just --

10 THE COURT: Have you had any discussions with
11 Mr. Kobak or his colleagues about this?

12 MS. AHARI: About allocation?

13 THE COURT: Yes.

14 MS. AHARI: No.

15 THE COURT: Okay. So you need -- I would
16 appreciate it if you did that, and obviously you're not
17 going to reveal attorney/client privilege information during
18 that, but I think there's a lot you can talk about and see
19 whether you can resolve these issues without having to come
20 back, okay?

21 MS. AHARI: Okay. Thank you.

22 THE COURT: All right.

23 Anything else that anybody else wants to raise for
24 today? Yes, Mr. Doody?

25 MR. DOODY: Your Honor --

1 THE COURT: Come up to the microphone.

2 MR. DOODY: I'm sorry, Your Honor. Stephen Doody
3 for -- from Allen & Overy for MFGA .

4 Just a point of clarification. I believe when I
5 was answering the question about the one claim I was
6 answering the question with respect to MFGI having one
7 claim, not that there was no other claims out there, just to
8 clarify.

9 THE COURT: Let me -- let me -- I do want to
10 because I think Mr. Bennett interpreted it a different way.
11 So Mr. Bennett indicated that MFGH also submitted a claim.
12 Is it -- do you know about that?

13 MR. DOODY: I believe that's correct. I don't
14 have hard facts with me, but I believe that's correct.

15 THE COURT: So when you say there's one claim tell
16 me what you mean by one claim.

17 MR. DOODY: What I'm referring to, Your Honor, is
18 under the policy the various claims that come out of the
19 events that led to the eventual failure of MFGA are all
20 considered a single occurrence in that sense.

21 THE COURT: Okay. Am I correct that you're not
22 lumping together as a single claim the individual officers
23 and directors request, claim, call it what you will for
24 advancement or reimbursement of defense costs with whatever
25 MFGI and MFGH have submitted?

1 MR. DOODY: No, I'm not saying that, Your Honor.

2 THE COURT: Okay.

3 MR. DOODY: I just wanted to make that point of
4 clarification.

5 THE COURT: Okay. Now let me ask because I asked
6 this of Ms. Ahari. Are you prepared -- no, Mr. Doody stay
7 up there. I asked this of Ms. Ahari, she already answered
8 it. Are you prepared to meet with Mr. Kobak and Mr. Bennett
9 and I guess Mr. Entwistle I'll put in this category as well,
10 with respect to a discussion of the allocation between the
11 two towers, D&O and E&O?

12 MR. DOODY: We have no problem with that, Your
13 Honor.

14 THE COURT: Okay. Can you tell me do the E&O
15 policies have a dispute resolution procedure in the
16 policies?

17 MR. DOODY: I don't recall if they do. I'm pretty
18 sure that they do not have an arbitration provision.

19 THE COURT: Okay. All right.

20 Anything else you want to add?

21 MR. DOODY: No, Your Honor.

22 THE COURT: All right, thank you.

23 MR. DOODY: Thank you.

24 THE COURT: Anybody else have anything else they
25 want to add?

1 All right, so I've indicated what the disposition
2 is for today. And I really encourage you all to see whether
3 you can work this out without having to come back again.
4 Particularly Mr. Kobak, I'm not going allow the debtors or
5 the class representatives to leave the defendants without
6 the ability to defend themselves in litigation. That's what
7 insurance is about. I'm not going to allow them
8 particularly as to the E&O tower where there are competing
9 claims, I'm not going allow them to have a blank check
10 either, okay?

11 All right, we're adjourned.

12 (Whereupon these proceedings were concluded at 3:53 PM)

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.

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