

Hearing Date: December 17, 2014
Objection Deadline: December 10, 2014
at 4:00 p.m. (Prevailing
Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Case No. 11-15059 (MG)
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MF GLOBAL HOLDINGS, LTD.,	:	Chapter 11
<i>et al.</i> ,	:	
	:	Jointly Administered
Debtors.	:	
_____	x	
	:	
In re:	:	Case No. 11-02790 (MG) SIPA
	:	
MF GLOBAL INC.,	:	
	:	
Debtor.	:	
_____	x	

**MOTION OF THE INDIVIDUAL INSURED TO MODIFY THE AUTOMATIC STAY
AND THE PLAN INJUNCTION SO AS TO EXTEND THE “SOFT CAP” ON THE USE
OF THE PROCEEDS OF CERTAIN MFG ASSURANCE COMPANY POLICIES OF
PROFESSIONAL LIABILITY INSURANCE**

Pursuant to Section 362 of the United States Bankruptcy Code, Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure, and Rule 4001-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Southern District of New York, the Individual Insureds respectfully request that the Court enter an order (1) modifying the automatic stay (as to MF Global, Inc. [“MFGI”]) and the Plan injunction (as to MF Global Holdings, Inc. [“MFGH”]), to the extent necessary, with respect to the proceeds of certain professional liability insurance policies issued by MFG Assurance Company (“MFG Assurance”) to MFGH for the 2011-2012 policy year (the “E&O Policies”); (2) authorizing MFG Assurance to make payments of an additional \$7,500,000 for the reimbursement of Defense Costs in accordance with the terms of the E&O Policies; and (3) authorizing MFG Assurance or its designee to provide certain

additional information to the SIPA Trustee and the Plan Administrator concerning invoices that are submitted for payment of Defense Costs from the E&O Policies.¹

Preliminary Statement

1. The lawsuits against the Individual Insureds are becoming more active. The customers and the securities plaintiffs have moved for class certification, and litigation over those motions is underway. Millions of pages of documents have been produced and are being reviewed, and after long negotiations, motion practice as to document discovery issues has begun. Depositions are likely to begin soon. A host of deadlines relating to discovery and other issues are looming.

2. To fund their defense, the Individual Insureds have relied on the coverage of the E&O Policies and the directors and officers liability insurance policies (“D&O Policies”) that MF Global obtained. In September 2014, the Court ruled that the D&O Policies no longer are subject to the automatic stay or the Plan injunction and that the D&O insurers could advance defense costs and resolve claims in accordance with the terms of the D&O Policies. But under the provisional allocation of responsibility for defense costs that the D&O and E&O insurers have agreed to, more than 40 percent of the coverage for the Individual Insureds with respect to certain of the lawsuits has come – and, for at least some amount of time, will be coming – from the E&O Policies.

3. Since April 2012, this Court has governed the use of the proceeds of the E&O Policies through a “soft cap” on payments from the E&O Policies, and the parties have either stipulated to, or applied for, extensions of that soft cap. The most recent soft cap of \$43.80 million (which included both D&O and E&O insurance payments) has been reached. As the

¹ The “Individual Insureds” are Bradley I. Abelow, David P. Bolger, Jon S. Corzine, David Dunne, Eileen S. Fusco, David Gelber, Martin J.G. Glynn, Edward L. Goldberg, John R. MacDonald, Vinay Mahajan, Edith O’Brien, David I. Schamis, Robert S. Sloan and Henri Steenkamp.

Court has urged, the respective counsel for MFG Assurance, certain of the issuers of D&O Policies, the Individual Insureds, the SIPA Trustee, and the Plan Administrator have negotiated for months over both the amount and the terms of an extension of an E&O-only soft cap. In recent months, the Individual Insureds and their insurers have been discussing these issues directly with the SIPA Trustee, who we understand has kept the Plan Administrator informed about the progress of the discussions.

4. Based on these negotiations, the Individual Insureds, MFG Assurance, and the SIPA Trustee agreed that the SIPA Trustee, without waiving any rights with respect to the E&O Policies, would not oppose a request by the Individual Insureds for an extension of the soft cap for the E&O Policies containing the following terms: First, the SIPA Trustee would not oppose a \$7,500,000 extension of the soft cap to permit MFG Assurance to resume its payment of Defense Costs. Second, MFG Assurance agreed that respective counsel for the SIPA Trustee and the Plan Administrator will receive additional information concerning the invoices that law firms, experts, and other vendors for the Individual Insureds are submitting in connection with the defense of the claims against the Individual Insureds. The SIPA Trustee has advised the Individual Insureds that he believes this proposal is reasonable and that he does not oppose this Motion.

Jurisdiction

5. This Court has jurisdiction to consider this Motion under 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409.

6. The statutory predicates for the relief requested are Section 362 of the Bankruptcy Code, Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure, and Rule

4001-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Southern District of New York.

Factual Background

The Individual Insureds Must Defend Themselves Against Increasing Activity in Various Civil Actions

7. The Individual Insureds continue to face the main lawsuits that have been consolidated before Judge Victor Marrero in the U.S. District Court for the Southern District of New York. These include:

- A consolidated securities litigation brought on behalf of purchasers of MF Global securities.
- A class action suit brought on behalf of commodity trading customers of MFGI.
- An action brought by one of MFGI's institutional trading customers, called Sapere CTA Fund, L.P., which elected to file a separate action.
- A suit by the Liquidating Trustee of MFGH, asserting claims for breach of fiduciary duty.
- A suit by the CFTC, claiming violations of the Commodity Exchange Act.

8. Together, these suits seek to hold the Individual Insureds jointly and severally liable for more than one billion dollars in damages, and subject to a reservation of rights the E&O Policies have advanced Defense Costs in connection with a number of those suits. The suits already have been going on for more than two years, and they are becoming even more active and costly to defend. Motions to dismiss narrowed the range of claims and reduced the number of defendants, but in each of the cases discovery is well underway. The amount of document discovery alone is staggering. The electronic equivalent of more than ten million pages of documents have been produced and are being reviewed. Vendors have been needed to manage the vast amount of data. Class certification motions have been filed in the customer and securities cases, and are now being litigated. Fact discovery is scheduled to end on April 15,

2015. Expert discovery will take place after that, so experts have begun their work. Dozens of depositions are likely to be taken before then.

9. Before its bankruptcy filing, MFGH obtained insurance that covered the directors and officers of MFGH and the subsidiaries of MFGH against many kinds of claims relating to the directors and officers' work for those companies. This included both the D&O Policies (which are not at issue in this motion) and the E&O Policies.

10. For all the claims against the Individual Insureds that have been at issue here, the relevant E&O Policies are those that were in effect for the 2011-2012 policy period. In all, there are eleven E&O policies for that period, which together provide a total of \$157,450,000 in coverage. Of that amount, the Individual Insureds understand that as of today \$12,696,453.44 has been paid out of the E&O Policies as defense costs, and invoices totaling \$1,546,050.17 have been submitted for payment from the E&O Policies, but have not been paid because the soft cap has been reached and the Court has not yet approved an extension of the soft cap for the E&O Policies.

Prior Proceedings Involving the E&O Policies

11. Starting in November 2011, the Individual Insureds and other directors and officers of MFGH and MFGI gave notice under the D&O and E&O Policies of the lawsuits against them and the investigations involving them.

12. In February 2012, the D&O insurers asked the Court to authorize them to pay defense costs in accordance with the terms of the D&O Policies. At the same time, MFG Assurance entered into a stipulation with the respective Trustees for MFGH and MFGI to permit defense costs to be paid with proceeds from the E&O Policies.

13. In April 2012 the Court ordered that the automatic stay be modified, to the extent necessary, so as to permit defense costs to be paid from the proceeds of the D&O and

E&O Policies, up to a “soft cap” of \$30,000,000. In its Opinion, the Court held, among other things, that both sets of policies provide coverage to the Individual Insureds *and* that equity favored permitting the insurers to pay the Defense Costs of the Individual Insureds. (2012 Op. [ECF Doc. 619] at 23-26). The Court observed:

The Customer Objectors, some of whom are also the plaintiffs in the Underlying cases, can prosecute their cases against the Individual Insureds without the constraints of the automatic stay. But the Customer Objectors seek to use the protections of the Bankruptcy Code to enjoin the Individual Insureds, who are not debtors and are not protected by the automatic stay, from seeking coverage from valid, applicable insurance policies. . . . Without underestimating the hardships that many of MFGI’s commodity customers have faced, the Individual Insureds would suffer significant hardships if the Policies were disabled. [*Id.* at 29-30].

14. The April 2012 Order provided that the soft cap would be “subject to further adjustment either by agreement among the SIPA Trustee, Chapter 11 Trustee, [and the insurers], or by further order of this Court.” (*Id.* at 31)

15. By May 2013, the payment of Defense Costs for the dozens of covered directors, officers, and employees was approaching the soft cap of \$30,000,000, and an agreement was reached to further modify the automatic stay to extend that cap by \$10,000,000. In September 2013, this Court denied the request for a further modification of the stay, without prejudice to its being renewed after the Court of Appeals had resolved Sapere’s appeal of the Court’s April 2012 Order. On May 19, 2014, the Court of Appeals dismissed Sapere’s appeal as moot.

16. On April 28, 2014, the Individual Insureds joined with other insureds and former defendants in one or more MF Global-related actions, and again asked the Court to approve the payment of the previously-agreed \$10 million. In May 2014, the Court ordered that an additional \$13.8 million in proceeds from the D&O and E&O Policies could be paid out.

17. In July 2014, the Individual Insureds asked the Court to hold that the automatic stay and the Plan injunction did not apply to the D&O Policies, and on September 4, 2014, the Court held that except with respect to \$13.06 million of D&O insurance coverage, the proceeds of the D&O Policies would not be subject to the soft cap.

18. Even before the Court issued its September 2014 ruling, the Court urged the parties to try to reach agreement on the soft cap issues. Respective counsel for the Individual Insureds, MFG Assurance, and certain insurers that issued D&O Policies negotiated with respective counsel for the SIPA Trustee and the Plan Administrator concerning an extension of the soft cap on the use of proceeds from the E&O Policies. Most recently, counsel for the insurers and the Individual Insureds dealt directly with counsel for the SIPA Trustee, but we understand that the SIPA Trustee has kept the Plan Administrator informed about those negotiations. The negotiations centered around two key issues. The Individual Insureds sought a reasonable extension of the amount of the soft cap. The SIPA Trustee sought an agreement that the E&O insurers would provide additional information concerning the amounts that the E&O Policies are being asked to cover.

19. At present, the SIPA Trustee and the Plan Administrator receive information only as to the aggregate amounts that have been paid out of the E&O Policies. As a result of the relief sought by this Motion, they will receive each month information on the aggregate amount in invoices that have been submitted for payment out of the E&O Policies in the preceding month, broken out by the month to which those billings relate. Thus, in contrast with the current arrangement, the SIPA Trustee and the Plan Administrator will receive information on the aggregate monthly amount of defense billings before any of the invoices are paid.

Relief Requested

20. In these circumstances, the Individual Insureds respectfully request that the Court enter an order (1) modifying the automatic stay (as to MFGI) and the Plan injunction (as to MFGH), to the extent necessary, with respect to the proceeds of MF Global's E&O Policies for the 2011-2012 policy year, (2) authorizing MFG Assurance to make payments of an additional \$7,500,000 for defense costs in accordance with the terms of the E&O Policies, and (3) authorizing MFG Assurance or its designee to provide certain additional information to the SIPA Trustee and the Plan Administrator concerning invoices that are submitted for payment of Defense Costs from the E&O Policies.

Basis for Relief Requested

The Requested Extension of the Soft Cap is Reasonable and Fair to All Parties

21. As they always have been, the Individual Insureds are eager to settle the claims in the consolidated actions, and they continue to work to that end. To date, however, despite early and continuing mediation, the parties have not reached a settlement, and with litigation discovery proceeding actively, the Individual Insureds must take steps to protect themselves from prejudice in the lawsuits and to ensure that they will be able to pay their defense costs.

22. There is no question that the Individual Insureds need an extension of the soft cap on the E&O Policies. With the litigation having entered into increasingly active discovery, the Individual Insureds now have to engage experts and other vendors, whose work will comprise an increasing share of the total defense costs. On the claims that are being covered by both D&O and E&O insurance, the E&O Policies have been advancing more than 40 percent of the total Defense Costs. Since the time when the current soft cap was reached, no further payments have been made from the E&O Policies, and the D&O Policies have covered only the

portion of the total defense costs that was originally allocated to the D&O Policies under the insurers' provisional agreement. Thus the D&O Policies have covered none of the obligations of the E&O Policies, and more than 40 percent of the fees and costs of defending the Individual Insureds in several of the lawsuits is not now being paid.

23. The relief sought by this Motion is fair to all parties. It permits outstanding Defense Costs to be paid. It provides the SIPA Trustee and the Plan Administrator with greater and more prompt insight into the rate at which defense costs are being incurred. It comes at a time when the litigation against the Individual Insureds is becoming even more intense, and both the Individual Insureds and the SIPA Trustee have an even greater need for the assurances they sought and would receive with the requested relief. The SIPA Trustee has authorized us to state that he believes the requested relief is reasonable and that he does not oppose this motion.

Conclusion

For these reasons, the Individual Insureds respectfully request that the Court enter an order (1) modifying the automatic stay (as to MFGI) and the Plan injunction (as to MFGH), to the extent necessary, with respect to the proceeds of the E&O Policies, (2) authorizing MFG Assurance to make payments of an additional \$7,500,000 for the reimbursement of Defense Costs in accordance with the terms of the E&O Policies, and (3) authorizing MFG Assurance or its designee to provide certain additional information to the SIPA Trustee and the Plan Administrator concerning invoices that are submitted for payment of Defense Costs from the E&O Policies.

Dated: New York, New York
November 21, 2014

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