Hearing Date: July 17, 2014 at 10:00 a.m. (Prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY OF THE PLAN ADMINISTRATOR TO DANIEL BRERETON'S RESPONSES IN OPPOSITION TO (A) PLAN ADMINISTRATOR'S FORTY-SEVENTH OMNIBUS OBJECTION SEEKING TO, IN PART, (1) SUBORDINATE AND RECLASSIFY AND (2) DISALLOW CERTAIN NON-DEBTOR EMPLOYEE CLAIMS AND (B) PLAN ADMINISTRATOR'S FORTY-EIGHTH OMNIBUS OBJECTION SEEKING TO SUBORDINATE AND RECLASSIFY CERTAIN CLAIMS

MF Global Holdings Ltd. ("**Holdings Ltd.**" or the "**Plan Administrator**"), the Plan Administrator under the *Second Amended and Restated Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code for MF Global Holdings Ltd., MF Global Finance USA Inc., MF Global Capital LLC, MF Global FX Clear LLC, MF Global Market Services LLC, and MF Global Holdings USA Inc.* (the "**Second Amended and Restated Plan**") [Docket No. 1382], hereby files this reply (the "**Reply**") to (a) *Daniel Brereton's Response in Opposition to the Plan Administrator's Forty-Seventh Omnibus Objection Seeking to, in Part, (1) Subordinate and Reclassify and (2) Disallow Certain Non-Debtor Employee Claims* [Docket No. 1878] and (b) *Daniel Brereton's Response in Opposition to the Plan Administrator's Forty-Eighth Omnibus Objection Seeking to Subordinate and Reclassify Certain Claims* [Docket No. 1879] (together, the "**Responses**"). In support of the Reply, the Plan Administrator respectfully states as follows:

PRELIMINARY STATEMENT

1. By filing its objections to Claim Nos. 1363 and 1359[1] filed by Daniel Brereton ("**Brereton**"), the Plan Administrator shifted the burden to Brereton to demonstrate that he has a valid claim against the Debtors. Brereton has not met and cannot meet that burden. The so-called second sign-on bonus portion of Claim No. 1363 (an award of restricted share units in respect of Holdings Ltd. common stock under a long term incentive plan) is merely a contingent equity interest, not a claim; the balance of Claim No. 1363, to the extent it is valid, is an obligation of a non-debtor affiliate (and not the Debtors). Claim No. 1359, the entire basis for which is the same sign-on bonus that is part of Claim No. 1363, likewise is merely a contingent equity interest, not a claim. Accordingly, the Court should (a) subordinate and reclassify the

[1] Unless otherwise indicated, references to Claim Nos. herein are to claim numbers listed on the official claims register maintained in the Debtors' chapter 11 cases by GCG, Inc., the Plan Administrator's claims and noticing agent.

second sign-on bonus portion of Claim No. 1363 and disallow and expunge the balance of the claim and (b) subordinate and reclassify Claim No. 1359 in its entirety.

BACKGROUND

2. On August 21, 2012, Brereton filed Claim No. 1363 against Holdings USA in the total amount of $899,833.24, consisting of (a) $145,833.24 in purported unpaid base salary, (b) a purported guaranteed incentive award in the amount of $250,000.00, (c) a so-called second sign-on bonus (the "**Second Sign-On Bonus**") in the amount of $500,000.00, and (d) $4,000.00 in purported unreimbursed employee expenses. On August 21, 2012, Brereton filed Claim No. 1359 against Holdings Ltd. in the amount of $500,000.00, the entire basis for which is the Second Sign-On Bonus.[2]

3. On April 11, 2014, the Plan Administrator filed the *Forty-Seventh Omnibus Objection of Plan Administrator Seeking to, in Part, (1) Subordinate and Reclassify and (2) Disallow Certain Non-Debtor Employee Claims* ("**Omni 47**") [Docket No. 1836], including Claim No. 1363, which seeks to subordinate and reclassify the Second Sign-On Bonus portion of Claim No. 1363 as a Class 9A Common Interest under the Second Amended and Restated Plan[3] and to disallow and expunge the balance of the claim because the Debtors' books and records reflect that Brereton was an employee of MFGI, a non-debtor affiliate (and not any of the Debtors). Also on April 11, 2014, the Plan Administrator filed the *Forty-Eighth Omnibus Objection of Plan Administrator Seeking to Subordinate and/or Reclassify Certain Claims* ("**Omni 48**") [Docket No. 1844], including Claim No. 1359, which seeks to subordinate and reclassify the entirety of such claim as a Class 9A Common Interest under the Second Amended

[2] Brereton asserts that $11,725.00 of each of Claim Nos. 1363 and 1359 is entitled to priority under section 507(a)(4) of the Bankruptcy Code; the balance of each of the claims is asserted as a general unsecured claim.
[3] Claim No. 1363 was filed against Holdings USA, but Holdings USA did not issue stock or have stockholders. Only Holdings Ltd. issued stock.

and Restated Plan.[4] On May 15, 2014, Brereton filed his two nearly identical Responses, one in opposition to Omni 47 and one in opposition to Omni 48.[5]

REPLY

4. A filed proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Section 502(b)(1) of the Bankruptcy Code provides, in relevant part, that a claim may not be allowed to the extent that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law…." 11 U.S.C. 502(b)(1).

5. If an objection refuting at least one of the claim's essential allegations is asserted, the claimant has the burden to demonstrate the validity of the claim. S*ee Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (2d Cir. B.A.P. 2000) ("[T]he objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim. . . . Once the [trustee] offered the evidence refuting the allegations in the proof of claim, the burden shifted to the [claimant]."); *In re Residential Capital, LLC*, 2014 WL 1414136, at *5 (Bankr. S.D.N.Y. April 10, 2014) ("In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. Once this is done, the burden then shifts back to the claimant to produce additional evidence to prove the validity of the claim by a preponderance of the evidence"); *In re Oneida Ltd.*, 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009), *aff'd sub nom., Peter J. Solomon Co., L.P. v. Oneida, Ltd.*, No. 09-cv-2229, 2010 U.S. Dist. LEXIS 6500 (S.D.N.Y. Jan. 22, 2010); *In re Rockefeller Ctr. Props.*, 272 B.R. 524, 539 (Bankr. S.D.N.Y. 2000), *aff'd sub nom., NBC v. Rockefeller Ctr. Props. (In re Rockefeller Ctr. Props)*, 266 B.R. 52 (S.D.N.Y. 2001), *aff'd*, 46 Fed. App'x 40 (2d Cir. 2002).

[4] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in Omni 47 and Omni 48.
[5] To the extent not already reserved in Omni 47 and Omni 48, the Plan Administrator reserves all of its rights to bring further objections to Claim Nos. 1363 and 1359 on any grounds, for any reason, regardless of the outcome of Omni 47 and Omni 48.

In short, the burden of persuasion is on the holder of a proof of claim to establish a valid claim against a debtor. *Feinberg v. Bank of N.Y. (In re Feinberg)*, 442 B.R. 215, 220-22 (Bankr. S.D.N.Y. 2010).

6. The Responses only address the Second Sign-On Bonus. Pursuant to Brereton's employment agreement, the Second Sign-On Bonus consists of an *award* under the MF Global Holdings Ltd. Amended and Restated 2007 Long Term Incentive Plan (the "**LTIP**").[6] The Plan Administrator seeks to subordinate and reclassify the Second Sign-On Bonus portion of Brereton's claims as a Class 9A Common Interest under the Second Amended and Restated Plan. The Omni 47 Response does not even address the disallowance portion of Omni 47. As noted, Omni 47 seeks to disallow $399,833.24 of Claim No. 1363 on the ground that the Debtors' books and records reflect that Brereton was an employee of MFGI, a non-debtor affiliate. Brereton filed a $399,000.00 claim against MFGI in the SIPA proceeding (SIPA Claim No. 500000173) (presumably for the same salary, incentive award and expenses set forth in Claim No. 1363 against Holdings USA) which was allowed as modified pursuant to an order of this Court in the reduced amount of $254,000.00 [SIPA Docket No. 8016].

7. The Second Sign-On Bonus was an award (the "**RSU Award**") of restricted share units ("**RSUs**") in respect of common stock of Holdings Ltd. pursuant to the terms and conditions of a Restricted Share Unit Award Agreement (the "**RSU Award Agreement**"), a copy of which is annexed as Exhibit B to the Responses. As set forth in the RSU Award Agreement, each RSU granted entitled the grantee to receive one share of Holdings Ltd. upon a certain vesting date or dates. In other words, each RSU corresponds to, and represents a contingent right to receive, a share of Holdings Ltd. upon vesting. Brereton's employment

[6] As noted, the Second Sign-On Bonus is included in both Claim No. 1363 against Holdings USA and Claim No. 1359 against Holdings Ltd.

agreement (the "**Employment Agreement**"), a copy of which is annexed as Exhibit A to the Responses, specifically states that the Second Sign-On Bonus constitutes an *award* or a *grant* under the LTIP, not a cash payment (in contrast to Brereton's first sign-on bonus under the Employment Agreement, which the agreement specifically states was to be paid in *cash*). The Debtors' Compensation Committee approved the Second Sign-On Bonus. The RSU Award Agreement provides that, *in the discretion of the Debtors' Compensation Committee*, Holdings Ltd. may deliver cash to the grantee in lieu of the delivery of shares of Holdings Ltd. *See* RSU Award Agreement, ¶ 4(b). Therefore, delivery of shares of Holdings Ltd. was the default option under the RSU Award Agreement; cash could be delivered to the grantee *in lieu* of shares *only in the Debtors' discretion*.[7] The Debtors' Compensation Committee did not determine to deliver cash in lieu of shares. Accordingly, Brereton's assertion -- throughout the Responses -- that the Second Sign-On Bonus was to be paid in RSUs/stock or cash is misleading.[8]

8. The threshold issue is whether Brereton has a claim or holds an interest with respect to the RSU Award. By filing Omni 47 and Omni 48, the Plan Administrator shifted the burden to Brereton to demonstrate that he has a valid claim. *See, e.g.*, *Reilly*, 245 B.R. at 768; *Residential Capital*, 2014 WL 1414136, at *5. As set forth below, Brereton has not met and cannot meet his burden of establishing that the RSU Award constitutes a claim against the Debtors. Brereton does not cite a single case supporting that proposition. The RSU Award is not a "claim" within the meaning of section 101(5) of the Bankruptcy Code, which provides that a "claim" is a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). Brereton does not have a "claim" under the Bankruptcy Code definition because he has no absolute "right to payment" (in

[7] Brereton admits this in paragraph 13 of the Responses.
[8] Nor have the Debtors (or the Plan Administrator) somehow conceded, as Brereton suggests, that Brereton had a right to the Second Sign-On Bonus in cash or RSUs.

cash) with respect to the RSU Award. Rather, the RSU Award represents a contingent right to receive shares of Holdings Ltd. upon vesting of the award -- or cash in lieu of shares *only at the Debtors' option*.

9. Section 101(16)(A) of the Bankruptcy Code defines "equity security" as "share[s] in a corporation, whether or not transferrable or denominated 'stock', or similar security." 11 U.S.C. § 101(16). Brereton's contention that an RSU grant cannot constitute an equity interest under section 101(16) because the convertible nature of these instruments pulls them outside the definition of an "equity security", as set forth in subsection (C), is without merit. The RSUs granted to Brereton were not convertible at his option. Only the Debtors had the discretion to deliver cash in lieu of shares. In addition, although Brereton correctly notes that section 101(49)(A) of the Bankruptcy Code defines a "security" to include a list of items that does not mention RSUs, the use of the word "includes" in section 101(49)(A) means that it is *not* an exclusive list. Moreover, the list of items in section 101(49)(B) of the Bankruptcy Code *excluded* from the definition of "security" does *not* include RSUs.[9]

10. Accordingly, for the foregoing reasons, the Plan Administrator submits that the RSU Award is merely a contingent equity interest in Holdings Ltd. and not a claim against the Debtors.[10]

11. Though it is discussed in Omni 47 and Omni 48, section 510(b) of the Bankruptcy Code (as well as the cases cited therein and in the Responses) is not relevant here because section 510(b) was not the basis for the objections to Brereton's claims. Claim Nos. 1363 and

[9] Nor is the fact that the RSU Award was an employment incentive relevant. The first sign-on bonus was a cash bonus. The Second Sign-On Bonus was an equity bonus. If the Second Sign-On Bonus was meant to be paid exclusively in cash, Brereton's employment agreement could have provided as much (like with the first sign-on bonus).

[10] Even if the Court were to determine that the RSU Award constituted a right to payment in the form of RSUs/stock, Brereton still would be merely the holder of a contingent equity interest (RSUs) or an equity interest (Holdings Ltd. common stock upon vesting). In other words, in order to be made whole on any "claim", Brereton would simply be entitled to RSUs or stock (upon vesting), not cash.

1359 filed by Brereton were included in omnibus claims objections where the basis for the objections was that each of the claims included therein *either* (a) was not a claim as defined in section 101(5) of the Bankruptcy Code or (b) asserted a claim for damages arising from the purchase or sale of Holdings Ltd.'s common stock subject to subordination and reclassification under section 510(b) of the Bankruptcy Code.[11] Brereton is not asserting damages arising from the purchase or sale of Holdings Ltd. common stock; rather, the issue is whether Brereton has a claim as defined in section 101(5), which he does not. Nonetheless (and even if Brereton is deemed to be asserting a claim for damages for which section 510(b) would apply), the cases discussed in Omnis 47 and 48 and the Responses in the context of section 510(b) are instructive on the issue whether an RSU is a "security". In *In re Enron Corp.*, 341 B.R. 141, 151, 161 (Bankr. S.D.N.Y. 2006), for example, the Court held that a claim for damages arising from the acquisition of stock options as part of an employment compensation package should be subordinated pursuant to section 510(b). The grantee of an RSU is closer to being a shareholder than the holder of a stock option. A stock option must be exercised by the holder. The grantee of RSUs, however, has been granted the right to receive shares subject only to a vesting schedule -- all that is required is for the RSUs to vest, or ripen into stock, on a date or dates in the future. Since stock options have been considered a security (subject to subordination under section 510(b)), so too should RSUs.

NOTICE

12. Notice of this Reply has been served on (a) counsel to Brereton and (b) other parties entitled to notice pursuant to this Court's *Order Pursuant to 11 U.S.C. § 105(a) of the Bankruptcy* Code *and Fed. R. Bankr. P. 1015(c) and 9007 Implementing Certain Notice and*

[11] Section 510(b) of the Bankruptcy Code provides that a claim for damages arising from the purchase or sale of a debtor's common stock must be subordinated to the level of common stock. *See* 11 U.S.C. § 510(b).

Case Management Procedures [Docket No. 256]. The Plan Administrator submits that no other or further notice need be provided.

CONCLUSION

13. For the foregoing reasons, the Plan Administrator requests that (a) Omni 47 be granted as to Claim No. 1363 filed by Brereton and (b) Omni 48 be granted as to Claim No. 1359 filed by Brereton, and that the Plan Administrator be granted such other and further relief as this Court may deem proper.

Dated: July 14, 2014
New York, New York

/s/ Craig A. Damast

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